

Rethinking Legal Aid

An Independent Strategic Review



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Foreword

I was invited by Annabelle Ewing, Scottish Government Minister for Community Safety and Legal Affairs, to conduct this independent review in February, 2017. Establishing the review was seen as an opportunity to take a strategic, independent and long-term look at the legal aid service in Scotland to ensure that it is fit for purpose and fair, and that Scotland's population can access legal assistance when they need it.

I found, rather to my surprise, that the Scottish legal aid service compares very well internationally. That finding should not lead to any complacency. The vision I suggest seeks to move Scotland towards having one of the very best services in the world. I have no doubt Scotland is capable of making that move. I say that not least because of the quality and commitment of the people in the public, private and third sector legal and advice services I met through this review.

The wider publicly-funded legal assistance service in Scotland shares a key characteristic with other important public services. It is complex, has extraordinary reach, is delivered by multiple providers and is under-researched. At the conclusion of my evidence gathering, I considered four options for change. These were:

- retrench: reduce services;
- restructure: organise services in a different way;
- reform: focus on improving delivery; or
- rethink: develop a completely new approach.

I concluded, along with many of those who provided evidence, including the Law Society of Scotland, that we need a fundamentally new approach. We need to rethink legal aid and in doing so, widen it to encompass the whole range of what I have called 'publicly-funded legal assistance'. We must also place the interest of users at the heart of this service. In my report, I identify a vision, set out a mission, and develop six strategic aims that are intended to start to change the existing system into the future service.

The recommendations I make are intended to lead to far more flexible processes and a step change in innovative delivery that both recognise and accommodate complexity. If public policy can encourage this flexibility and innovation, there is a better chance that service providers and funders can use their understanding and insights to adjust and adapt to rapidly changing circumstances to produce viable solutions. The next 10 years will bring further extraordinary changes in the digital world that will have significant consequences for people and organisations in the field of publicly-funded legal assistance. A strategy that does not attempt to build in adaptability will not succeed. If publicly-funded legal assistance can take an effective lead on technological innovation it can transform the experience and outcomes for people at times of great stress and worry in their lives.

In recommending simplifying aspects of the rules and regulations that surround publicly-funded legal assistance, I am aware of the recurring public policy dilemma. The dilemma is that the ambitions of simplicity, flexibility and fairness are held in tension with each other. An increase in simplicity may well make a system less responsive to the widest range of circumstance and therefore lead to reduced flexibility. Similarly, increasing the fairness of the system may make it more complex. Some see this dilemma as a reason not to change. I see the dilemma as the central modern challenge that effective change of complex systems has to overcome.

I cannot recommend all the changes suggested to me. The key one being a general increase in legal aid fees, for which I could not find the evidence to justify. However, I do recommend an evidence-led review of fees and income for 'judicare' lawyers. That is no soft option. Such a review carries a very significant risk for both the Government and the profession. Both have to commit, approve the ground rules and agree to abide by the outcome.

Building a persuasive and robust evidence base for any increase in fees is important, but so too is public trust. I became concerned during the review that in making the tactical case for increased fees for legal aid lawyers, in the ways they have done, the profession is losing the strategic argument with the public about the value of publicly-funded legal assistance to the rule of law and building a fairer Scotland.

There is a strong tradition in Scotland, since the publication of the 2007 National Performance Framework, to focus on outcomes. There is already a Scottish Government vision for a justice outcome. I have set that as the outcome for my review's recommendations.

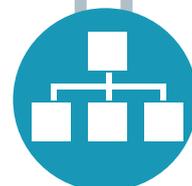
We need to narrow the gap between policy design and implementation. This can be done by a combination of good evidence and welcoming the experience of practising solicitors, advocates

and advice workers. Together these will have a profound and positive impact on the future delivery of publicly-funded legal assistance. There is a crucial need for people in a range of different positions and roles in publicly-funded legal assistance, who understand the need for change and are willing to act on it. Good evidence is the second cornerstone of successful systems. As an example, I hope that the digital case management process being developed by the Scottish Courts and Tribunal Service will increase the level of meaningful measurement and feedback mechanisms to provide some of the evidence that is vital for change.

Finally, I quote the past President of the Supreme Court of the United Kingdom Lord Neuberger in my report on the responsibility of lawyers and judges to not stand on the side-lines and criticise. He said they have a heavy duty to do all they can to support and improve access to justice for ordinary citizens and small businesses. I found many stepping up to that challenge over the course of my review. And also, many in third sector advice services and those administering the courts system doing the same. I am convinced that together they can deliver the vision, mission and outcomes of this review.

Martyn Evans

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Acknowledgments

I wish to record my sincere thanks to all those who have contributed the work of my review.

I would like to thank all those who responded to the call for evidence and who were willing to meet me to explain their work and share their thoughts. All their views and insights were invaluable and helped shape my review report and its recommendations.

Professor Alan Paterson OBE was the International Legal Adviser to my review. He was an outstanding guide to the complexities of the justice system in general and legal aid in particular.

I am grateful in particular for the advice of the expert panel:

- Margaret Burns CBE
- Colin Lancaster
- DCC Iain Livingstone QPM
- Brian McConnachie QC
- Alison McInnes OBE
- Susan McPhee

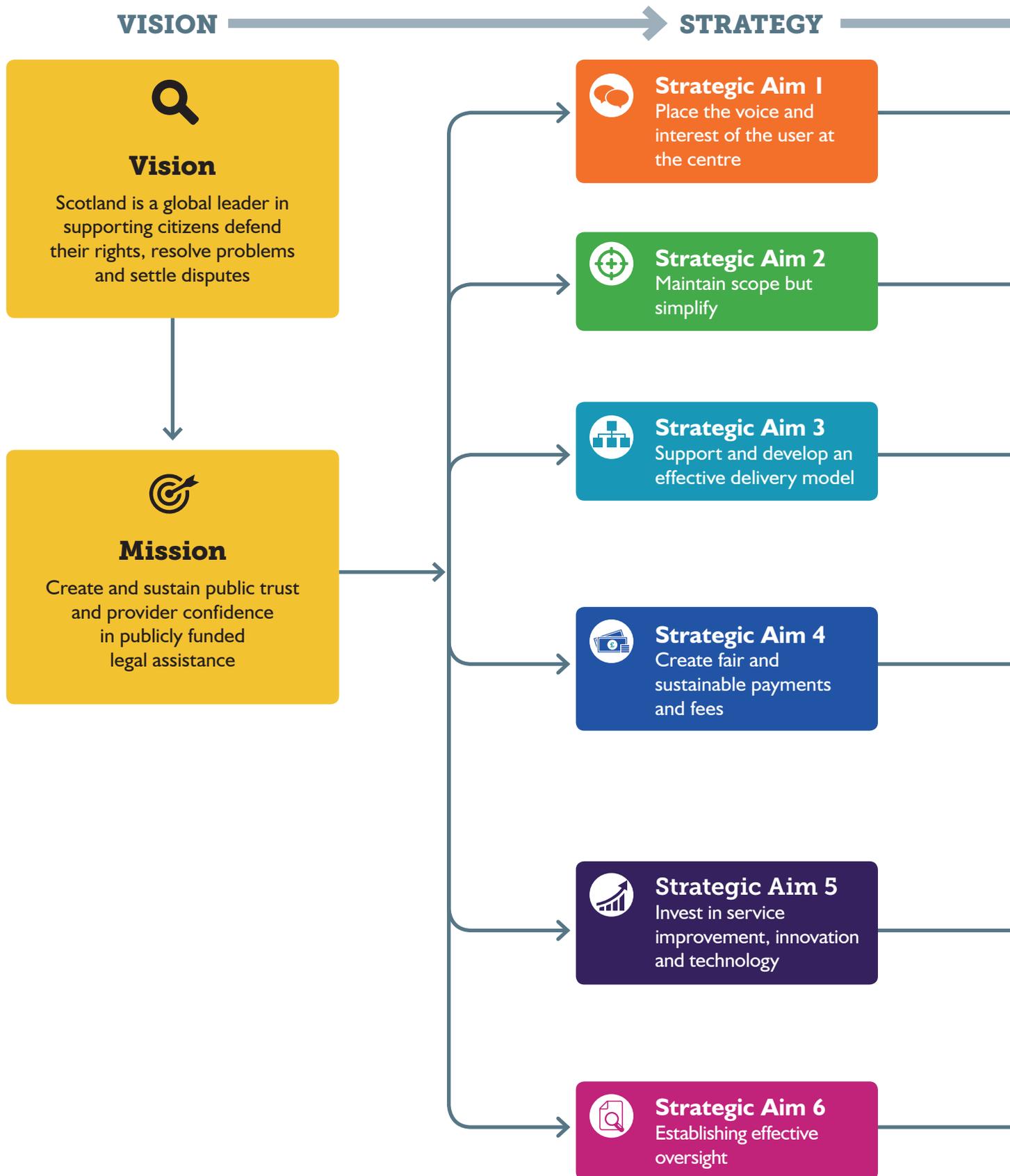
- Lindsey McPhie
- Jackie McRae
- Janys M Scott QC
- Professor Fran Wasoff

The expert panel played an important role. Their knowledge, experience and views have been an invaluable resource. However, the responsibility for this report and the recommendations made in it are mine alone.

I would also like to place on record my thanks to the review secretariat led by Hazel Dalgard with Susan Bulloch. I, along with the secretariat, undertook many meetings and discussions with a very broad spectrum of interests. My final thanks are to Jennifer Wallace, Douglas White, Liz Macdonald and Alison Manson. Without all their outstanding support and help this review would not have been possible.



Visual executive summary



RECOMMENDATIONS

OUTCOMES

- Representatives of the third sector advice services and local authorities should be formally involved in the strategic planning and delivery of justice outcomes through membership of the Justice Board.
- A consumer panel should be established to represent the interests of current, potential and future users of publicly funded legal assistance.
- A solicitor reference group (including both civil and

- criminal legal aid solicitors) should be established to ensure their involvement in the court business planning.
- There should be targeted public legal education and information programmes to improve the capability of citizens to deal with justiciable problems.

4 of 8 Recommendations within the Aim

- The current scope of the legal aid fund should be maintained.
- The rules on contributions and clawback should be made fairer between similar level of income and capital.
- There should be a formal review of contact cases to consider the most appropriate mechanism for resolving these disputes within a reasonable time.

- The legal aid fund should be available for group or multi-party actions.
- There should be a review of outlays with a view to establishing a preferred national and/or local supplier list.

5 of 16 Recommendations within this Aim

- There should be explicit public policy to maintain and fund a mix of demand led and targeted legal assistance delivery models. This model would include 'judicare' but also direct public delivered, grant aided and independently funded services.
- It should be an active public policy for publicly funded legal assistance funded solicitors to be embedded within third sector organisations who have a significant civil case workload.
- There should be a new online and telephone

- service to signpost members of the public who need access to publicly funded legal assistance
- Future publicly funded legal assistance services (criminal and civil) should be based on a local action plan created in partnership with each Community Planning Partnership.
- The in-court advice service should be replicated in all six sheriffdoms.

5 of 14 Recommendations within this Aim

- A robust and independent evidence based process for reviewing and agreeing legal aid fees should be established and it should include the actual incomes of legal aid funded lawyers and law firm
- Solicitor fee regulations/arrangements should allow for the flexibility to pay higher fees from the legal aid fund in designated geographic areas and/or areas of law in order to ensure access to services.
- The fees for the criminal judicare legal aid service should be a priority issue for the first review.
- A mechanism should be established to pay legal aid quarterly in advance to law firms and advocates

- with a good track record of claims over the previous two years.
- Any law firm or advice service receiving funds from the legal aid fund should have a clear memorandum of agreement setting out the extent of the service they will offer including their willingness to take a minimum number of appropriate referrals.
- Citizens Advice Scotland should be assisted financially and with expert help to make the online advice interactive for the public.

6 of 11 Recommendations within this Aim

- The saving in the legal aid budget (identified earlier in the Review) should be invested in service improvement and innovation within publicly funded legal aid and assistance.
- There should be competitive led investment in 'just in time' legal information and advice online platforms.
- All publicly funded legal assistance services should be required to adopt an explicit 'any door will do' policy. The policy would actively refer a caller/visitor to a specific and appropriate legal assistance

- service provider and offer to make an appointment.
- The legal assistance authority should work in partnership with the Improvement Service to understand how knowledge hubs and innovations exchanges (to name just two) work in practice and how they might be adapted to publicly funded legal assistance services.

4 of 7 Recommendations within this Aim

- There should be a new arm's length public delivery body called in this report the Scottish Legal Assistance Authority.
- The new Scottish Legal Assistance Authority should have overall responsibility for the delivery of publicly funded legal assistance, along with powers to monitor and quality assure delivery, monitor access and adjust the delivery model as a result.

- The new Scottish Legal Assistance Authority should be required to deliver changes to the system within a consultative, transparent and accountable process.
- The new Scottish Legal Assistance Authority should lead efforts to ensure the availability of publicly funded legal assistance is more visible to the public.

4 of 11 Recommendations within this Aim



Outcome

We live in a safe, just and resilient Scotland

1 Approach and methodology

1.1 Remit

The review was established by the Scottish Government to fulfil the Programme for Government commitment to:

'Engage with the legal profession and others to identify during this year specific measures to reform Scotland's system of legal aid, maintaining access to public funding for legal advice and representation in both civil and criminal cases alongside measures to expand access to alternative methods of resolving disputes.'

(SCOTTISH GOVERNMENT, 2017A)

The challenge presented to the review was:

'To consider legal aid in the 21st century: how best to respond to the changing justice, social, economic, business and technological landscape.'

1.2 Call for evidence

A formal call for evidence was issued between March 2017 and May 2017. This was sent to 150 stakeholder organisations including public-sector bodies, representative bodies and third-sector organisations.

The questions posed were:

- How can the administration of the legal aid service in Scotland be made better?
- How can the Scottish Government get the legal aid service in Scotland to work better for people who use it?
- If you were designing a legal aid service today, what would you do differently from the current service?
- How can the legal aid service in Scotland be more effective and person-centred?

The call for evidence drew a range of very diverse and effective responses. The full list of those who responded is contained in Appendix 1.

1.3 Focus groups

In July, I commissioned focus groups with members of the public across Scotland to explore what people knew about legal aid, what they valued and what they thought might be improved. The discussions were in-depth conversations with participants exploring where they look for help with any justiciable problems, their knowledge and perceptions of legal aid, and their experiences and opinions of the courts and the legal system more generally. Focus groups were held in Bathgate, Edinburgh, Glasgow, Peterhead, Portree and Renfrew.

1.4 Discussion groups

Views were sought from a wide range of organisations in the private, public and third sectors. I met around 30 different organisations and these meetings helped me explore in depth the public interest, good practice and potential gaps in the service. The organisations involved in these discussions are listed in Appendix 2.

- What shared standards and beliefs should underpin the legal aid services?
- How can the Scottish Government make sure that these standards and beliefs are maintained when delivering legal aid in the future?

1.5 Presentations

To further inform the understanding of the current picture and potential gaps in legal aid, I heard (along with the expert panel) a number of presentations. These included:

- Scottish Legal Aid Board on key trends in expenditure and quality assurance;
- Public Defence Solicitors' Office and Civil Legal Assistance Office on the publicly-employed model;
- Scottish Government Justice Analytical service on trends in crime and court capacity;
- Law Society of Scotland on the financial health of legal aid firms;
- Judicial Institute and Sheriff Courts (Glasgow, Kilmarnock and Perth) on legal aid within the court system;
- An academic perception of legal aid in Scotland facilitated by Queen Margaret University, with the participation of academics from various Scottish universities.



2 Background – a brief history of legal aid

In its earliest form, state-sanctioned legal aid in Scotland emerged from two civil statutes in 1424 and 1535. Although the latter provided for a minimal level of state funding, the formalised Poor's Roll with a merit and means test in civil cases in the Court of Session did not emerge until 1784.

The profession's acceptance of an obligation to represent poor persons on criminal charges seems also to stem back to the 16th century. In the sheriff court, agents for the poor in civil and criminal cases were not formally organised until 1825. The system depended on the willingness of the profession to embrace a pro bono commitment proportionate to perceived need. By the 20th century, efforts to achieve reform was long overdue. An attempt to introduce a substantial contribution from the state, but administered by the profession, was proposed in 1937, but this was overtaken by the second World War.

The success of a salaried legal service for the armed services during the war in dealing with the many marital breakdowns of that time led to the Rushcliffe and Cameron committees, which recommended the introduction of a peacetime legal aid scheme available to a large section of the population. Rushcliffe intended legal aid to be available to those in the middle-income bracket as well as the poor, and expected almost half the civil funding would go to the salaried provision of advice work and divorce.

However, the legal profession persuaded the Government to abandon the salaried element in the scheme. Moreover, Attlee's government did not see law as a way of enforcing the new welfare rights – and neither had Beveridge, the architect of the welfare state. The exclusion of legal aid from tribunals and defamation, however, was not due to the profession but originally in part to

the personal objections of one influential cabinet minister, Herbert Morrison. He felt tribunals should be simple enough for unrepresented persons and also that defamation cases were ill advised and should not be encouraged. Accordingly, the legal aid model that emerged after the war was a judicare one (delivered by the private profession to individual clients) administered by the new professional body, the Law Society of Scotland (LSS).

The initial representation scheme in civil cases was supplemented a decade later by a criminal representation scheme (1964) and an advice and assistance scheme (1972). In recognition of the fact that the state was providing the funding, legal aid lawyers received 85% of the fees fixed by the auditor of the relevant court for their legal aid work. In 1984, the Government introduced new rates of pay for legal aid cases, which were about 10% lower than the rates for privately-funded cases.

The Law Society of Scotland continued to be responsible for managing legal aid for 37 years. In 1980, however, the Royal Commission on Legal Services in Scotland had recommended that the conflict of interest between a professional body administering legal aid and making payments from the public purse to its members was such, that the administration of legal aid should pass to an independent authority. In April, 1987, the Scottish Legal Aid Board (SLAB) came into being, and took over responsibility for:

- deciding whether to grant legal aid applications;
- examining and paying accounts;
- advising the Secretary of State for Scotland; and
- a new scheme of assistance by way of representation (ABWOR).

Since then, there have been further changes, some of the most significant being:

- The introduction, in 1998, of a code of practice for criminal legal assistance, and registration for solicitors carrying out that work;
- A pilot scheme of public defence solicitors employed by the Scottish Legal Aid Board, initially in Edinburgh but extending in 2004 to Glasgow and Inverness, and in 2007, to Falkirk, Dundee, Ayr and Kirkwall;
- A series of projects embedding Scottish Legal Aid Board salaried solicitors into third sector organisations followed by the establishment of civil salaried solicitors in Edinburgh, Aberdeen and Inverness.
- Transfer from the courts to the Scottish Legal Aid Board of the responsibility to decide applications for solemn legal aid, followed by children's legal aid;
- A grant funding programme which incorporated different models for delivering and planning advice services;
- A quality assurance scheme for civil, criminal and children's legal aid, incorporating a peer review of solicitors' files to ensure that they are meeting quality standards; and
- The establishment of a police station assistance scheme following the Cadder decision in the UK Supreme Court.



3 Overview

I set out an aspirational vision for a citizen-focused service in Scotland, which incorporates all forms of publicly-funded legal assistance, including legal aid, alternative forms of dispute resolution services and public legal education.

I also propose a mission of raising public trust and confidence in the legal aid system. Six strategic aims and associated recommendations provide the detail on how to achieve the vision and mission. In this chapter, I give the background context to my analysis and findings:

- What is publicly-funded legal assistance and why does it matter
- Spending on publicly-funded legal assistance in Scotland
- The wider policy context for publicly-funded legal assistance in Scotland
- How publicly-funded legal assistance in Scotland compares with other jurisdictions
- A new vision and mission for publicly-funded legal assistance in Scotland: A citizen-focused approach

It is important to emphasise that I am not seeking to provide an exhaustive or academically comprehensive review of the purpose of publicly funded legal assistance.

3.1 What is publicly-funded legal assistance and why does it matter?

I have adopted a wide and inclusive definition of legal aid, incorporating many forms of legal assistance. This includes legal aid funding to lawyers in private practice or in publicly-funded services; third-sector advice services; alternative forms of dispute resolution, including mediation; and public legal education. My analysis and recommendations extend across this wide spectrum of services.

This broad approach is in line with the UN Principles and Guidelines on Access to Legal Aid, recognising

that legal aid today has a wide scope including legal education, access to legal information and other services provided through alternative dispute resolution and restorative justice (UNODC, 2013).

Legal aid is an important aspect of publicly-funded legal assistance. For many people, legal aid in Scotland is synonymous with the relatively narrow concept of publicly-funded legal aid and representation delivered by private-sector solicitors and advocates. The focus is on legal advice for justiciable problems – that is, advice on matters that potentially raise a legal issue or on matters that, if not resolved earlier, could ultimately lead to court action or some other form of legal procedure, for example, tribunals. As such, access to the courts system is a key part of this approach, sometimes referred to as a ‘judicare’ system of legal advice. Judicare was first coined to cover the federally funded programmes in United States of America providing free or low-cost legal services to the poor.

However, it is not only legal aid that helps people in Scotland with problems that may result in a court action. In my review, the term ‘publicly-funded legal assistance’ will be used to describe the wider services that include information and advice about the law and alternative means of resolving legal problems, help in preventing or resolving disputes, and help in enforcing decisions. It includes advice that is often not described as legal, for example welfare rights advice, housing advice, money and debt advice and consumer advice. This wider definition allows for a strategic approach that is rooted in the current pattern of complex service provision and user need. There are some advice services, such as Shelter Scotland’s housing advice services, which are funded partly from charitable funding and partly from the public purse. So long as there is a public funding

element, services are included in my definition of publicly-funded legal assistance.

Publicly-funded legal assistance is a critical part of Scotland's legal system. In its annual report, the Scottish Legal Aid Board describes the purpose of the legal aid fund as being '*to provide access to justice for those people who are unable to pay for their own*' (Scottish Legal Aid Board 2017a). This includes making access to legal representation and advice from a lawyer more affordable for those who need it (Law Society of Scotland, 2017a). There are a very wide range of other organisations that deliver publicly funded legal assistance. Probably the best known is the Citizens Advice Bureau service.

The provision of publicly-funded legal assistance is anchored in a desire – and many would say a duty – to help those who are subject to some form of inequality, whether financial, educational, or social. Legal aid services provide support to some of the most vulnerable people in Scotland and can be used to directly assist others tackling problems arising in family breakdown, education, employment, housing, immigration, mental health and a range of other areas. In this way, publicly-funded legal assistance delivers a form of social and legal insurance that contributes to the efficient and fair operation of the Scottish justice service leading to a fairer Scotland. It makes a tangible difference to people's lives, enhances social cohesion and fairness and supports the delivery of a broad range of social policy objectives. It benefits society as a whole, not just those who are direct users. The provision of legal assistance contributes to the Scottish Government's purpose and to several national performance framework outcomes (Scottish Government, 2016a).

Publicly-funded legal assistance is rooted in three fundamental aspects of the justice system, which were raised to a greater or lesser extent in the evidence gathering process for my review:

- the rule of law
- access to justice
- human rights

These concepts underpin the attitude and approach adopted by me and my recommendations.

The rule of law

The rule of law is an essential component of democracy requiring that both the governed and the government are equally subject to the law of the land. In a democracy, we are governed by a set of rules and principles rather than by the mere whim of those in authority or power. I have adopted the following definition:

'At its most basic, the expression connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied.'

(LORD NEUBERGER, 2013)

The rule of law requires certain preconditions:

- the law must be freely accessible to all, with free public access to the law in databases such as the Statute Law Database (2018) and the British and Irish Legal Information Institute Database (BAILII)
- the law must be as easy to understand as possible
- laws must be democratically made and lawfully enacted
- laws must satisfy criteria of fairness
- the enforcement of law and order must be carried out effectively while ensuring due process
- laws must preserve the fundamental rights of citizens against the state, and regulate relationships between citizens in a fair way

Publicly-funded legal assistance contributes to ensuring that the rule of law exists in reality as well as in principle. For example, it can enable discrimination to be tackled and equality of opportunity promoted for people who are vulnerable as a result of their gender, race, disability or other factors (Law Society of Scotland, 2017a). Furthermore, it supports the premise that the law must be enforceable: unless legal rights are enforceable at an affordable cost, the rule of law is meaningless.

Access to justice

'A fair and robust system of a publicly funded legal assistance is fundamental to ensure meaningful access to justice.'

(FAMILY LAW ASSOCIATION OF SCOTLAND, 2017)

Access to justice has a number of components. These include;

- a competent and impartial judiciary
- accessible courts
- properly administered courts
- a competent, accessible and honest legal profession
- an effective procedure for getting a case before the court
- an effective legal process
- affordable justice

(LORD NEUBERGER, 2013)

We take for granted many of these components in Scotland. The integrity and competence of the Scottish judiciary, legal profession and advice workers is of a very high order. As with any public service, there are citizens whose engagement with the service is not as positive an experience as they might wish. However, my general observation is that Scotland is well served by the people who work in and around the courts and in the administration of justice.

Human rights

Taken together, the rule of law and access to justice underpin the rights of citizens in Scotland. To these, it is useful to add a human rights approach. A modern state has ambitions for its citizens' wellbeing, which place human rights at the heart of their law and actions. A human rights approach:

'...identifies rights-holders and their entitlements and corresponding duty bearers and their obligations and works towards strengthening the capacities of rights-holders to make their claims and of duty bearers to meet their obligations.'

(UN HUMAN RIGHTS, 2011)

Article 6 of the European Convention on Human Rights (ECHR) was the earliest attempt in modern times to set out the European citizen's entitlements in relation to access to justice.

For criminal cases, it requires that legal aid is provided when the interests of justice so require, due to factors such as the seriousness of the offence, the severity of the expected sentence or the complexity of the case. The court has power to appoint a legally aided solicitor when an accused faces a prison sentence for the first time. It has also recently been established that anyone in police custody has a right to consult with solicitor at any time, and has a right to have a solicitor present before and during questioning if they so choose.

For civil cases, Article 6 does not specifically mention legal aid. Alternatives such as the simplification of procedures or help from advice workers may suffice unless the domestic law requires representation from a lawyer in a case, or the procedure or the content of the case is very complex. In the leading case of *Airey v Ireland* (ESCR-Net, 1979) emotional involvement was recognised to be a factor which might indicate that legal aid was required to ensure effective participation in legal proceedings relating to judicial separation. Age and ability are also relevant to the test of effective participation. In these situations, a lawyer may have to be made available by the state (if the citizen cannot afford one and the case has sufficient merit).

The ECHR Article 6 has limitations as a safeguard of guaranteed minimum standards of legal aid provision. The ECHR looks at access to justice for a citizen in a particular procedure. It does not evaluate legal aid systems as such. Because the ECHR applies broad and open-ended tests for access to justice and does this on a case-by-case basis, there are no clear minimum criteria.

Sustainable development goals

Governments around the world are increasingly recognised to have front-line responsibility for the social and economic wellbeing of their citizens (Brown, 2016). One way of expressing that

responsibility is to adopt sustainable development goals. The 17 Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development, adopted by world leaders in September 2015 at historic UN Summit, officially came into force in 2016. Goal 16.3 of the Sustainable Development Goals is designed to 'promote the rule of law at the national and international levels, and ensure equal access to justice for all' (United Nations, 2015).

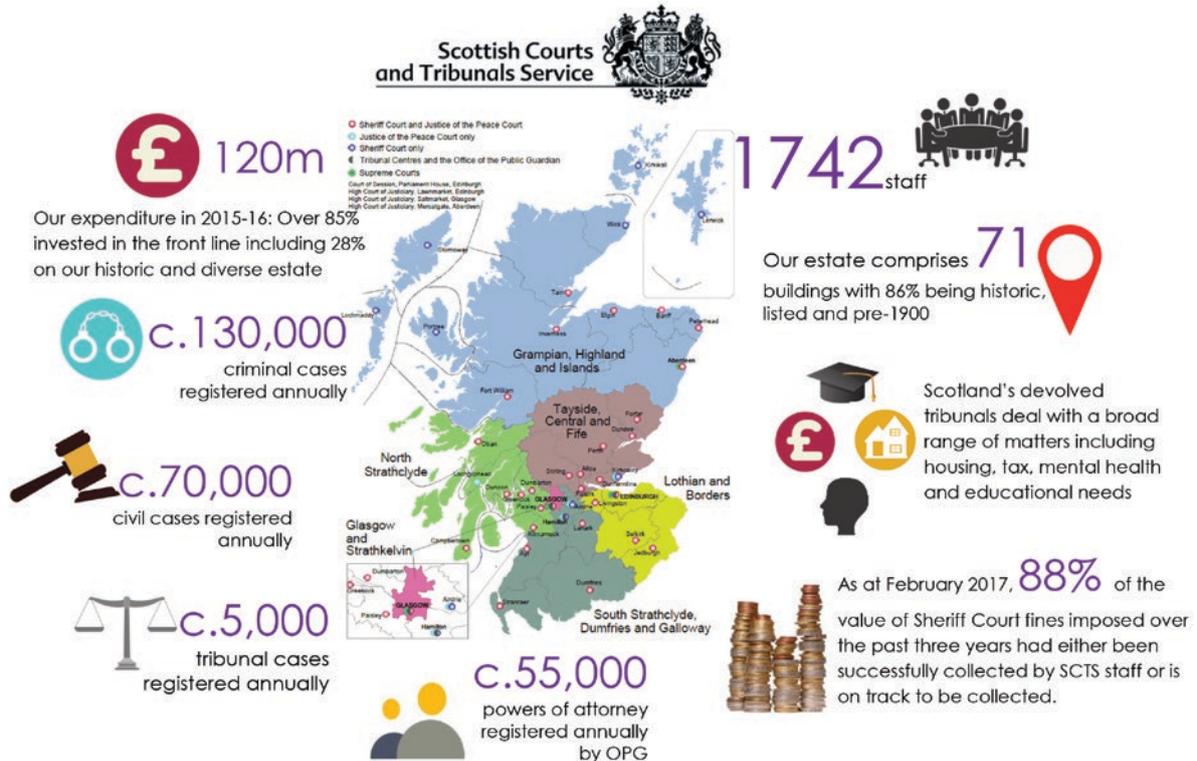
The First Minister announced in July 2015 that the Scottish Government would adopt the SDGs, making Scotland one of the first nations to commit to the goals. The Scottish Government implements the SDGs in Scotland through the National Performance Framework and the Scottish National Action Plan for Human Rights (SNAP Plan) (Scottish Government, 2017e). Over the next fifteen years many countries will increase efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind (United Nations, 2015). While the SDGs are not legally binding, governments are expected to take ownership and establish national frameworks for the achievement of the 17 goals.

Fair society

Giving individuals substantive legal rights is of little value if they lack the capacity and the means to enforce them or to participate effectively in the justice system. Assisting citizens to realise their legal rights contributes to a just and fair society.

'Governments must, in addition, retain a general responsibility to ensure that their citizens have access to law and dispute resolution. This, as the 'access to justice' evangelists of the 1970s pointed out, does not immediately equate to funding lawyers and legal aid.'
(SMITH & PATERSON, 2014)

Ensuring the rule of law, access to justice and human rights come at a cost. The budget for civil and criminal courts and tribunals administration alone (including judicial salaries) was £120 million in 2015-16. The following illustration gives some idea of the extent of the court service in Scotland.



Scottish Courts and Tribunal Service, 2017c

3.2 Purpose of publicly funded legal assistance

The call for evidence asked respondents how they defined the purpose of legal aid. There was a very wide range of responses, and I have also benefited from previous reviews (Scottish Executive, 2004) which had gone into some detail on the purpose of legal aid. It is clear that there is no shared view. A recurring theme in the submissions was that what was seen as the purpose of legal assistance was strongly related to the interest of the respondent. While this is understandable, the result is a variety of different perspectives. My summary is as follows:

For the legal profession, the primary purpose is ensuring equality of access to the law and the legal system, and an equal ability to use it. For the advice sector, the primary purpose is ensuring fairness and contributing to social justice by advising on rights and remedies, assisting with problem resolution and by using the evidence to bring about social change. There are also different views about the purpose of civil and criminal legal aid. So, while there is general agreement on creating shared access to the law, I have concluded that there are a range of more detailed views on the purpose of legal assistance, as set out below.

For legal aid and assistance on civil matters:

- To enable the resolution of 'justiciable problems' by promoting:
 - ✓ the early resolution of legal problems
 - ✓ effective access to formal mechanisms of dispute resolution
 - ✓ social inclusion
 - ✓ public legal education

For legal aid and assistance on criminal matters:

- to protect the interests of justice
- to promote systemic efficiency

3.3 Spending on publicly-funded legal assistance in Scotland

The total cost of civil and criminal legal assistance was around £136 million in 2016-17. This split between £40.9 million for civil legal assistance, £85.1 million for criminal legal assistance and £5.4 million for children's legal assistance. The cost of the public-sector services of the Public Defence Solicitors Office (PDSO) is a very small part of legal assistance at £2.3 million and the costs of the Civil Legal Assistance Office (CLAO) even smaller at £1.4 million. A separate funding stream for civil legal assistance also includes grant funding which the Scottish Legal Aid Board administers to a range of projects involving third sector providers. Expenditure on grant funding in 2016-17 was £3.9 million.

Judicare-case by case funding (private solicitors and advocates)	£127.5m
Public sector service (PDSO criminal)	£2.3m
Public sector service (CLAO civil)	£1.4m
Third sector advice services and related projects-funded by grants	£55m
Alternative dispute services (mediation)	£1.7m
Public legal education	unknown

Mediation costs include Scottish Government grants of £1.5 million to Relationships Scotland, £105,000 to Scottish Arbitration Centre, and £100,000 to Scottish Mediation Network. In 2016/17, the Scottish Government provided £21 million of funding for advice service-related projects, with local authorities spending around £30 million (estimate) on advice services.

Falling cost of legal aid

Legal aid expenditure has been falling since 2010-11. While a strategy to make savings to the legal aid system was signalled in 2011 through the publication of the paper *A Sustainable Future for Legal Aid*, other societal and changes to the justice system have had a greater impact (Scottish Government, 2011a).

It is these trends that have largely contributed to the reduction in expenditure. For example, recorded crime is down, leading to fewer court cases. The volume of cases overall has reduced, and the way in which those cases are dealt with in court is changing. Greater use is being made of diversion from the courts, through the use of fines, a greater use of the Justice of the Peace courts, and a move towards using the most appropriate court for the issue being considered. This has had a significant impact on the workload of criminal defence solicitors. In addition, the number of people seeking legal aid has reduced and the Court Reform (Scotland) Act 2014 led to those cases up to the value of £100,000 being dealt with at the Sheriff Court rather than automatically at the Court of Session.



At a cost to the taxpayer of
£136m



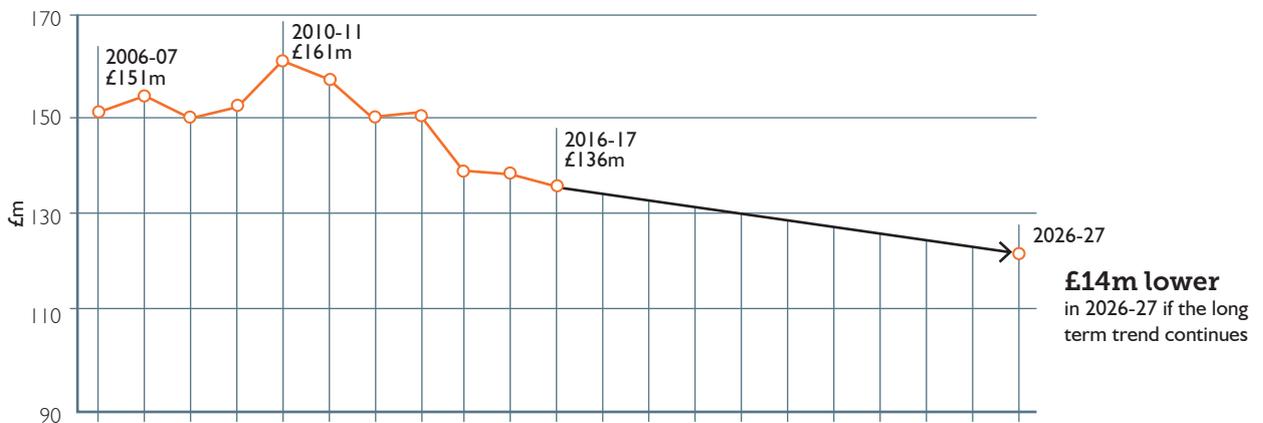
Costs falling
with lower demand for legal aid



£75m saving
over next decade if trend continues



Demand is falling for legal aid in Scotland



Review extrapolation from the Scottish Legal Aid Board 2016a

Legal aid changes in England

Superficially, developments in England and Wales have been very similar. As Green and Sandbach observed in 2016: *'Our analysis demonstrates that the civil legal aid system is in free fall.'* (Green & Sandbach, 2017) However, in England and Wales, legal aid expenditure has been intentionally cut – from £2.51 billion to £1.55 billion in real terms in a few short years (UK Ministry of Justice, 2017). There has been no such dramatic and deliberately planned reduction in Scotland. The cuts in England involved a substantial reduction of scope in family, social welfare, debt, and housing law cases, as well as much advice at an early stage in proceedings.

These changes generated very negative responses from the English legal profession and the third sector and in the UK media. This negativity has inevitably seeped over the border since the proximity of the two jurisdictions and shared media means that the casual reader may assume the same is true in Scotland. That is quite evidently not the case. The Scottish system (as my review establishes) compares well with other jurisdictions in terms of scope, eligibility and cost. However, that should not lead to any complacency and my review sets out a global vision for the Scottish system.

3.4 The wider policy context for publicly-funded legal assistance in Scotland

Spending on publicly-funded legal assistance in Scotland takes place within the context of wider public expenditure, service reform, changes and challenges. Justice is the fourth largest budget heading for Scottish Government expenditure. Justice includes the police service, prison service, the courts services and community justice services.

Scottish Government Budget Lines 2017

Area	£millions (rounded)
Health and sport	13,500
Communities, Social Security & Equalities	11,000
Education and skills	3,500
Justice	2,500

(Scottish Government, 2017b)

The legal aid spend of £136 million represents around 5% of the annual justice budget and less than 0.5% of total public spending on Scotland. On that basis, the expenditure on legal aid can seem relatively modest. But looking at this from another perspective, Scotland spends around the same amount on funding the Third Sector (£24.5 million), social security (£96 million) and equalities (£20 million) added together as it does on legal aid.

Modernising the courts system

In the focus groups conducted for this review, people frequently expressed frustration about the length of time trials take, and the amount of time people have to take off work, as litigants or jurors. The lengthy nature of court cases can cause individuals, families and businesses distress.

'It doesn't matter what route you go down the legal system everything takes ages and causes stress on families, workers, businesses. Everything seems as though it can and should be done a lot quicker.'

FOCUS GROUP PARTICIPANT IN GLASGOW

Ambition for change in the court service is clear within both the Scottish Government and judiciary. The Scottish Government plans to modernise civil and criminal law, and the justice system, to meet the needs of people in Scotland in the 21st century

(Scottish Government, 2017c). The Courts Reform (Scotland) Act 2014 modernised many aspects of the Scottish civil courts system from top to bottom and also changed aspects of the criminal courts. The Scottish Civil Justice Council is undertaking a major rewrite of the courts rules in Scotland to make them less complex and more accessible to people including what used to be known as the summary procedure (now simple procedure). The Scottish Courts and Tribunal Service are no less ambitious:

'Our task now is to bring our summary criminal court procedure right into the 21st Century, not by tinkering at the edges, but by radical digital transformation to improve the quality of justice for all concerned.'

(MCQUEEN, 2017)

The Scottish Government and the Scottish judiciary are working to modernise the administration and delivery of justice.

'Exploiting the opportunity which digital technology presents is needed to make sure we continue to have a justice system that matches public expectation in the 21st century.'

(LORD CARLOWAY (LORD PRESIDENT), 2017)

Although Scottish courts and tribunals are regularly criticised, that criticism is rarely about their fairness or lack of impartiality. There is a high level of public trust in the integrity of these institutions, which is vital for the rule of law. However, modernising justice systems can seem painstakingly slow and beset with systemic challenges.

'The task to improve the efficiency of the courts system is daunting. Under the current summary system, approximately 52,000 allocated trial diets called in the Sheriff Court in 2015-16 but only 9,000 proceeded to trial with evidence being led. In the same year, in the Justice of the Peace Court, approximately 20,000 trials called but only 3,000 proceeded.'

Crown Office and Procurator Fiscal Service (2017) submission to the call for evidence which references the Evidence and Procedure Review (Scottish Courts and Tribunals Service, 2017a).

Taylor review

The Review of the Expenses and Funding of Civil Litigation in Scotland carried out by Sheriff Principal James Taylor in 2013 made recommendations aimed at making the cost of privately-funded civil action more predictable. This has led to the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill, currently before the Scottish Parliament, which aims to increase access to justice by creating a more accessible, affordable and equitable civil justice system. The Bill expands the range of funding options available to pursuers while increasing protection from potentially crippling court costs.

'The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill will make the cost of court action more predictable, the bill will introduce a sliding cap mechanism to make the legal fees in such cases clearer and protect people from facing a large expense bill if they do not win personal injury claims.'

(DAVIDSON, 2017)

It will also, for the first time, allow multi-party or group actions in the Scottish civil courts. Multi-party or group actions will enable groups of people to sue in the civil courts where they have the same or a similar claim against the same defender or defenders. The Bill will allow solicitors, as well as claims management companies, to offer 'no win, no fee' damages-based agreements for the first time.

It is not possible to know what impact this Bill will have on the demand for legal aid in the future. However, the changes in user and service delivery of private legal services envisaged by the Taylor review add to the argument made in my own review for flexible processes around the rules and oversight of publicly-funded legal assistance.

3.5 How publicly funded legal assistance in Scotland compares with other jurisdictions

In establishing a new vision for publicly-funded legal assistance in Scotland, it is useful to view the current legal aid arrangements in Scotland in an international context. This allows for benchmarking and the possibility of learning from other jurisdictions. However, comparing legal aid programmes is difficult: in part, this is because the available data is often incomplete; and also because of differences between jurisdictions. For example, there may be differences in the definition of what they consider to be justiciable problems, differences in substantive law and legal process, how cases are processed, the definition and ambit of legal aid, the presence and scale of generalist and specialist advice services, and in the take up and scope of legal expenses insurance and third-party service provision, for example by trade unions.

That said, it is possible to provide a general comparison of the Scottish legal aid programme with that in other European countries. In 2002

the Council of Europe established the European Commission for the Economic Efficiency of Justice (CEPEJ). On a biennial basis CEPEJ publishes detailed comparisons of the justice systems of the 47 Council of Europe members.

For the sake of simplicity, I have taken three key areas of legal aid to compare the Scottish service with other jurisdictions:

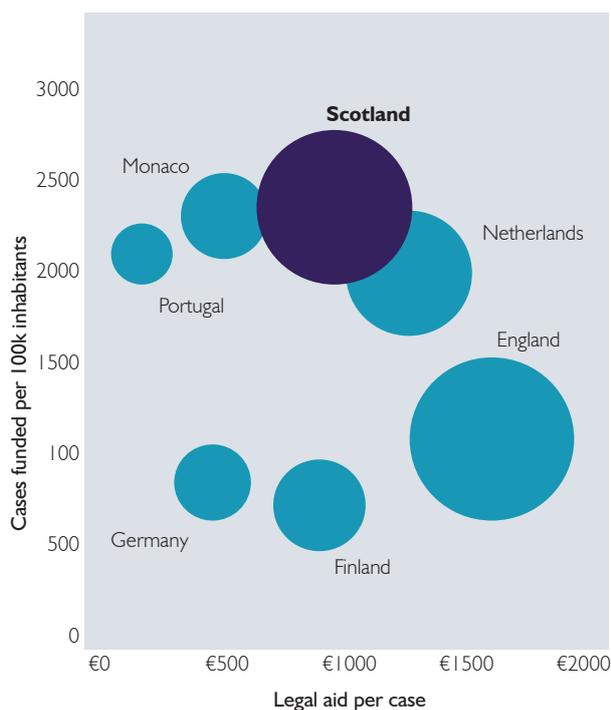
1. Scope (what you can obtain legal aid for)
2. Eligibility (who is able to obtain legal aid)
3. Cost (what is the cost of the legal aid scheme)

Scope

In relation to criminal legal aid, provision in Scotland compares well with other systems: in almost all criminal cases prosecuted as solemn offences (those with a jury), the accused will get legal aid, and potentially legal aid will pay for the best criminal defence lawyers available. In relation to civil legal aid, the scope of legal aid in Scotland is broader than very many jurisdictions, with comparatively little excluded from legal aid.

Scotland is one of the most generous providers of legal aid

Bubble size shows relative per capita legal aid budget



70 per cent

of Scotland's population is eligible for civil legal aid



2388

case funded for every 100,000 people, the highest in Europe



ranks 3rd

for legal aid spend per capita in Europe

The most significant exclusions are some tribunal hearings and small claims (now simple procedure) for under £3000.

Eligibility

Approximately 70% of the Scottish population is eligible on the basis of their income for civil legal aid to fund at least part of their legal actions. This is one of the highest levels of eligibility (Scottish Government, 2011a).

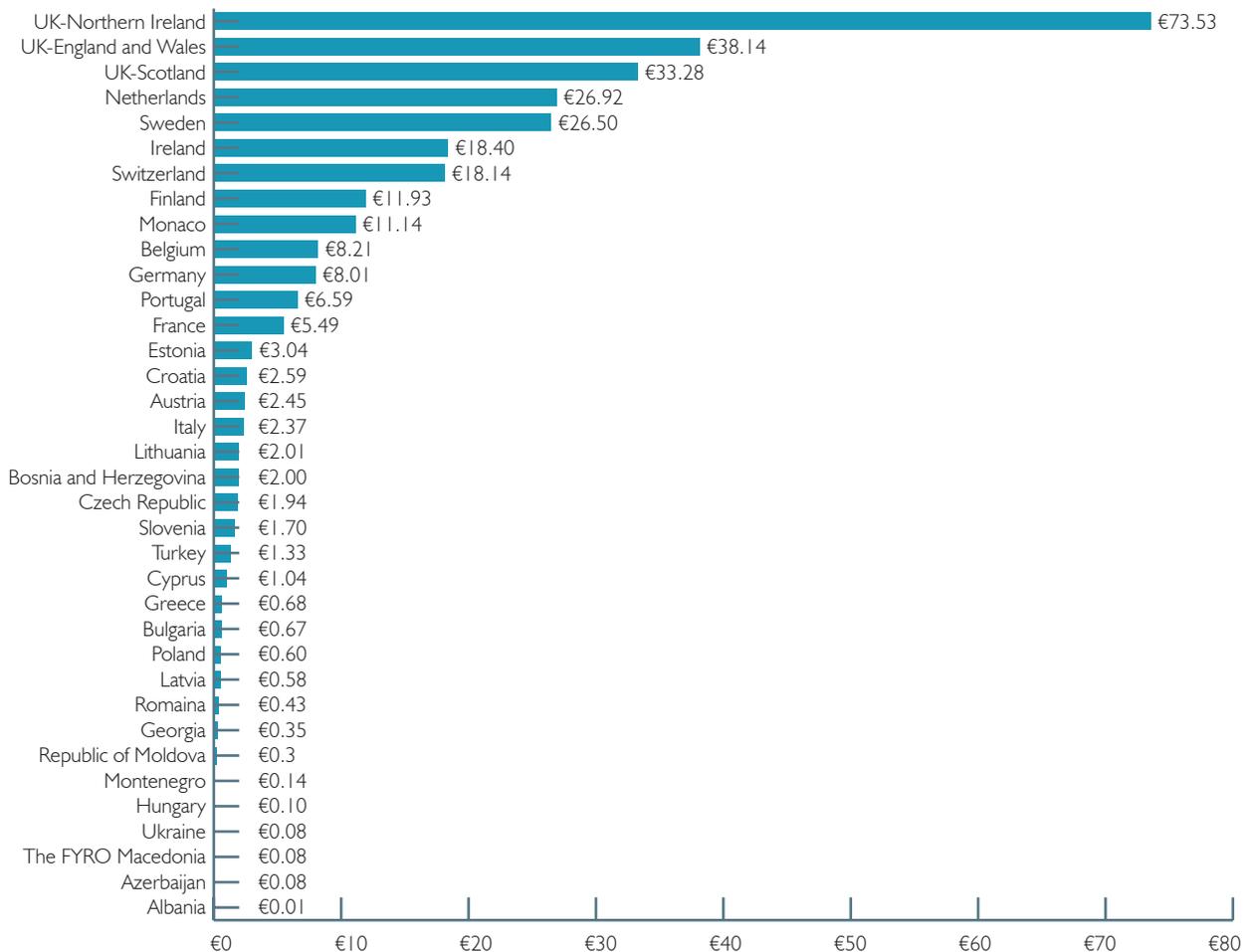
Cost

Scotland's expenditure on legal aid exceeds €30 per capita (Council of Europe, 2016). The average

for European countries is €9 and the median is €2 per capita. This makes Scotland one of the highest spending jurisdictions. Most legal aid systems operate with clear budget caps and explicit rationing. Scotland and the Netherlands have an open-ended, uncapped, demand-led provision.

In summary, Scotland is one of the leading jurisdictions in Europe in the provision of legal aid judged by scope, eligibility and expenditure per capita. Internationally, Scotland's legal aid programme is also recognised for its independence from Government and the public accountability of its legal aid authority. It's also known for being an early adopter in terms of on-line applications and accounts, for its quality assurance system and for being well integrated with the wider justice system through the Justice Board.

Annual public budget allocated to legal aid in 2014 per capita (€)



4 A vision for publicly-funded legal assistance in Scotland: a citizen-focused approach

VISION

Scotland is a global leader in supporting citizens to defend their rights, resolve problems and settle disputes.

The Scottish Government document, *Justice in Scotland: Vision and Priorities* (Scottish Government, 2017c) sets out seven priorities for the future. I propose my recommendations should contribute to the key aim:

We will modernise civil and criminal law and the justice system to meet the needs of people in the 21st century.

Countries around the world are exploring innovative approaches to adopting a citizen-centred perspective, promoting access to legal and justice services to demonstrate their responsiveness to the legal needs of citizens, communities and businesses, while targeting resources more effectively. Adopting a people-centred perspective is an important guiding principle. In an institution-centred perspective, service users are often seen as passive recipients of services, whereas in a user, citizen or people-centred perspective, people are able to voice their demands and needs, contribute to shaping the policy agenda, and evaluate service content and delivery (OECD, 2017). Scotland should aim to be at the forefront of these international developments in the design and delivery of its publicly-funded legal assistance service.

Agency and capability

Citizens vary widely in their capabilities and ability to act. Many of the capabilities required to deal with legal issues relate to general life skills, social

relationships, confidence and personal resilience, rather than specific legal capability. Although many problems have a potential solution in law, research indicates that many people are unlikely to pursue this option ((Genn & Paterson, 2001); (Consumer Focus Scotland, 2012)).

It is important to take a holistic view of legal needs and access to justice, reflecting the fact that people often have a cluster of related issues to resolve. There is an important place for local advice networks across the country, providing face-to-face advice and representation to cover both generalist and specialist information and advice. (Equality and Human Rights Commission, 2017)

Focus group participants were generally very supportive of the idea of legal aid, though they had little knowledge of it, who was eligible for it, how they might find out about or apply for it, and which solicitors might provide it. Overall, people felt that the service is poorly explained and marketed and could be more accessible. There was a commonly held worry about going to a lawyer for help with a dispute in terms of 'going in blind', not knowing if you are eligible for legal aid, nor if you are accessing the best lawyer for your case. It is clear from the focus groups that there are misconceptions surrounding the provision and how legal aid is funded.

Generally, people were not familiar with the idea that legal aid can contribute to paying for advice, although they felt strongly that accurate and timely legal advice should be available when faced with serious problems.

There certainly isn't any marketing for legal aid. I think I've only seen once ever just a wee sticker beside a building, but I haven't ever seen anything to say that if you're at the bottom, you know, there's always help.

FOCUS GROUP PARTICIPANT IN SKYE

Most people thought the legal aid budget of £136 million was not excessive and sounded reasonable. They were, however, concerned that it was used as effectively and transparently as possible to provide a high-quality service to more people.

The vision set out in my review is intended to cover a 10 year time frame to 2028. This will allow for shorter term impacts to be made, with time to develop more ambitious and strategic improvements that will provide the sustainability and stability the publicly-funded legal assistance service Scotland needs.

Structural reform

The international benchmarking exercise places Scotland near the top of legal aid systems among the world's richest countries. There is clear commitment from the Scottish Government, the judiciary and the legal profession to modernise (indeed modernise radically) the wider justice system. The advice sector wants a similar modernisation. However, responses to me from the legal profession's representatives were more ambivalent. The Law Society of Scotland believe that the legal aid service does enable effective delivery of access to justice to people across Scotland, but that the service is urgently in need of structural reform (Law Society of Scotland, 2017a). In contrast, the Faculty of Advocates: "do not consider that beyond modernising the service to take account of technological/IT advances, such as standardised sanction application forms, and the introduction of more flexible payments structures,

there is much we would change to make the current system more effective and person centered". (Faculty of Advocates, 2017)

The responsibility for delivering a user-centred approach is a shared one. While much of the responsibility for ensuring access to justice lies with the Government, Lord Neuberger, who served as President of the Supreme Court of the United Kingdom from 2012 to 2017, has argued that lawyers and judges have an equal duty in this regard. Lawyers and judges should not be 'standing on the side-lines and criticising: they have a heavy duty to do all they can to support and improve access to justice for ordinary citizens and small businesses.' (Lord Neuberger, 2017). I share that sentiment.

Placing the public interest before the individual needs of their members is what gives the professions certain privileges. One is that they are left to govern their members because they have knowledge of their own occupations that others do not have. If professions are to enjoy this privileged status, their stakeholders, including the public and their clients, must trust them (National Consumer Council, 2010). The results of the focus groups conducted for this review indicate a worryingly low level of trust in the legal profession, but a positive view of legal aid.

Improvement research

It was clear from the responses to me that legal aid and advice services in general are under-researched and under-analysed in Scotland. To an extent this is due to what the Harvard Law School has called 'legal exceptionalism':

'We have a problem in law. We think we know everything and we're wrong. We need to get over the idea that because we're lawyers, we can't learn from any other field. The fundamental issue with access to justice is that a lot of what we do is wrong and we don't yet know what that is.'

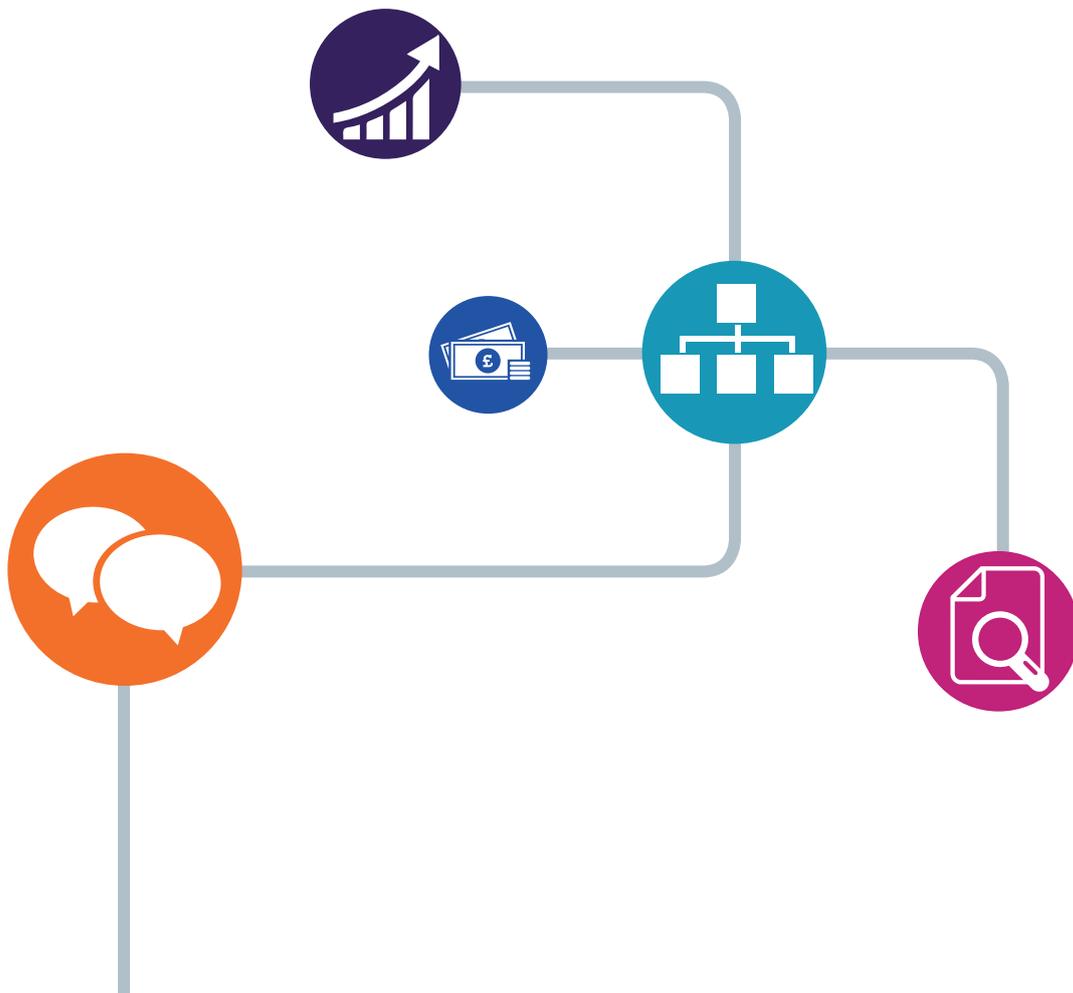
(MILANO, 2017)

As the Scottish judicial and legal assistance systems are modernising rapidly we need input from our academic and policy institutions. They must add their considerable weight to the debate, contributing to the development and assessment of effective change.

Improvement research is common in other public services. Publicly-funded legal assistance needs investment, and it needs service providers willing to take risks, exploring what works:

- What small-scale innovations can be independently tried and tested?
- Which successful innovations need to be tried on a larger scale?
- How can we share and spread good practice among providers of publicly-funded legal assistance services?

While empirical studies of access to justice in Scotland have been conducted regularly in the last 35 years, there appear to have been fewer such studies in recent years. Although competition for the available funding from the Arts and Humanities Research Council (AHRC), Economic and Social Research Council (ESRC), the Nuffield Foundation and the Leverhulme Trust has been increasing in the last decade, there has been a decline in the number of socio-legal scholars available to do the work, as a report from the Nuffield Foundation recognised in 2006 (Genn, et al., 2006). It may be that more needs to be done by the Scottish Government and Scottish Legal Aid Board to nudge researchers to work in this area, perhaps through underlining their commitment to evidence based policymaking in the field.



5 A mission for publicly-funded legal assistance 2018-2028

MISSION

Create and sustain public trust and provider confidence in publicly-funded legal assistance

The six strategic aims and the consequent recommendations are intended to deliver the vision. However, there is an important mission which is critical to success. That is to address the twin issues of trust and confidence. The findings from the focus groups show that public trust in the legal profession seems low. A good reputation is one of the most prized assets a business can have. For this to happen, consumers and citizens need to know whether or not individuals and firms are compliant with regulations and are achieving acceptable standards of performance (National Consumer Council, 2013).

Perception and reality

While others across the world hold the Scottish legal aid service in high regard, it is criticised domestically and, at times, derided by voices within the legal profession. This feeds into media and public perceptions that all is not well with legal aid in Scotland. Turning that around is critical to protecting a continued financial and human investment in the publicly-funded legal assistance service. It is an irony that, on objective criteria, Scotland appears to have one of the best systems of legal aid in the world and yet there are domestic concerns about poor public value and low trust both in the service itself and in those who deliver it.

'The continuance of representation by the very best lawyers is undoubtedly under threat from market forces.'
(FACULTY OF ADVOCATES (ARBITRATION), 2017)

There is also a lack of confidence within the legal aid provider community. This was clear throughout my review. Ten years ago, a solicitor was quoted in a Law Society of Scotland report saying, *'The current situation is terrible. I don't foresee anyone carrying out legal aid work in 10 years.'* (Law Society of Scotland, 2007). Ten years later, this prediction seems far-fetched. Yet similar predictions were being made during this review.

Adding value to public expenditure

The Law Society of Scotland has published important research attempting to put an economic value on the work of their legal aid-funded members (Law Society of Scotland, 2017b). That publication referenced research in England, on the notional social return on investment value of legal aid and social welfare advice showed that *'all of the studies reviewed concluded that legal aid not only pays for itself, but also makes a significant contribution to households, local economies and reducing public expenditure.'* (Law Society of Scotland, 2017b).

Measuring the impact, quality and effectiveness of legal assistance services in a climate of competing funding and increased government expectations is critical. Broadly, there are two approaches to obtaining the required information: specifically designed and tailored research methodologies (bespoke research), and monitoring and assessment through administrative data collected by the agencies concerned (OECD, 2017). The research by the Law Society of Scotland in 2017

Value Added by Legal Aid

Judicare (private lawyers)	Investment £	Return £	% of the return to individual	% of the return to public services
Housing	1	11	80%	20%
Family	1	5	95%	5%
Criminal	1	5	90%	10%
Third sector advice service (CAB)	1	14	100%	

(Law Society of Scotland, 2017b) & (Citizens Advice Bureau, 2017)

falls into the first category. On their evidence the social value to us all of criminal legal assistance is £411 million a year. The increased ability of the Scottish Courts and Tribunal Service to collect data through their digitised case system will be a very important contribution to the second category of evidence.

I received a very positive impression of the legal profession and agree with the Law Society of Scotland that the values and the ethos of legal

aid providers in large part overlap with those for public services more generally and provide an effective foundation for helping the public during some of the most challenging events of their lives (Law Society of Scotland, 2017a). As the Faculty of Advocates wrote: *'Positive outcomes for and with the people of Scotland will be achieved if there is greater public confidence that the justice system and persons can readily gain access to it.'* (Faculty of Advocates, 2017)



6 A clear outcome

OUTCOME

We live in a safe, just and resilient Scotland

I have aligned the outcome sought with the vision of the Justice Board.

Scotland is at the forefront of the development of outcomes-based approaches to public policy and accountability. Outcomes-based performance management aims to align all aspects of the Government's activity to focus on achieving specific, clear objectives. It developed as a reaction to new public management (NPM) techniques which emphasises target setting. In Scotland, as in other governments, NPM led to the proliferation of targets and by the mid-2000s the (then) Scottish Executives programme for government had over 400 targets to be met often with associated ring-fenced funding. The NPM approach promoted in the Blair years of the UK Government began to be discredited as concerns gathered about the lack of significant improvements in wellbeing and the risk of 'hitting the target, but missing the point'.

In 2007, the Scottish Government sought a different approach, implemented through a new National Performance Framework. This approach became the cornerstone of the Scottish Model of Government, where 'government' is perceived as a single entity. The National Performance Framework consists of a statement

of purpose, a small number of national outcomes and a larger number of national indicators. It was given a statutory basis through the Community Empowerment (Scotland) Act 2015, which requires Scottish Ministers to consult on, publish and report on progress towards National Outcomes. Following engagement activities in 2017, the new National Outcomes are due to be laid before the Scottish Parliament in March, 2018.

The Scottish approach, in common with experience in Australia, New Zealand and Finland, has focused on outcomes-based approaches that apply to the whole of Government. In this way it differs from Outcome Based Accountability which is generally programme or project specific.

Outcomes-based performance management generally has the following components:

- a clear unifying vision for the whole of government
- a small number of strategic commitments
- aligned national strategies, national budgets and local government planning
- data sources to assess performance
- engagement and information sharing with citizens and stakeholders (OECD, 2015)



STRATEGIC AIM 1: Place the user voice and interest at the centre

Scotland's legal aid provision was established by statute in 1950 to provide a service for citizens, the costs of which are predominantly borne by the state – the same fundamental principle that underpins the modern welfare state established in the same period. The public benefits of a well-run legal aid service remain today: improving the quality of life for recipients; tackling inequality; empowering individuals and making a significant contribution to the delivery of social justice.

'We believe that the law plays an essential role in supporting civil society, economic development and democracy. Our vision is of a society where everyone understands the role and value of the law and has the capability and opportunity to use it to ensure their rights and to fulfil the obligations that accompany these rights.'

(LEGAL EDUCATION FOUNDATION, 2017)

Taking together all the evidence received and discussions held, I find that legal aid does not appear to have been articulated, designed and delivered as a public service. Legal aid sits within the wider justice system and the allocation of resources to that system is considerable as indicated earlier in this review report and stands at £2,500 million a year.

While those who deliver legal aid have their individual clients' best interests at heart, it is not clear that all of those who provide legal aid see it or promote it as a public service. Many members of the profession do not seem to identify legal aid as a public service. The influential report of the Civil Courts Review in 2009 came to this conclusion about the wider justice system:

'The theme of this Report is that the legal system is a public service and that in the allocation of the resources available to it the public interest is of vital importance.'

(COURT OF SESSION, 2009)

There may be a number of reasons for legal aid not being articulated or delivered as a public service. The statutory framework for legal aid is primarily focused on the structure of the service and on the fee structure, rather than on the public good it represents. Unlike health or education services, relatively few members of the public will make use of legal aid – around 2% annually. However, the existence of publicly-funded legal assistance is a service which can help to ensure a fairer Scotland. This is not just about access to courts, but access to information, advice on rights, redress, and representation.

Another reason could be the perception that a service predominantly provided by private, self-employed solicitors and advocates cannot be a public service. However, not all public services are delivered by public servants and there are many examples of public services being delivered by private providers, for example GPs and dentists, the fees for whose services are provided by the state. Recent public debate around legal aid has focused almost exclusively on solicitors' fees, and to a lesser extent on individual cases where the receipt of legal aid by a particular individual is questioned or challenged. In contrast, there is very little public discussion or promotion by the legal profession and judiciary about the reliability, availability, dependability, responsiveness and

the value that this service delivers for users and society – unlike the public narrative around other areas of public service delivery such as health or education.

Public perceptions

I commissioned a number of focus groups with members of the public around Scotland. The most frequent finding from the discussions was that people didn't know much about legal aid. They did not know the criteria for qualifying for legal aid, what it could be used for or which lawyers provided it. Many people in the focus groups had the perception that legal aid was not for them.

'I've always just assumed legal aid is something for people that are on benefits.'

FOCUS GROUP PARTICIPANT IN LIVINGSTON

'Thought you couldn't get legal aid if you worked full-time.'

FOCUS GROUP PARTICIPANT IN RENFREW

The research also found that people tend to shy away from using lawyers and going to court to resolve a dispute, largely because of the uncertainty about what it would cost and the belief that it would be very expensive. Participants in the groups that discussed self-representation welcomed it as a cheaper option than a lawyer.

The move to personalisation and user focus

In recent years there has been a substantial shift amongst public service providers in Scotland, the rest of the UK and wider in-thinking about the

role of the state, its relationship with citizens and how public services are developed and delivered. In Scotland, a central part of this shift has been a renewed focus on ensuring that public services are designed around the central purpose of serving the needs of users. The 'personalisation' agenda, as set out by the Christie Commission (2011) represents a key direction of travel for public services in Scotland. This approach not only supports delivery of effective services that are more clearly aligned with need, it also builds public trust and support for the availability of these services.

Personalisation

'User-led collaboration which focuses services on individuals, their needs and aspirations. There is growing evidence that personalisation is effective in meeting service users' needs more directly, through peer support and access to high-quality information and advice.'

(CHRISTIE COMMISSION, 2011)

The legal aid service in Scotland, perhaps because it is too rarely promoted and articulated as a public service by both the public and those involved in its delivery, lags behind this trend. There are a number of challenges that must be addressed if Scotland's publicly-funded legal assistance service is to become a truly user-centred service in the future.

Flexibility

There is rigidity in payment regimes, restrictions on who the Scottish Legal Aid Board can pay to deliver services, and inflexibility in how the service responds to emerging needs which all demonstrate that the service is not focused on the user.

Many respondents to me reflected that the current service was not well structured to meet the needs of those with disabilities. The point was made very forcefully that with disabled clients, solicitors often needed more time to diagnose

the issues presented to them, more time to find potential solutions adapted to the needs of the client, and more time to explain these. Disabled people are statistically more likely to suffer civil dispute issues than non-disabled people (Scottish Government, 2016b). None of this is recognised in the standard fee for Advice and Assistance or for the other types of legal aid without further application to the Scottish Legal Aid Board.

Similarly, the verification system cannot easily adapt when a solicitor is, for example, acting for a homeless client who may not have to hand the financial verification documents needed to assist with a legal aid application. Although the Scottish Legal Aid Board can try to make adjustments, this still creates a barrier to advice. These kinds of issues will be dealt with in another section of this report, but demonstrate how the structure of legal aid hampers the design of a user-focused service, if not the delivery of that service. Understanding need, of both individual and community, and responding to emerging needs is the foundation on which the future legal aid service should be built.

User voice

In other public policy and service areas, user representatives engage directly in the policy making process. However, this rarely happens with legal aid. On occasions when there is public engagement, this is often through specific interest groups, and more often in the context of service failure rather than proactive improvement planning or co-production of services. While this focus on what is wrong with the service is both welcome and valuable, there is less engagement on the underpinning principles and purpose of legal aid and how it is being or should be delivered to clients.

Responses to my call for evidence reflected this limited level of engagement: while representatives of specific interests or groups were keen to engage, there was little response from the wider third sector. Given the potential role

of publicly-funded legal assistance in tackling inequality, upholding rights and supporting communities – the same constituencies that the third-sector supports – the lack of engagement of broad, strategic third-sector representatives was disappointing. While I received many very good and persuasive submissions to the call for evidence, and in subsequent meetings, it was difficult to engage effectively with users and potential users of the service and with the third sector, whose beneficiaries are key users of publicly-funded legal assistance services. The focus groups were a way of trying to draw out what the user experience might be and to get a flavour of public attitudes towards the service. If the legal aid service is to be re-established as a public service that puts users at the centre of its design and delivery, then the voice, interests and experience of the user in re-design, maintenance and continuous improvement is critical. This will be a real challenge. The experience of how other sectors have addressed that challenge and the experience of consumer groups, user-led and user-focused third-sector organisations in those sectors will be invaluable.

Consumer panels

Consumer panels are a feature of services where there is a strong and articulate provider interest and a weaker user voice. The panels represent the interests of current and future consumers in the development of policy. They advise and challenge from the earliest stages of policy development to ensure the consumer interest has a voice. Members of such panels are recruited through a process of open competition and encompass a broad range of relevant expertise and experience.

A framework for sustained, credible user engagement in the legal aid service should be established. It needs to be one that robustly and regularly provides opportunities for users and user representatives to reflect on their experience of the legal aid service and the extent to which it meets needs. This framework should also provide opportunities to have an input into the

continuous improvement of the service. Third-sector organisations should participate fully in any engagement strategy that is developed. Responsibility and accountability for taking this forward has to be clearly identified and I return to this in Strategic Aim 6.

The Scottish Government will be consulting on how best to deliver the optimal approach to consumer protection and competition in Scotland. This Programme for Government commitment provides an opportune avenue for engaging with consumers of legal aid. There is clearly scope to create the right kind of framework to support the delivery of a user-focused legal aid service.

Stronger engagement with local authorities, their representative body (Convention of Scottish Local Authorities – CoSLA) and local elected councillors should also be built into the framework. Local government is a very significant funder of local advice and information services. Equally importantly, many people approach their elected representatives for assistance on a wide variety of issues and these representatives must be confident in referring their constituents to generalist and specialist advice services – and legal aid – when appropriate.

Strategic Oversight

The Justice Board members comprise many of the key players in the wider justice system. They include Scottish Government directors and the heads of justice organisations in Scotland. At present, the following are also members: Police Scotland, Crown Office and Procurator Fiscal Service, Scottish Fire and Rescue Service, Scottish Police Authority, Scottish Children's Reporter Administration, Scottish Legal Aid Board, Community Justice Scotland, Scottish Prison Service and Scottish Courts and Tribunals Service. The third sector and local government are not represented.

'We believe that it is important to consider what kind of ethos and values should inform the provision of legal aid over the next decade. At a time when there is wide-ranging discussion on the nature of service delivery, the respective roles of public and private sector provision and how successful outcomes can be maintained in a persistently challenging financial climate, there are benefits in moving towards an ethos shared with other public services. There are clear links between outcomes in justice, education, health and other areas and a number of ways that services can coordinate, mutually learn and build capacity.'

(LAW SOCIETY OF SCOTLAND, 2017A)

Best Value

Public services in Scotland are subject to Best Value principles. Best Value provides a common framework for continuous improvement in public services in Scotland, and is a key foundation of the Scottish Governments Public Service Reform agenda (Scottish Government, 2011b). There are nine characteristics of Best Value that public service organisations are expected to demonstrate:

1. Commitment and leadership
2. Sound governance at a strategic and operational level
3. Accountability
4. Sound management of resources
5. Responsiveness and consultation
6. Use of review and options appraisal
7. A contribution to sustainable development
8. Equal opportunities arrangements
9. Joint working

The mixed model of service provision in publicly-funded legal assistance services makes it harder to implement the principles than in traditional public-sector models of public service. However, there is no doubt that all publicly-funded legal assistance services should be subject to performance audit by the Accounts Commission and by the Auditor General for Scotland.

Invest in prevention and public legal education

'Legal education is a key component of a holistic approach to legal services - a view that is endorsed in other jurisdictions such as Canada and New Zealand.'

(CONSUMER FOCUS SCOTLAND, 2012)

Legal education has shifted over the years from a focus on a 'just in case' approach to a 'just in time' one. The old idea of public legal education, the 'just in case' approach, was to link it to the school curriculum. The modern 'just in time' approach is to link it to the times when people need help. New technology and social media can be particularly effective in this and have transformed public legal education thinking.

'Legal education and information can be provided in a variety of ways that may involve passive or active engagement - through face-to-face contact, via social media, by telephone or via leaflets and other written material. Diverse methods of delivery are needed to reflect the fact that people receive and understand information in a number of ways, something that may be determined by their level of education or even by their cultural or community background. Interactive approaches, properly resourced, can be particularly effective.'

(ADVICE SERVICES ALLIANCE/CITIZENSHIP FOUNDATION, 2004)

Public legal education provides people with awareness, knowledge and understanding of rights and legal issues, together with the confidence and skills they need to deal with disputes and gain access to justice. Equally important, it helps people recognise when they may need support, what sort of advice is available, and how to go about getting it. Public legal education (PLE) has a further key role in helping citizens to understand everyday life issues, make better decisions and anticipate and avoid problems (PLEAS Task Force, 2007).

In line with the Christie Principles it is also important to emphasise the benefits of early intervention and prevention, for example effective co-ordination of general advice and support that which could help prevent the need to resort to legal action and defence in the first place.

(COSLA, 2017)

Public legal education aims to:

- raise awareness of rights and legal issues and of the wider justice system
- help people to identify the legal dimensions of everyday situations
- equip people with the skills and confidence to resolve issues and prevent problems
- enable people to recognise when they need help and find the best help
- help people to organise effectively for legal and social changes and get involved in shaping the decisions that affect them both at a local and national level.

Public legal education can raise awareness of rights and how to seek redress when those rights are not being upheld. Some problems may not be readily considered as a legal or justiciable matter, and while most can be resolved using legal solutions, many can be resolved by non-legal action. There will often be choices on what route to take, and any client must be supported to make decisions that meet their individual needs and preferences (Genn & Paterson, 2001).

Legal capability

Raising awareness and understanding of the kinds of support available to an individual and for what purpose will increase legal capability. This, in turn, would encourage greater uptake of preventative approaches to dispute resolution. I find that Scotland does not have a coherent approach to public legal education that could reduce the problems people face in their lives and create a culture where help is sought before a crisis is reached.

'The organisations with which they have the problems also have a responsibility to do what they can to avoid and resolve them.'

(CONSUMER FOCUS SCOTLAND, 2012)

A previous Scottish Government programme, *Making Justice Work* (Scottish Government 2016d), aimed to deliver significant change in the justice system in Scotland. The programme was overseen by Police Scotland, the Crown Office, Procurator Fiscal Service, Scottish Courts and Tribunals Service, Scottish Legal Aid Board and the Scottish Government. It included a project on legal capability, which commissioned research on how people deal with problems that arise in their lives and the findings were reported by Consumer Focus Scotland (Consumer Focus Scotland, 2012). These findings underpin this section of my review.

The Consumer Focus Scotland report, *Facing up to Legal Problems* (2012), reported that the way in which people respond to similar problems can be very different, depending on the levels of various skills and abilities such as:

- being able to identify a potential solution;
- accessing additional support and advice; and
- being determined to deal with it.

Issues such as shame or embarrassment at the situation they find themselves in can have a significant impact on people's ability to resolve difficulties. More tangibly, a lack of access to services, or knowledge of how to access services was also highlighted. These points are still relevant and were commented on by a number of submissions to me. The discussion groups for the review found that in line with research findings (for example in *Paths to Justice* (Genn & Paterson, 2001)), people had attempted to solve justiciable problems in a variety of ways. Some people had tried to sort out a dispute directly with the other party, through phone calls and letters. Others had simply put up with the situation.

'We believe that public legal education is a right. There is urgent need actively to promote public awareness and knowledge of legal issues, to help overcome the difficulties that most people experience dealing with the law in their daily lives.'

(CONSUMER FOCUS SCOTLAND, 2012)

The voice of the practising solicitor

Lawyers are also users of the legal aid service. The vast majority of legal aid services in Scotland are provided by solicitors in private practice. One of the important roles that solicitors perform is to navigate the complexity of the court process for their client.

'It is our experience that solicitors as court practitioners are often excluded from, or are not seen as appropriate participants in, many of the structural bodies that exist to ensure the effective day to day local running of the criminal justice system.'

(GLASGOW BAR ASSOCIATION, 2017)

There is a close interaction between legal aid lawyers and the court process. As recognised by the evidence submitted by the Law Society of Scotland, there is '*broad collaboration between legal aid providers and other justice agencies*' (Law Society of Scotland, 2017a). I found that there is a willingness by local bar associations to meet and engage regularly with, for example, representatives of the Crown Office and Procurator Fiscal Service, with the Scottish Courts Administration, with members of the judiciary and with the Scottish Legal Aid Board to improve the administration of justice locally. A more formal method to ensure that the solicitors' perspective is embedded in decision making would be to have legal aid practitioners represented on Criminal Justice Boards for each Sheriffdom.

Changes to court process can have a significant impact on legal aid. For example, there is a move towards 'front-loading' work in the justice system, which requires a great deal more preparation to be done before court action begins, and early in the process of a court action. Improving the efficiency of the justice system in this way is likely to have a positive impact on those involved in a case. However, it is not always easy to keep the legal aid service to keep up to date with developments as they evolve, due to the prescriptive nature of the system and the need to make changes through subordinate legislation.

There are other aspects of the way in which the court system operates that have an effect on the way solicitors work, and these were raised by those who I have met in the course of the review. For example, multiple callings can have a significant impact on the ability of criminal defence solicitors to work efficiently. Cases are due to be called on a certain day, which requires the solicitor and client to be present. However, when the day arrives, the case is either delayed or postponed. This can also be frustrating for solicitors' clients who may have taken a day off work or arranged childcare to attend.

This example illustrates a frustration felt by many criminal defence solicitors that their position is not considered as part of the business planning that underpins the court system. While the Law Society of Scotland is involved in discussions about court processes at national level, the practising solicitor can feel disengaged from the policy-making process at local level, despite its impact on their work. While this is not purely a publicly-funded legal assistance issue, changes to the way the justice system operates has an impact on legal aid, and, as such, I consider it important to have the solicitor perspective embedded in decision making around each local court's business planning.

Quality assurance

The public focus groups identified a lack of knowledge by users of publicly-funded legal services about information on the quality and standards of the providers. The participants spoke

of the need for more help with choosing the right lawyer, including legal aid lawyers. They suggested an up-to-date database or advice line with information relating to experiences of similar cases and about the quality of services. Participants wanted to know about the existence of quality or performance measures for legal aid solicitors and whether quality assessments can be made public to support people making an informed choice about which lawyer to use.

In terms of standards, Scottish solicitors are overseen by a wide array of regulators ranging from the LSS to the Courts and from the Scottish Legal Aid Board to the Scottish Legal Complaints Commission (SLCC), and this equally true for legal aid solicitors (Law Society of Scotland, 2018) with some additional requirements contained in codes of practice and the regulations which are specific to legal aid practice. That said, regulation supports a wide range of public benefits many of which are not directly related to quality assurance. Not all legal aid lawyers are covered by the Client Protection Fund, although that is a discretionary fund that safeguards client money and therefore not primarily directed at quality assurance. However, all legal aid practitioners must subscribe to the Master Policy insurance scheme which, because a poor claims record is reflected in the size of premiums, is likely to encourage good standards of professional performance. The Law Society of Scotland also supports a specialist accreditation scheme in which panels identify whether practitioners who apply to them demonstrate 'significant experience' in the relevant field. Although the scheme has been in existence since 1991 it is unclear how many legal aid lawyers are accredited specialists (less than 7% of the practising profession are Law Society of Scotland accredited specialists whereas around 70% of practitioners are thought to specialise). The accredited specialism scheme therefore has limitations as a way of reassuring the public as to the quality of all legal aid providers.

According to the UN's Global Survey of Legal Aid (UNODP, 2016) 57% of the responding jurisdictions relied on complaints as their primary quality assurance mechanism. However, it is

widely recognised that complaints are not a particularly good indicator of the general level of quality of performance by legal aid lawyers: they are reactive rather than proactive, they suffer from substantial underreporting and complainers are usually not best equipped to assess the quality of the legal advice or drafting which they receive, whether the case or transaction was completed within a reasonable timeframe and finally, whether the cost was reasonable (Paterson & Sherr, 2017). In addition, in a Scottish context the efficacy of the independent complaints system as a way of encouraging quality assurance in solicitors is likely to have been reduced by the Anderson Strathern case (Scottish Legal Complaints Commission, 2016).

Scotland is one of a dozen or so jurisdictions globally that has an objective quality assurance system of the performance and outcomes achieved by legal aid-funded solicitors based on peer review of their files (Paterson & Sherr, 2017). I have been advised that this system has been demonstrated, drawn on, or piloted in a wide range of places including the Netherlands, Chile, South Africa, Ontario, Finland, Moldova, Georgia, Ukraine and China.

There is no similar scheme for legal aid-funded advocates or solicitor advocates. The absence of a quality assurance for advocates in legal aid cases is understandable, as advocates and solicitor advocates are chosen for instruction by legal aid solicitors. As reasonably frequent users of advocacy services, solicitors can be expected to be familiar with their reputation and quality. Since 2016, there is the Faculty of Advocates Quality Assurance programme which is based on simulation as opposed to real cases. The criteria applied and the results of the programme are not published. On the other hand both advocates (and solicitors) have to carry out a number of hours of Continuing Professional Development each year, which for advocates, includes three hours of advocacy training.

File-based peer review of solicitors' legal aid files was developed for the Legal Services Commission in the 1990s and introduced for all civil legal

aid practitioners and firms in Scotland in 2005, through a partnership of the LSS, the Scottish Legal Aid Board and the Government. The primary aim of the programme was to provide an impetus to improvement by the profession.

A total of 12% of files and 6% of firms failed their first review and 3% of firms failed their follow-up review six months later. In the second three-year cycle, similar proportions failed their first review, but fewer failed the follow-up review. The third cycle of peer review was extended to six years for civil firms and practitioners who could demonstrate their competence, but less well-performing firms and solicitors were reviewed on a more regular basis. A similar risk-based approach is applied to practitioners working in areas of law with vulnerable clients (for example, adults with incapacity, and immigration and asylum law) where a larger sample of 10% of files is assessed.

In 2011, peer review was extended to all 550 criminal defence firms and 1500 criminal legal aid practitioners and all children's legal aid practitioners. In the first criminal defence practitioner cycle, 7% of files and 6% of practitioners failed their initial review, but the practitioner fail rate for the subsequent review has been less than 1%.

The peer reviewers apply a set of 20-30 generic criteria, depending on the area of practice being assessed. These have been widely consulted on in the profession and have a focus on client-centred practice and client communication. They cover:

- the lawyer's fact and information gathering skills
- the appropriateness of any legal advice given (including its general and ethical soundness)
- the content of the letter of engagement
- the aptness of the advice on legal aid
- the operation of the legal aid clawback
- the use of experts
- the level of preparation for any hearings
- the timeliness of actions taken and advice given
- the quality of ongoing advice and communications covering the outcome of any hearing and the option of appeal

Each criterion is scored with one of five outcomes and then each file is given a score between one and five based on the overall performance of the lawyer on the criteria. Finally, the reviewer will check the total number of files that have been assessed for the practitioner before awarding the practitioner an overall mark on a 1-5 scale (a score of 3 or more is a pass) (Paterson & Sherr, 2008). Between 2014-2017 the peer reviewers' marks given to civil legal aid files in Scotland were as follows:

Score		Numbers (2014-2017)
5	Excellence	62
4	Competence Plus	798
3	Threshold Competence	4,805
2	Inadequate performance	691
1	Non-Performance	163

This indicates that 87% of civil legal aid files in Scotland that have been randomly assessed in the last three years passed their assessment. The principal causes of failure have been poor communication and delay rather than legal mistakes. On the criminal side, the pass rate is higher, with 94% of practitioners passing their review in the last two years. It is thought that fewer than 2% of practitioners who have been assessed in the last 12 years have withdrawn from registration or been de-registered from the legal aid register on quality grounds. These results provide information to the Law Society and the Scottish Legal Aid Board as to the general quality and value for money of work done by civil and criminal defence legal aid solicitors. More information could be collated as to the scores achieved by solicitors and firms.

What use is made of the quality assurance information?

The system allows individual marks for each criterion in each file to be compiled, thus enabling the areas of strength and weakness of legal aid practitioners to be identified. This system gives

the Law Society of Scotland and Scottish Legal Aid Board more information on the quality of work completed, the service provided and the results achieved by legal aid solicitors than in almost any other country in the world. Information as to the strengths and weaknesses of the criminal defence practitioners assessed each year is passed on to the profession by way of an annual update from the Scottish Legal Aid Board.

However, this information is not currently made available to legal aid service users or potential users. As it is not in the public domain, there is also less informed public scrutiny of the service. In a user-based system, and in a world where customers are seeking ever higher standards of transparency from those who provide services, it is very difficult to make a case that information on the quality of the publicly-funded legal service should not be in the public domain. However, for this to occur, it will be necessary to indicate what elements of quality peer review of files covers, and what it does not. Nevertheless, such quality assurance information could play an important role in helping to build public trust in legal aid, by improving openness and accountability. The issue of trust and confidence is one that I return to again in the later sections.

More publicly available information on the quality of legal aid services would also be beneficial for solicitors delivering them. The higher-performing solicitor and firm should gain competitive advantage for their efforts, and the poorer would have to improve or lose business.

Already some third-sector organisations, for example Age Scotland (Solicitors for Older People Scotland, 2018), endorse firms of solicitors who they consider offer good quality services to their beneficiaries. This is a valuable approach and one that other third-sector organisations should consider. Endorsement gives a clear signal of confidence in a service and can also be a mechanism to improve services through feedback and transfer of best practice between firms. There is no reason why the process could not be adapted for a range of publicly-funded legal assistance services provided by private solicitors.

Advice providers

Many advice providers outside the legal profession, especially those whose organisations belong to Advice Services Alliance are subject to some forms of regulation including mandatory insurance, with a view to protecting the public. Quality assurance is also becoming established in this sector of the advice services. As the third sector becomes more involved in providing legal assistance about justiciable problems it will be important for them to be underpinned by appropriate regulation, insurance and quality assurance measures.

The Scottish National Standards for Information and Advice Providers (Scottish Government, 2010) are designed for providers and funders in the third, private and statutory sectors with an interest in developing effective information and advice services. They ensure consistency and quality across the sector.

The standards are backed by a system of accreditation. Unlike the position with Scottish solicitors accreditation is awarded to agencies and not to individual advisers. The process was designed to provide independent recognition of achievement of the standards. The accreditation process follows a three-year cycle with stages staggered to make the process more manageable for organisations and enable them to integrate it with business development. The core focus is on evidencing the technical quality of advice achieved through the use of independent peer review techniques, centrally co-ordinated to ensure consistency. The aim is to support continuous improvement for the organisation and enable the sharing of good practice amongst advice providers. Any outcome of a quality assurance system for a third-sector advice service should be in the public domain for the same reasons as the legal profession.



Strategic Aim 1

Place the voice and interest of the user at the centre

Rethinking the Place of the User and the Public in publicly funded legal assistance

The call for evidence which started off this review asked about the purpose of legal aid. It became clear that there should be a driving focus on the outcomes that publicly-funded legal assistance seeks to achieve. The best outcomes will be achieved by placing the service user and public interest at the heart of the system.

The focus groups provided the opportunity to see legal assistance from the perspective of users and the public. They raised real concerns in my mind around awareness and trust. I then questioned aspects about the availability of quality assurance data, a lack of timeliness and flexibility of services.

Putting users at the heart of any system is not a one-off intervention, it cannot be achieved through statements of intent. Action has to be taken to build in user voice and interest into the system. I make recommendations and comment on the statutory framework and a consumer panel as being effective mechanisms. In the interests of their clients the solicitors involved should be drawn in further to court business planning. In the interests of their beneficiaries and their constituents, the third sector and local government should be drawn closer into the strategic planning of the justice system.

From a public and user perspective, prevention and early intervention are clearly better than court action. Again, these require system level changes and involve partners outwith the legal profession. Building people's agency and capacity through modern legal education services will further enhance both the user and public interest.

Strategic Aim 1 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
1	There should be a statutory framework for embedding the voice and experience of the user in the design and delivery of publicly-funded legal assistance.	✓			
2	A consumer panel should be established to represent the interests of current, potential and future users of publicly-funded legal assistance.		✓		
3	Representatives of the third-sector advice services and local authorities should be formally involved in the strategic planning and delivery of justice outcomes through membership of the Justice Board.				Third sector Local authorities COSLA Community planning partnerships
4	There should be targeted public legal education and information programmes to improve the capability of citizens to deal with justiciable problems.		✓		
5	A solicitor reference group, including both civil and criminal defence legal aid solicitors, should be established to ensure their involvement in court business planning.		✓	✓	Scottish Courts and Tribunal Service
6	Legal aid practitioners should be represented at local Criminal Justice Board level in sheriffdoms.			✓	Scottish Courts and Tribunal Service
7	All quality assurance reviews and reports on both lawyers and third sector advice services under publicly-funded legal assistance should be published.		✓	✓	Third sector
8	Third-sector organisations should consider endorsing publicly funded legal assistance services which provide a good level of service to their beneficiaries.				Third sector



STRATEGIC AIM 2: Maintain the scope but simplify

Despite financial challenges in public funding, the Scottish Government has not sought to reduce the scope of legal aid. The Scottish Government strategy for controlling the cost of the legal aid system, *A Sustainable Future for Legal Aid*, was published in 2011 and contained a number of proposals which would lead to a reduction in expenditure while maintaining scope.

'The Government's view remains that wholesale reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society.'

(SCOTTISH GOVERNMENT, 2011A)

A Sustainable Future for Legal Aid proposed four overarching themes:

- focusing legal aid on those who need it most;
- ensuring wider access to justice – the right help at the right time;
- maximising the value of legal aid expenditure; and
- making the justice system more efficient.

Action was taken under each of the four themes. Changes implemented included reductions in fees for some activities (such as travel time for solicitors, criminal summary legal aid, and photocopying), changes to financial eligibility, and a cut to the running costs of the Scottish Legal Aid Board. Not all of the proposed actions were achieved. Neither the plans to enter into contracts with criminal defence legal aid solicitors nor the intention to collect contributions from those accessing criminal legal assistance were implemented. Nevertheless, savings of around £20 million per annum were made through this strategy while maintaining the wide scope of legal aid (Scottish Legal Aid Board, 2014a).

A different approach was taken in England and Wales to reduce expenditure, and a range of measures were taken, including restrictions to the overall scope of the legal aid scheme and changes to the thresholds for client eligibility.

Maintaining the current scope of legal aid in Scotland while managing its cost is challenging. This is particularly true when coupled with generous eligibility criteria which result in 70% of applicants receiving some form of legal aid. The Law Society of Scotland issued a discussion paper on legal assistance in 2014 (Law Society of Scotland, 2015) in which it proposed reducing the scope of civil actions for which legal aid would be available alongside the introduction of civil loans. It suggested that savings made from this reduction in scope could be reinvested in fees for solicitors conducting legal aid work. This suggestion was very robustly resisted by many in the legal profession themselves and the third sector.

'We would not support any restriction to the universality of provision of civil legal aid. The Commission would have serious misgivings about any potential exclusion of specific areas from the scope of legal aid.'

(EQUALITY AND HUMAN RIGHTS COMMISSION, 2017)

If its wide scope and generous eligibility criteria are to be retained, alternative means must be found to prevent the cost of legal assistance from spiralling. Costs must be managed, and use should be made of the data collection and analysis that the Scottish Legal Aid Board undertakes to monitor fluctuations in costs.

High cost areas

There is greater use of legal aid for certain categories of cases, and evidence of increased use over recent years. This includes financial and welfare guardianship cases, and family cases involving child contact.

'In general, in family cases, the most vulnerable financially are certainly supported to be able to take action and deal with the issues between parties. Emotionally however, having a large contribution or just failing the qualification test can put a huge burden on some people making them ultimately more vulnerable than they might otherwise have been without the added financial stress.'

(RELATIONSHIPS SCOTLAND, 2017)

Financial and welfare guardianship

The Scottish Government is consulting on proposals to introduce means testing for joint financial and welfare orders. I therefore make no recommendation in this area.

Adult with incapacity cases all include an outlays charge for the preparation of a medical report and may also include a report on property.

'An application for welfare guardianship under Part 6 of the AWI Act attracts legal aid without any means test. In contrast, a person seeking to appoint a welfare power of attorney under Part 2 of the Act will only be entitled to support if they meet the financial criteria for legal advice and assistance, and the amount of support they will receive is very limited.'

(MENTAL WELFARE COMMISSION, 2017)

Family cases

A total of 60% of the civil legal assistance budget goes on family cases (£18 million in 2016-17) and 40% goes on all other cases.

Costs of civil legal assistance

(Scottish Legal Aid Board, 2018 still in draft form)

All courts – total cost 2016/17		
Family	Appeals	£0.3m
	Contact/parentage	£9m
	Residence	£3.3m
	Divorce/separation	£2.5m
	Property/monetary	£0.7m
	Protective order	£0.6m
	Family/matrimonial – other	£1.8m
Total family		£18.2m
Total non-family		£12.5m
Total		£30.7m

The Society of Solicitors in the Supreme Courts of Scotland 'recognises that some cases conducted under legal aid have been allowed to occupy far more court days over a far longer period than objectively appropriate (although this is not a practice restricted to legally-aided litigation)' (Society of Solicitors in the Supreme Courts of Scotland, 2017). The Scottish Legal Aid Board has become involved where cases seem to be long-running and now requires people on legal aid to consider alternatives before raising court action, but this has had limited effect to date. There has been criticism from stakeholders and from the courts on the length of time some contact and residence cases take. In light of this, the Scottish Government submitted a policy paper to the Family Law Committee of the Scottish Civil Justice Council on case management in family actions.

There are also plans to control and manage expenditure on contact cases. Contact cases may be heard in the sheriff court or in the Court of Session. In the sheriff court, contact disputes may also be heard in child welfare hearings (child welfare hearings do not exist in the Court of Session). Both

contact cases and child welfare hearings are covered by civil legal assistance. Child welfare reporters may be appointed by the court and outlays can be significant. In cases where grounds for referral have been established, contact may again be considered at children's hearings (and can be covered by children's legal assistance).

In October, 2015, changes were made to the rules for family cases in the sheriff court and the Court of Session in relation to the appointment of child welfare reporters which tightened up the court's control of the issues to be addressed and consequently how long the reports should be. This provided more detailed direction, and created a presumption that parties would share the costs of a child welfare report equally. Before the changes, the legally-aided applicant was usually allocated the cost of the report. Costs reached a peak in 2012-13 at £4.6 million. In 2016-17, costs dropped to £3 million, representing a 27% reduction on the previous year. The Scottish Legal Aid Board intends to investigate in more detail whether the involvement of child welfare reporters truncates litigation and brings matters to a conclusion more swiftly or whether it does not have significant impact on the length of cases.

There has been some discussion during my review that there should be a centralised system for child welfare reporters, potentially similar to that for safeguarders in children's hearings, and this is likely to be discussed by the Scottish Government during the upcoming review of the 1995 Act. The idea of a central register or a preferred supplier arrangement is likely to be considered.

Case management in family actions

The Family Law Committee commissioned and published research in this area, and asked a sub-committee to consider case management in family actions. The sub-committee produced a report which included a key recommendation that there should be an initial case management hearing in cases under section 11 of the Children (Scotland) Act 1995, such as contact and residence cases. This will function as a triage hearing which can clarify and narrow the issues in dispute. The sheriff will seek

to establish whether the case is of a complex or potentially high-conflict nature requiring proactive judicial case management leading up to a proof hearing, or a more straightforward case, where the issues in dispute can be resolved by a series of child welfare hearings without the need for a proof.

In responding to my review, the Faculty of Advocates (2017) argued that it was the delays in the current system of grants of legal aid that need to be addressed:

'Against a procedural and "best interests/welfare" backdrop that requires the expedited resolution of child cases, delays in the grant of legal aid can be extremely prejudicial not only to assisted parties but also to the children concerned.'

The Family Law Association (2017) is of the view that:

'It is essential to maintain meaningful access to justice for members of the public who may not have the necessary financial resources to access justice in family cases by other means.'

It is their view that a fair and robust system of publicly-funded legal assistance is fundamental to ensure meaningful access to justice for such individuals.

Alternative dispute resolution (ADR)

I believe that alternatives to court can, in some circumstances, provide more effective means of resolving family disputes. These include mediation, collaborative legal practice which is based on solicitors and their clients working together in a group to resolve disputes without going to court, and arbitration which provides a direct alternative to court proceedings in which clients choose their arbitrator and the type of process they want to use to sort out a disagreement. Some advocates for ADR refer to 'appropriate' dispute resolution rather than 'alternative' dispute resolution. I have used 'alternative' dispute resolution through this report

as it is in more common usage at the moment. In England, family conflict resolution services are seeking to empower families to resolve issues away from court and improve outcomes for children. There is a system of Personal Support Units with 50 staff and 550 volunteers based in courts. Over half the cases the PSU helps with are family matters. There is a Help and Support for Separated Families (HSSF) Innovation Fund, which aims to help parents avoid adversarial approaches upon separation and to collaborate in the best interests of their children. I can see no reason why such an Innovation Fund should not be established in Scotland to pursue similar aims.

There is good evidence on what has been learned from 40 years of court annexed mediation in the USA (Eisenberg, 2016). While it is vanishingly rare that policy can be transferred wholesale from one jurisdiction to another, it is entirely reasonable that we can transfer policy learning. The main points of learning I take from the report are:

- *The Positive Impacts on Participants.* The research reveals that the majority of participants like mediation and believe the process is fair (although the outcome may not always be objectively fair).
- *Mediation Outperforms Litigation on Some Measures.* Random studies comparing mediation to litigation have found that mediation quantitatively outperforms litigation on several measures.
- *Mediation Saves Judicial Resources,* but the results are mixed about whether parties save time and money.

Arbitration and mediation can be quicker and more cost-effective than litigation. Such options reduce the burden on the courts and can be facilitated by telephone or online (Scottish Arbitration Centre, 2017). Encouraging greater use of alternative dispute resolution may therefore contribute to more efficient resolution of family cases. The Report of the Civil Courts Review (Court of Session, 2009) recognised the importance of forms of alternative dispute resolution in many areas of the law. In family cases, it argued that mediation and early intervention should be paramount from the first grant of advice and assistance, so in terms of

the 'range' of services in family cases these options should be prioritised (Relationships Scotland, 2017).

The Faculty of Advocates (FOA) have created FOA Arbitration, made up of members with an interest in promoting the use of arbitration in Scotland, as a way of introducing speed and flexibility into the settlement of disputes, and of reducing costs. The passing of the Arbitration (Scotland) Act 2010 has created a framework for the conduct of arbitration. The Faculty makes the point, reflected in my review, that the user of arbitration services has a much greater say in how their dispute is resolved.

'They (users) are not straightjacketed in a formal process which will result in a procedure which is dependent on the resources of the court system.'
(FACULTY OF ADVOCATES (ARBITRATION), 2017)

The Scottish Government provides funding for mediation services. Some in-court advice funding provides limited mediation services, mainly in Edinburgh sheriff court. It is also possible to have mediation funded by the Scottish Legal Aid Board as a result of grants to Relationship Scotland (RS), accredited solicitors who are members of Comprehensive Accredited Lawyer Mediators (CALM) and the Scottish Mediation Network.

Relationship Scotland generally focuses on disputes involving children and provides a free service, which has no legal aid implications. CALM mediators offer a comprehensive mediation service including on financial matters and issues about children, and make a charge for the service. Legal aid will cover the client's share of the mediation fee.

An increasing embedding of the study of ADR and mediation in particular in legal education in Scotland led in 2013 to the establishment of the first student clinic in mediation at Strathclyde University Law School. The service, which includes Simple Procedure cases, is free.

Alternative dispute resolution including online availability, is, however, underused at present.

It is not clear whether there is a coherent and consistent approach to the potential use of mediation: it appears to be piecemeal, dependent on which solicitor is acting for clients and on which area of Scotland clients are based in, and whether and where mediation services exist. I would like to see mediation as a credible, readily available alternative to the courts. If the only choice for legal assistance is litigation, it follows that users will follow this route, despite the fact that court action might be more expensive and less flexible than arbitration or mediation. There is a clear public interest in resolving cases as quickly as possible, both for those involved and for the public purse. (Scottish Arbitration Centre, 2017).

'We support provision of alternative dispute resolution including mediation where appropriate.'

(EQUALITY AND HUMAN RIGHTS COMMISSION, 2017)

No compulsion

I am clear, however, that there are situations where mediation is not an appropriate mechanism for resolving disputes. Women's Aid organisations stressed that it would be unacceptable to make participation in mediation a condition of access to legal aid in domestic abuse cases.

'Mediation, ADR, family group counselling and out-of-court agreements are often offered as successful alternatives, both in outcome and financially for SLAB and the parties. We would take this opportunity to emphatically emphasise that in relation to domestic abuse, these are not appropriate alternatives, or indeed, pathways for women, children and young people experiencing domestic abuse to access justice. They do not offer equality of arms or equal participation and only serve to reinforce the power imbalance inherent in domestic abuse.'

(SCOTTISH WOMEN'S AID, 2017)

There is some evidence of the public and private value of making mediation mandatory from the United States (Quek, 2010). Nevertheless Genn argues convincingly that mediation can exacerbate power imbalances between the parties (Genn, 2010). I do not conclude that mediation or other alternative dispute resolution mechanisms should be compulsory prior to litigation. However, where the decision is taken to use the alternatives, it is essential that there are clear and consistent rules on how financial help is made available to eligible users. The shift to alternative dispute resolution is gathering pace. It is common in on-line commercial dispute services such as eBay. It may be that private markets can look after themselves in this area, but it is likely that in some areas of dispute it is in the public interest to encourage and fund alternatives to litigation on the grounds of the vulnerability of the users and/or cost.

Tribunals

At the time of its introduction, the Government deliberately chose not to extend the legal aid scheme to tribunal representation. The first significant influx of tribunals as alternatives to the courts had come with 1906-14 Liberal government's experimentation with early welfare state provisions on pensions and employment. Reformers at the time did not believe that politically-appointed judges could be trusted to support the interests of workers in disputes relating to pensions and employment (Paterson, 1974). Accordingly, with each new social welfare provision a specialist tribunal was introduced. It had no fees or expenses awards, and a more informal and inquisitorial procedure than the courts. It was hoped that lay people would be able to navigate tribunals without the need for legal representation. The welfare state provisions of the Attlee government continued to reflect the same philosophy. Gradually, however, some tribunals became more formal and adversarial, less discretionary and more controlled by detailed legal provisions. Some tribunals introduced fees and some the possibility of expenses awards.

Civil legal aid is available for the following Tribunals:

- The Lands Tribunal for Scotland
- The Employment Appeal Tribunal
- Appeals to the Upper Tribunal for Scotland

Civil Assistance By Way of Representation (ABWOR) is available for the following Tribunals

- The Immigration and Asylum Chamber of the First Tier Tribunal
- The Immigration and Asylum Chamber of the Upper Tribunal
- The Mental Health Tribunal for Scotland
- The Employment Tribunal at first tier
- The Additional Support Needs Tribunals for Scotland, in some circumstances
- The First-tier and Upper Tax Tribunal for Scotland, in some circumstances
- The Upper Tribunal for appeals against administrative decisions
- The First-tier Tribunal or the Upper Tribunal which consist of an appeal against a decision of the Pensions Regulator

The case for excluding legal aid from such tribunals became less strong over time, and repeated research studies showed that unrepresented appellants in tribunals fared worse than represented ones, and that appellants were increasingly reliant on representatives, whether legally qualified or not, before tribunals (Adler & Gulland, 2003).

Following the Scotland Act 1998 (incorporating Article 6 of the ECHR), legal aid, in the shape of assistance by way of representation (ABWOR) was extended to a range of the more formal tribunals, and to appeals from them to the Upper Tribunal for Scotland, which was introduced at the end of 2016. This was welcomed by the Scottish Association of Law Centres, but the introduction of clawback in employment tribunal cases has reduced the value of ABWOR in the first place, just as it causes major problems in mortgage arrears cases (Scottish Association of Law Centres, 2017). Legal aid has become more available to children and others involved in Children's Hearings. Nonetheless, current civil justice policy is rightly encouraging

the greater settlement of disputes outside the adversarial system through the use of semi-inquisitorial proceedings, mediation and arbitration.

I received few responses calling for the further extension of legal aid to tribunals. Accordingly, although I am not recommending any major change to the scope of legal aid in tribunals, I do recommend there should be at regular intervals, an in-depth assessment of the availability of legal aid in tribunals from the perspective of article 6 of the ECHR and Sustainable Development Goal 16.3, with a view to addressing anomalies and deficiencies in provision.

Clawback

Clawback is a form of contribution that occurs at the end of a case. A successful assisted person may have to pay a contribution towards the cost of their legal expenses from any award or recovery. The principle underlying the rules on clawback is that if a person has been supported to pursue litigation, and benefits financially from that litigation, then the public funds that were used should, where reasonable, be refunded. That ensures best value from public funding.

However, there may be occasions where applying the clawback rule would be unfair. I heard opposition to the introduction of clawback for Employment Tribunals, and it would appear reasonable to apply some form of test before applying clawback, at least in respect of Employment Tribunals. Any test on whether clawback should be applied. If so, to what extent should be based on reasonableness. This could take the form of a means or hardship test, or a financial bar under which the clawback rule would not apply.

Social Security and devolution

The Social Security (Scotland) Bill 2017 will introduce a new Scottish social security system. The Bill establishes a framework for the new system. Eleven existing social security benefits are being devolved. The Scottish Government intends to create 'a Scottish social security system based on dignity, fairness and respect, which will help

to support those who need it, when they need it' (Scottish Government, 2017f). They quote recent research published by the University of Ulster which concluded that the courts 'represent an inefficient means of protecting dignity and respect on a systematic scale' and that 'it is through the legislature that most rights will continue to be realised' (Scottish Government, 2017g). This finding is a clear challenge to the traditional judicare model and an opportunity for innovation in publicly-funded legal assistance services and dispute resolution.

Group or multi-party actions

At the time of my drafting this review, the Expenses and Funding of Litigation (Scotland) Bill is progressing through the Scottish Parliament. This Bill takes forward recommendations made by Sheriff Principal Taylor in his report on the *Costs and Funding of Civil Litigation in Scotland* (Sheriff Principal Taylor, 2013). The intention is to increase access to justice by creating a more accessible, affordable and equitable civil justice system for Scotland. One long-awaited innovation is the introduction of a procedure for group or multi-party actions whereby an individual or set of individuals with a common interest are enabled to litigate on behalf of some or all of those with that interest against a common defender. The Bill provides the procedural framework for such actions. However, a mechanism for funding such actions will be crucial to their success. Under the current legal aid rules it would not be possible for the Scottish Legal Aid Board to fund group actions unless all of the group were eligible for legal aid. In Northern Ireland, the legal aid scheme has been amended to allow group actions to attract legal aid, and I recommend that legal aid should be made available in appropriate cases to group or multi-party actions in Scotland.

Means, merits, contributions and clawback

While the broad scope of issues for which legal aid is made available should be maintained, I recommend that there should be stricter processes to ensure that public funding is used efficiently.

The use of a means test complies with the European Convention on Human Rights, and the 'undue hardship' test ensures that there is also provision for taking account of the wide range of circumstances of the individual and the case. The current use of means and merits tests ensures that legal assistance is directed to those who need it, delivers good value for public funds, and public assurance that responsible decisions are made by all those who are involved in the service.

There are three sources of income to the Fund from assisted persons and their opponents in legal aid cases. The amounts received in the past three years are:

	2013/14	2014/15	2015/16
Contributions from assisted persons	£3.5m	£3m	£3m
Expenses recovered from opponents	£8.5m	£6.5m	£8.5m
Clawback	£1.5m	£1m	£1m
TOTALS	£13.5m	£10.5m	£12.5m

The future sustainability of the legal aid service depends on proper use of the controls that ensure everyone who needs it has access to legal assistance, and that those who can afford to pay in part or whole for their legal assistance should do so.

Merits Test

The merits test operated by the Scottish Legal Aid Board is the mechanism that ensures funding is only given where this is in the public interest. To make the process more transparent, the merits tests should be codified and set out the criteria to be applied in various cases. It should be updated regularly. This would allow the tests to be revised as new procedures and processes emerged. This is particularly important in the light of the changing digital technology that will be coming over the next 10 years. To allow proper oversight of this important public interest function, this codification should be subject to Ministerial approval.

Contributions

Contributions to legal aid play an important part in the responsible management of the system. This approach is embedded in the civil legal assistance system, where means tests are applied and some clients pay contributions. However, there are differences in the means tests, computation periods and contribution levels as between advice and assistance and civil legal aid. These can be confusing and can appear unfair, particularly where work of a similar nature or cost is undertaken but very different contribution levels or means tests are applied. As the system is simplified, the rules around eligibility and contributions should be aligned as far as possible and consistent with the principle of encouraging the early settlement of cases.

In criminal legal assistance, the Scottish Civil Justice Council and Criminal Legal Assistance (Scotland) Act 2013 continued the provision for applying a means test to criminal legal assistance. Under this legislation, clients would be subject to a means test, with any contributions paid directly to the solicitor. That part of the Act has not yet been implemented. During the Bill process, the legal profession raised concerns (Scottish Government, 2012) that if they were responsible for the collection of criminal legal aid contributions, this would put them in conflict with their client if the contributions were not paid, potentially putting them in the position of advising the court and the client that they could not continue to act until the contribution was paid. There was also concern amongst the legal profession that some solicitors might adopt a system of not collecting contributions and that such a practice, by effectively discharging a liability owed to them, might be regarded as a 'payment in kind' to a client and a breach of Article 9 of the Society's Code of Conduct for Criminal Work. This states that *'no payments in money or in kind should be made to an accused person, a member of an accused's family or a potential witness.'* The Law Society of Scotland made changes to its Code of Conduct for Criminal Work to waiving collection of such contributions.

'Criminal contributions are common practice in many other legal aid jurisdictions and indeed are already payable in Scotland within a fairly narrow range in criminal cases funded by Assistance by Way of Representation (ABWOR) and across criminal Advice and Assistance (A&A). There are therefore very strong arguments for introducing contributions into criminal legal aid.'
(SCOTTISH GOVERNMENT, 2011A)

This has a financial effect on the cost of the legal aid service, as potential contributions of £250,000 a month (Scottish Legal Aid Board, 2014a) are being lost to the service. Further, I am concerned that the policy for those who can afford it and should contribute to their legal assistance is not being carried through. This principle was endorsed by cross-party agreement in the Scottish Parliament at the time of consideration of the Scottish Government proposals on the matter. This principle is important for public trust and confidence in publicly-funded legal assistance. If Scottish society is expected to make a significant contribution to the costs of an individual's legal costs then, where an individual is deemed to have the disposable income, they should also make a contribution.

However, I recognise the severe practical difficulties that arise over collection of an individual's contribution. The failure to receive a contribution further reduces the payment a criminal defence solicitor will receive for the work which they do. In the event that a client does not pay, how is it to be recovered? Is it anticipated that the solicitor will raise court proceedings for it? There are real threats to the system if the view is taken that a failure to pay a contribution means the client no longer has representation. One can anticipate the chaos which could be caused in that situation and the costs which could stem from that in relation to wasted court time, witness expenses etc.

In addition, my review makes a recommendation which relates to a more holistic approach taken by solicitors in relation to clients with whom they

have a unique bond of trust. A solicitor, because of that relationship, may be able to direct the client in a way beneficial to him or her and to society by using other agencies to reduce the prospect of reoffending. I am concerned that if the solicitor becomes, in effect, a debt collector, this unique bond of trust is threatened. If that is correct, it would undermine that recommendation.

It is right both as a matter of principle and as a mechanism to retain public trust, that those who can afford it should make a contribution to their publicly-funded legal costs. The collection of such contributions will add to the legal aid fund and allow others to benefit. I do not reach a conclusion on who should collect contributions. As the whole scheme is simplified and made more consistent under the recommendations of this review, the collection any lawful contributions should be a matter of serious consideration.

Negative public attitudes to criminal legal aid

Concerns were raised in the focus groups about legal aid being used inappropriately in the criminal system. Some participants were concerned over press reports of very high legal aid costs reported in a small number of complex criminal cases.

In their response to the call for evidence, the Faculty of Advocates commented that:

'It can often be unpopular for the public to learn that persons accused, or guilty, of the worst criminal offences in our society incur expense representation. The Scottish Legal Aid Board is administering a fund which is a fundamental part of our democratic society, allowing the poorest, most vulnerable and sometimes mentally afflicted persons within our society to be represented by highly skilled advocates.'
(FACULTY OF ADVOCATES, 2017)

The focus groups also raised the issue that repeat offenders frequently access legal aid at great cost to the public purse. For example, one group said they knew people *'who've always got it... never been refused,'* and in most cases it was for:

'... stupid stuff like speeding and stealing and drunken disorder... he's been to court a few times... he always gets it. ... just popped into the solicitors and that's it done.'

FOCUS GROUP PARTICIPANT, PETERHEAD

Participants appeared not so much worried about the costs in these frequent-use cases, but more so that being able to access legal aid does nothing to deter individuals from offending. There was a perception that the high use of legal aid by repeat offenders might be preventing others, potentially one-off civil case users, from accessing legal aid. People thought this was unfair when the criminal legal aid users had put themselves in that situation, but those waiting for civil legal aid might have got into a dispute by chance or through no fault of their own.

Outlays

Outlays are expenses that arise in the course of a court action, such as the payment of child welfare reporters and expert witnesses. These expenses must be met by the solicitor, often well before the payment is refunded through the legal aid service. The court can appoint a child welfare reporter in a family action to compile a report that will inform a decision made on for example, child contact arrangements. At present, decisions as to whether an expert witness is needed, the number of experts and which experts are engaged, are left to the parties, subject to the Scottish Legal Aid Board approving the expenditure. The cost of expert witnesses is for the market to determine and it is an area of significant cost to the legal aid service.

There was discussion during my review about the lack of control on the cost of expert witnesses and child welfare reports. Solicitors appear to have little ability to negotiate a fee. The Scottish Legal Aid Board can ask for fee quotes and refuse to approve an expert who is considered too expensive. Attempts by the Scottish Legal Aid Board to develop a preferred suppliers list have not been supported by some in the legal profession due to issues around independence, despite concerns that they themselves raise about the charges.

This is an area of legal aid expenditure where controls should be put in place. As a significant funder of child welfare reports and expert witnesses, the Scottish Legal Aid Board is in a prime position to negotiate competitive rates. A preferred suppliers list would enable the Board to manage fees while still allowing solicitors to choose which of the preferred suppliers to approach. It could have the added benefit of including a process for obtaining feedback on the quality of work undertaken by the preferred suppliers. It might also allow the instructed expert, if selected from the preferred supplier list, to submit their fee note directly to the Scottish Legal Aid Board for payment. This would alleviate the pressure on solicitors' firms who are carrying the cost of these outlays, which in many cases cannot be reclaimed until the conclusion of what can often be protracted legal proceedings. There is a good example in the National Crime Agency (NCA) expert witness arrangements which could be replicated.

The use of sheriff officers in the legal aid system

The fees for sheriff officers are determined by the Act of Sederunt (Fees of Sheriff Officers) 2016. These fees are updated annually and the current

fees represent a 1.3% increase on those for the previous year. The costs of postal and personal service by sheriff officers are significant, at £20.70 and £60.84 respectively including VAT for a small claim and £33.60 and £94.92 respectively for other sheriff court actions. The Law Society of Scotland has suggested in evidence to my review that a lower fee charged for solicitor's time and the use of recorded delivery by solicitors themselves could represent a saving. The Law Society of Scotland has also suggested that there may be ways to explore the use of other communication channels such as emails or texts, confirmed by read receipts, to effect service (Law Society of Scotland, 2017a). It is this sort of detailed flexibility and responsiveness I seek to embed in the publicly funded legal assistance service of the future.

Simplify the system

The publicly-funded legal assistance service in Scotland rates highly in a number of areas. However, one of the less positive aspects of the current model is its complexity. This was a common thread running through submissions made in response to the call for evidence and was frequently raised in subsequent meetings. It is not by any means a new issue. The Royal Commission on Legal Services in Scotland made a recommendation to simplify the system almost 40 years ago (Lord Hughes, 1980).

'The large number of legislative changes and the volume of guidance issued over the years have led to the development of a legal assistance system that is complex and difficult to navigate.'

(LAW SOCIETY OF SCOTLAND, 2017A)

Costs of outlays

	2012/13	2013/14	2014/15	2015/16	2016/17
Outlays	£20m	£19.5m	£18m	£18m	£17m

Type of legal aid	Eligibility testing*		Contributions
	Merits test	Means test	Assisted person pays towards the costs of the case if disposable income or capital over a set threshold
Civil			
A&A	✗	✓	✓
ABWOR	Depends on case type	Depends on case type	Depends on case type
Civil Legal Aid	✓	✓	✓
Children's			
A&A	✗	✓	✓
ABWOR	✓	✓	
Children's Legal Aid	✓	✓	
Criminal			
Police Station Advice (A&A)	✗	✗	✗
A&A	✗	✓	✓
ABWOR	Depends on case type	Depends on case type	Depends on case type
Summary criminal legal aid	✓	✓	✗
Solemn criminal legal aid	✗	✓	✗

* The statutory tests applied across advice and assistance and legal aid differ. In general terms, these can be categorised as merits tests and means tests. Some categories of assistance will not be subject to testing, or only partial testing.

Merits testing involves considering the justification for a grant being awarded. In some criminal cases the Scottish Legal Aid Board applies an 'interests of justice' test. For civil cases, SLAB assesses the legal basis for the case and applies a 'reasonableness' test. Advice and assistance are not subject to any merits test, provided the matter being advised on falls under Scots law.

Means testing involves assessing an applicant's financial situation. As a result, some people may receive free legal assistance while others may have to pay a contribution towards the cost of the case. In criminal cases, as well as assessing an applicant's financial situation, the Scottish Legal Aid Board also applies an 'undue hardship' test.

There are four schemes of legal aid in Scotland which may be accessed by people seeking help with civil law problems:

- Legal Advice and Assistance (A&A)
- Assistance by way of representation (ABWOR)
- Civil Legal Aid (CLA)
- Children's Legal Assistance (CHILDREN)

Each of these four schemes has a separate set of rules, guidance and procedures for application, and are subject to different eligibility tests, qualifications and restrictions. The Faculty of Advocates wrote to the review that the principles upon which the Scottish Legal Aid Board administers public funds to remunerate the legal representatives of litigants and persons accused of crimes are unquestionably sound. They were critical of the way in which that function is carried out as often cumbersome and subject to delay (Faculty of Advocates, 2017).

'The application process for Advice and Assistance and Legal Aid is complex and recent increased demands for financial verification have simply added to these problems. The whole process is very difficult to manage and when this is combined with stagnant income the prospects for long term sustainability are at the very least questionable.'

(SCOTTISH ASSOCIATION OF LAW CENTRES, 2017)

The current system of criminal legal aid has two separate summary schemes: Assistance by Way of Representation (ABWOR) and Summary Criminal Legal Aid, with different eligibility tests; while different schemes for solemn legal aid in the Sheriff Court and High Court are set down in detail in primary legislation.

'It has been Crown Office and Procurator Fiscal Service experience over a number of years that the complexity of the criminal legal aid arrangements are a significant hindrance to the development of a modern system of legal aid which promotes a more effective criminal justice system.'

(CROWN OFFICE AND PROCURATOR FISCAL SERVICE, 2017)

Scotland has a complex system made up of the original statutory framework (the Legal Aid (Scotland) Act 1986) and a myriad of regulations. These regulations reflect many changes to domestic and European law, court rules and solicitors' fees. The Scottish Legal Aid Board produces a well-written handbook for solicitors to guide them through the payment and application regimes, but given the range of variations that have to be described, this is, by necessity, a long and complex document.

'The current system expects a young person to comprehend and distinguish between four overlapping but different types of legal aid in relation to children's hearings: Children's Advice and Assistance; Children's Legal Aid and ABWOR.'

(CLAN CHILDLAW, 2017)

Eligibility

The complexity in the current arrangements brings a number of difficulties for both service users and for solicitors delivering legal aid.

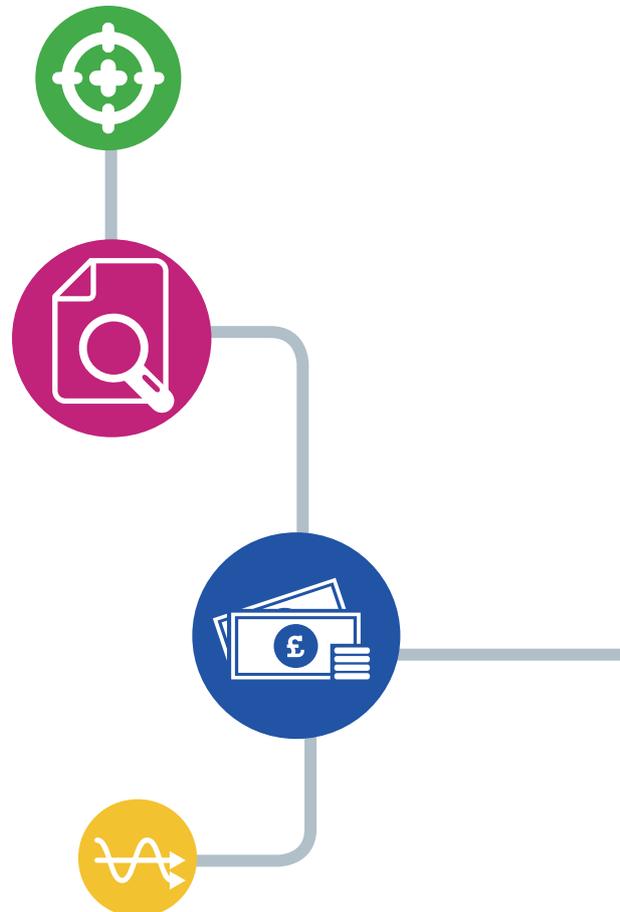
- There is confusion around the kinds of actions for which legal aid may be available, what criteria may be applicable and how to make an application.
- Assessment and verification of financial eligibility in civil legal aid cases where applicants are not in receipt of state benefits can be complex and is the main reason why it currently takes, on average, around 50 days for a civil legal aid application to be completed.
- For solicitors, it can be difficult to understand how to properly claim the appropriate fees, and this can lead to some moderation of accounts by the Scottish Legal Aid Board – a source of significant tension.
- Solicitors reported there is little flexibility in the verification process to address the particular circumstances of service users. For example, a service user who is homeless will need to provide a significant amount of evidence of income and expenditure before a legal aid application can be submitted, which may not be available, leading to delays in accessing legal aid.

'The authors of this paper have identified that if a single type of legal aid is introduced (as they advocate) it will be necessary to have a new simplified 'interests of justice' test and a new simplified financial test which can be easily satisfied by a solicitor representing an applicant appearing from custody and pleading guilty (for example allowing a standardised household expenditure). The overriding consensus of the submissions made by practitioners has been that a system which removes protracted correspondence with the legal aid board, eating into the time of both SLAB and solicitors, in an effort to satisfy the financial tests and to provide acceptable vouching, would allow them to focus more quickly either in the preparation for trial or to achieve early resolution where appropriate.'

(MCPHIE, 2017)

The consequence of the current arrangements has been to increase bureaucratic impediments to legal aid at the same time as increasing the amount of time solicitors and administrative staff have to take on administration as opposed to their actual legal work (Legal Services Agency, 2017). The Scottish Association of Law Centres proposed that financial verification processes should be reduced sharply.

Focus groups participants argued for a simpler system where they could easily and quickly find out if they are going to be eligible for legal assistance. They wanted to know about their eligibility, independently, prior to seeking a legal aid solicitor. There is considerable scope to streamline legal aid types and eligibility criteria, as these are different depending on the type of legal aid that is being sought. Simplification would benefit both solicitors and service users. Future reforms should hold simplicity and flexibility as a key design principle.





Strategic Aim 2

Maintain scope but simplify

Rethinking the need for simplicity

I considered the scope of legal aid (what you can get legal aid for) in some depth. There were very few voices in Scotland calling for a reduction in scope and it would be difficult to reconcile such an approach with the user focus outlined under Strategic Aim 1.

I did hear evidence of the high cost of family contact cases and suggestions that the system leads families into adversarial situations and sometimes even reduces their capacity to resolve their difference. On the other hand, there is no doubt that court is the most appropriate dispute resolution approach in some cases. I recommend a separate review of the system for contact cases to explore the correct balance between dispute resolution services in these circumstances. I also recommend the role that mediation can play in general should be strengthened.

The biggest area of change, therefore, is not in the scope of services, but in the complexity of the system. There are two areas of complexity. Firstly, the services on offer. The range of services on offer through publicly-funded legal assistance needs to be clarified and communicated. There should be a new statutory framework for publicly-funded legal assistance. This should make provision for a single legal aid type, replacing the current four types.

The second area is the system of eligibility, contributions and clawbacks in inconsistent and complicated. Previous attempts to simplify the system have not been sufficient. From a user perspective, it is difficult to build up a clear picture of what support can be expected from legal aid.

In recommending simplifying aspects of the rules and regulations that surround publicly-funded legal assistance, I am aware of the recurring public policy dilemma. The dilemma is that the ambitions of simplicity, flexibility and fairness are held in tension with each other. An increase in simplicity may well make a system less responsive to the widest range of circumstance and therefore lead to reduced personalisation. Similarly, increasing the fairness of the system may make it more complex. Some see this dilemma as a reason not to change. I see the dilemma as the central modern challenge that effective change of complex systems has to overcome.

Strategic Aim 2 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
9	The current scope of the legal aid fund should be maintained.	✓			
10	There should be a formal review of contact cases to consider the most appropriate mechanism for resolving these cases within a reasonable time.	✓			
11	Mediation for family matters should be actively promoted in appropriate cases under publicly funded legal assistance.		✓	✓	Third sector
12	The availability of legal aid for tribunals should be reviewed regularly in the context of ECHR Art 6 and the Sustainable Development Goal 16.3	✓	✓		
13	The legal aid funds should be available for group or multi-party actions.	✓			
14	Applications to the legal aid fund should remain subject to means and merits tests and these tests simplified where appropriate.	✓			
15	Contributions to civil and criminal legal aid should remain for those who can afford to do so.		✓	✓	
16	The merits tests should be codified and updated regularly.	✓	✓		
17	The merits test code should be subject to Ministerial approval.	✓			
18	The rules on contributions and clawback should be made fairer	✓	✓		
19	There should be powers given to a legal aid authority over outlays with a view to establishing a preferred national and/or local supplier list.		✓		
20	There should be a new statutory framework for publicly-funded legal assistance. This should make provision for a single legal aid type, replacing the current 4 types.	✓			
21	The statutory framework should ensure criteria for eligibility for legal aid are consistent and clear (including both income and capital).	✓			
22	The process for making a legal aid fund application should be simplified.	✓			
23	There should be an accurate online calculator for eligibility for legal aid funding.		✓		
24	Citizens should be able to give rights of access to their tax and benefits accounts for the purpose of assessing eligibility to legal aid.	✓	✓	✓	



STRATEGIC AIM 3: Support and develop an effective delivery model

There are a very large number of people involved in providing publicly-funded legal assistance service in Scotland. While many contributors to my review supported integrating general advice and legal aid, they also expressed concern about an apparent lack of strategic planning to ensure the correct balance between different providers.

The location, offer and structure of these services is not planned. That would involve a very high degree of control oversight and accountability as is the case, for example, in the NHS. The current situation is more akin to the mix of provision in local government services, where providers have greater freedom to decide where and when to offer services. Providers of publicly-funded legal assistance services, whether solicitors or third sector advice agencies, can choose what sort of service to offer.

Range of activity in legal assistance services



Accessible advice, available at the right time and adapted to meet the needs of users and communities, is an essential element of a modern publicly-funded legal assistance service. The challenge is to find a way of harnessing the undoubted benefits of a wide diversity of services without incurring the costs, complexity and risks of a centralised planning system.

The preceding simplified diagram shows the range of activity by publicly-funded legal assistance services. Many services undertake some of these, and a few undertake all. The third sector is more likely to undertake the actions at the top of the diagram, and the 'judicare' providers those further down. In addition, third-sector providers are much more likely to use their case work experience to create social policy reports and engage in public debate and advocacy, with the aim of preventing these problems arising in the first place. Law centres will also seek test cases with the same objective.

Private solicitors often take cases where there will be a wider beneficial impact beyond their individual clients, but these cases are not often, and possibly never, actively sought out. It would be valuable for publicly-funded legal assistance service providers to come together in a strategic forum to discuss test case issues and to identify suitable clients to be supported.

The legal profession in Scotland

The legal profession in Scotland is made up of solicitors and advocates. Both solicitors and advocates can provide legal aid services. Advocates and solicitor advocates are instructed

by solicitors to act for their clients in a court. Advocates do not have to register with the Scottish Legal Aid Board to provide legal aid services, and separate fees are payable to advocates under the legal aid scheme. Advocates are self-employed, while solicitor advocates can operate as both solicitors and advocates and can be part of, or a partner in, a firm of solicitors.

Solicitors in private practice

Legal aid is delivered predominantly by solicitors who claim fees for their services from the Scottish Legal Aid Board, and a small number of solicitors directly employed by the Scottish Legal Aid Board. The vast majority of legal aid fee work in Scotland is provided by private firms of solicitors. At the end of March, 2017, there were 581 firms registered to provide civil legal assistance. This compares with 649 in March, 2015. The current number is half the number of firms registered in March, 2010.

There were 499 firms and 1210 solicitors registered to provide criminal legal assistance in March, 2017. This compares with 551 firms and 1345 solicitors in March, 2015. For children's legal assistance, there were 377 firms and 908 practitioners registered in March, 2017. This compares with 380 firms and 863 solicitors registered in March, 2015, meaning that in contrast to the civil and criminal registers, there has been a small increase in registrations (Scottish Legal Aid Board, 2016).

'The main providers of civil legal aid are solicitors in private practice. This model means that the legal services available to people in need are largely dictated by the willingness of private practices to offer those services.'

(CITIZENS ADVICE SCOTLAND, 2017)

The number of firms and solicitors registered to provide civil and criminal legal assistance has fallen slightly in the last two years and more dramatically over the last ten years. There is a perception that, in some parts of the country, there is a drop

in the number of younger members of the legal profession willing to undertake criminal defence work (Court of Session, 2017).

These providers come from a mix of different-sized firms and individual practitioners. Some offer both criminal and civil legal; others, either one or the other. The Scottish Legal Aid Board has very little power to either manage the number of firms or solicitors registered, or the level of legal aid work delivered by those that are registered.

Law Centres

Law centres are not-for-profit organisations delivering legal advice to a defined community. Sometimes they are linked to particular charities or advice agencies. However, the terms of the legal aid regulations require them to operate as a private firm of solicitors if they undertake legal aid work. The solicitors in law centres usually specialise in areas of law such as housing and social welfare, while some specialise in particular client groups such as the Clan Childlaw. Law centres provide legal services and claim fees for these services in the same way as solicitors. They also receive grants from local authorities and charitable trusts. The following law centres have been identified.

- Castlemilk Law & Money Advice Centre
- Clan Childlaw
- Drumchapel Law & Money Advice Centre
- Dundee North Law Centre
- Environmental Law Centre Scotland
- Ethnic Minorities Law Centre
- Fife Law Centre
- Govan Law Centre
- Legal Services Agency
- Renfrewshire Law Centre

'Legal Aid has been crucial to our vision. Whilst oftentimes providing a service based on Legal Aid has been very difficult, the net result has been more secure services and more secure employment.'

(LEGAL SERVICES AGENCY, 2017)

'By far the largest part of legal aid funds are granted on a case-by-case basis in criminal and family cases. There are, however, other methods of funding for appropriate activities whether by grants or by directly employing solicitors and others. It is useful to maintain different methods of funding and this allows for flexibility.'

(SCOTTISH ASSOCIATION OF LAW CENTRES, 2017)

Publicly-employed solicitors

The Board has the power to employ solicitors to provide criminal and civil legal services and does so for a number of purposes.

Criminal

The Public Defence Solicitors Office (PDSO) operates in seven offices across Scotland (Edinburgh, Glasgow, Inverness, Ayr, Dundee, Falkirk and Kirkwall) and employs 25 solicitors. It says something about the small size of private criminal defence legal aid firms, that the PDSO is the largest single criminal defence practice in Scotland. The PDSO has a proportion of business allocated to it through the court duty and police station duty schemes. PDSO solicitors provide the full range of services offered by private firms and solicitors. Clients are subject to the same means and merit tests. PDSO solicitors receive a salary from the Board rather than fees, and PDSO solicitors are not required to submit accounts to their employer, the Scottish Legal Aid Board.

Civil

The Civil Legal Assistance Office (CLAO) is run from four locations (Inverness, Aberdeen, Oban and Edinburgh) and employs 17 solicitors. Each office works in partnership with local solicitors and agencies in the area. Each CLAO office has a specific subject remit and undertakes a mix of casework in response to local conditions and other advice and legal providers in its area. It also acts as a referral office for local legal and advice providers. A CLAO will offer casework using civil legal aid with the normal means and merits tests. CLAO also provide referrals to other providers of legal assistance and support; second tier support to other providers (including training); and partnership/development project working with local and national organisations operating in defined geographical areas.

The Solicitors Contact Line

The Solicitors Contact Line (SCL) was set up to support the provision of legal advice for people being held in police stations. A new model is being developed to respond to the Criminal Justice Scotland Act 2016, but at the time of writing, there are 13 solicitors employed by the Scottish Legal Aid Board to ensure 24/7 access to a solicitor. A rota covers three months and is issued a month ahead of the start date, taking into account solicitor preferences for time off. There is flexibility, allowing shifts to be swapped and holidays taken. Solicitors can choose how many shifts to work, and whether or not to undertake attendances. Solicitors have 15 hours of CPD during work time and can access technical legal advice from their manager or director as needed.

Costs of publicly employed solicitors

Net cost	2012/13	2013/14	2014/15	2015/16	2016/17
Civil	£1.2m	£1.2m	£1.3m	£1.4m	£1.4m
Criminal	£2m	£2m	£2m	£2.1m	£2.3m
Total	£3.1m	£3.2m	£3.3m	£3.5m	£3.7m

Advocates

Each advocate is an independent practitioner. Advocates can provide representation before any court in Scotland, including the Court of Session, the High Court of Justiciary, the Land Court, the Sheriff Appeal Court, sheriff courts and Justice of the Peace courts, as well as the UK Supreme Court, the European Court of Human Rights and the Court of Justice of the European Union. Advocates also represent clients before other decision-making bodies, such as tribunals, professional disciplinary committees and arbitrations. Advocates who have achieved distinction in advocacy before the supreme courts of Scotland may be appointed Queen's Counsel (QC) (Faculty of Advocates, 2017).

Third-sector advice providers

Advice provided by third-sector organisations can be categorised very broadly into three types.

Information, sign-posting and explanation

Type I includes the provision of information either orally or in writing, signposting or referring the user to other available resources or services, and the explanation of technical terms or clarifying an official document, such as a tenancy agreement or a possession order.

Casework

Type II includes a diagnostic interview, where the problem and issues are identified and a judgement is made as to whether the individual has a case that can be pursued. Once it has been established that the individual has a case, activities may include:

- setting out an individual's options;
- encouraging the user to take action on his or her own behalf;
- providing practical help with letters or forms;
- negotiating with third parties on the user's behalf;
- referring the user to another source of help; and
- supporting users in making their own case.

Representation

Type III includes the actions listed above and a range of further actions that may be undertaken by the adviser, or by another organisation or adviser to whom the case has been referred. Type III work includes representation at tribunals, at court and litigation. Third-sector organisations have found the provision of representation to be the most challenging of the three forms of assistance. One new source of free representation in Scotland emerged with the establishment of the university law clinic movement. Starting with the University of Strathclyde Law Clinic in 2003, there are now six student law clinics in Scotland (The University of Edinburgh Free Legal Advice Centre, The Aberdeen Law Project, Edinburgh Napier Law Clinic, The Law Clinic at Robert Gordon University and Glasgow Caledonian University Law Clinic) providing public legal education, and advice and representation to those cannot access this through other means. Funding of third sector provision

Funding of third-sector provision

Local government, the Scottish Government and the Scottish Legal Aid Board support advice services through grant funding for a range of projects across Scotland. The Scottish Legal Aid Board grant funding is aimed at delivering Scottish Government priorities and objectives which have included eviction, repossession, debt and welfare issues. These projects have been jointly funded by Money Advice Service, a UK organisation that funds money advice from a levy placed on financial organisations, and objectives are set primarily by Scottish Government in liaison with Money Advice Services. Many of the projects are delivered by local advice agencies such as citizens advice bureaux, law centres, local charities, local authorities and third sector organisations, both individually and as partnerships. In 2016-17, funding of £6.2 million was directed to such projects by the Scottish Legal Aid Board.

'While some of the voluntary advice projects have been running for anything from two to eight years, the funding agreements have tended to be on a year-to-year basis. This creates uncertainty in the projects, prevents long-term planning and is out of line with Scottish Government policy around the Compact. In its most recent Programme for Government, the Scottish Government set out a commitment to the third sector, saying: The third sector plays a vital role in Scotland's communities, working with them to tackle tough social issues at source. We recognise that to do this successfully the third sector needs stability of funding and the opportunity for longer term planning and development.'

(SCOTTISH GOVERNMENT, 2017B)

The current Scottish Legal Aid Board grant programmes fund 62 projects, involving around 84 organisations. The range of organisations funded has varied over time depending on ministerial priorities. The current programme runs until the end of March, 2019. Some providers already blend legal aid work with advice provision – receiving public funding for both activities. An example of an innovative model providing advice, advocacy and legal aid services is the Scottish Women's Rights Centre. The project agreement between the project partners and the Scottish Legal Aid Board runs to end of March, 2019 and has a budget of up to £225,000 per annum. This model of providing both legal aid and legal advice was widely supported by those who engaged with my review. But there is a striking difference in the amount of funding being directed to legal aid, compared to that provided for advice.

'Woman's Aid was very helpful as they have a designated solicitor who will speak to you about your problems and that was great.'

FOCUS GROUP PARTICIPANT IN GLASGOW

While legal aid is a well-established route to the provision of advice and representation by solicitors, the role of legal assistance in providing advice through advice providers, such as Citizens Advice Bureau (CAB) and other third-sector organisations is less visible. Advice services often provide first line advice for people facing a range of problems such as neighbourhood disputes, welfare benefit problems, debt, housing and homelessness. It is often the most vulnerable and disadvantaged who turn to advice providers for help and support, often at the point of crisis. Advice services provide a critical service to facilitate early and effective resolution to problems, preventing these escalating, and avoiding court action. The positive impact on lives can be considerable and the economic gain significant. These services are often offered at a local level and therefore also make a contribution to community improvement and empowerment as well as individual gain.

Participants in the focus groups valued advice services. When asked how they managed serious disputes, by far the most common response was that people went to citizens advice bureaux. This was the place most people said they would go to for help and advice, after family and friends. People go to the citizens advice service because it is free and has a good reputation. Several groups said that the Scottish Government should fund CAB directly and improve their capacity to provide advice including through lawyers. This is not least because bureaux can provide a triage service – supporting some, and referring others, including to legal aid lawyers. Some branches of CAB still have a policy of not referring to the local solicitor they think might be best placed to provide advice, but to give a list of three and ask the client to choose instead.

Public views on the Citizens Advice Bureau service

'As soon as I went to CAB they solved it.'

FOCUS GROUP PARTICIPANT IN PETERHEAD

'I went to Citizens Advice Bureau on two occasions...it was really useful at the time.'

FOCUS GROUP PARTICIPANT IN SKYE

'It was Citizens Advice who got the ball rolling.'

FOCUS GROUP PARTICIPANT IN EDINBURGH

'If something bad happened I would start with CAB as its free.'

FOCUS GROUP PARTICIPANT IN EDINBURGH

'I think that Citizens Advice Bureau is a good starting point for most things like this, they can kind of help guide you initially.'

FOCUS GROUP PARTICIPANT IN EDINBURGH

Citizens Advice Scotland (the umbrella body for the 61 citizens advice bureaux in Scotland) works with Citizens Advice in England and Wales to write and publish AdviserNet, a web-based information system. This is an outstanding resource and funded almost entirely from public money. AdviserNet is the source of the advice given by all citizens advice bureaux to their clients. CAS

also provides the content for citizensadvice.org.uk/scotland, the Scottish part of the public advice site. The CAS information system should be made available to all publicly-funded legal assistance providers. The system is already available to any organisation that wishes to pay to subscribe. It would be ideal if the information system was provided free of charge and CAS (and its sister organisation in England, Citizens Advice) are suitably compensated for any losses of income it currently receives from selling the system. However, the copyright for the information system belongs to Citizens Advice, and as such it is not in the power of CAS to make it freely available.

'We will seek to extend three-year rolling funding where possible across the Scottish Government. Together with a transparent and fair basis for the extension of core funding, this will give the third sector a significant level of stability of funding and the ability to plan ahead.'

(SCOTTISH GOVERNMENT, 2017A)

Early Resolution and Advice Programme (ERAP)

One of the grant-funded programmes managed by the Scottish Legal Aid Board and jointly funded by the legal aid fund and Money Advice Service is the Early Resolution and Advice Programme (formerly the Economic Downturn Programme). This has been running since 2012 and was originally set up to tackle the increased need for support following the financial crisis. The programme has two funding streams:

Stream 1 provides direct assistance and representation for people facing court action related to mortgage repossession or tenancy repossession, and direct assistance to tackle the multiple and serious debt issues underlying those court actions.

Stream 2 provides for information, one-off advice and signposting to people with small claims and

other civil court matters, to increase people's ability to navigate the court process themselves. It also provides casework assistance to people with small claims-level cases with a view to resolving matters before court action, or settling them early in the court process. Small claims have now been replaced by the Simple Procedure which is aimed at making it easier for individuals to represent themselves.

In-court advice projects

There are 20 projects supported through the Early Resolution and Advice Programme that provide advice to people facing court action in the sheriff court. A number of projects work in-court, while others attend on court days. There were around 4900 new clients assisted with 6000 problems. Project locations by sheriff court are given at Appendix 3.

There are two stand-alone projects that deal with simple procedure and general civil problems: the Edinburgh in-court advice project and the Tayside court advice project. The Edinburgh in-court advice project also includes the Edinburgh Mediation Project which helps people to mediate simple procedure disputes. Other projects have staff within organisations who provide support for in-court advice as part of a broader range of advice provided. The cost of running this programme is £2.3 million per annum. A full list of these projects is given at Appendix 3.

Project users found that it was less stressful to use the in-court project or mediation, and that they provided support to users, and gave them more confidence in the actions they were taking.

The views of in-court advice service users

Research on the Tayside court advice project and the Edinburgh mediation project was undertaken by Scottish Government, the Scottish Legal Aid Board and the Scottish Civil Justice Council Access to Justice Committee. The research focused on the experiences of those who had experience of the projects to resolve small claims issues. Researchers spoke to litigants involved in small claims issues who had not made use of the projects' services. The research had some interesting findings:

Dispute resolution projects

There are increasing opportunities to support those with entrenched disputes in different ways. For example, mediation can provide a way of communicating with the other party, when communication has proved difficult. The use of alternative dispute resolution (ADR) methods such as mediation, conciliation and arbitration, is promoted and incentivised in Europe, both in civil and criminal matters. Consensus Collaboration Scotland is an organisation that seeks to settle divorce cases out of court (www.consensus-scotland.com), while the Family Law Arbitration Group (www.flagsarb.com) offer arbitration services in the area of family law.

While the use of ADR is possible without prejudice to the fundamental right to have a remedy before a tribunal, closer attention should be paid to its impact on the general workload of courts and on resources. To improve timeliness and efficiency, online procedures for the processing of certain categories of claims are increasingly being developed and applied in different European

Clients helped and number of matters dealt with under ERAP

	ERAP Stream 1	Stream 2
New Clients	3829	1009
New Client Matters	5532	1061

Resolving disputes

Most people lack knowledge about how to resolve a civil dispute, and little understanding about what court procedures involve. This was a view expressed by court-users, sheriffs and court staff.

Most people tried to communicate with the other side. They sought informal advice from family/friends, tried to research issues such as the nature of the dispute and then sought formal advice from, for example, the CAB.

They were generally finding their way through a process they know little about and hoping that each step might help them find a resolution of the dispute.

Few used online resources and when they did, struggled to make sense of them. Key motivators for a chosen route are ease of access, affordability and getting practical help to resolve the dispute. There was evidence that the whole process of trying to resolve their dispute, and the time it had taken, had adversely affected people's health and wellbeing.

Court process

Project users' perceptions of the court process were generally that it is daunting and confusing.

Avoiding a court appearance can motivate people to resolve disputes earlier.

Sheriffs in Edinburgh have a clear role in influencing people to consider mediation, raising the profile of that option and suggesting that this might be the most favourable route, often because of the potential time and cost implications of continued court action.

Sheriffs in Edinburgh noted that there were certain types of dispute, attitude and ability which would make them more likely to suggest mediation to those involved.

(Scottish Legal Aid Board, 2016c)

states. This is a trend which should be replicated in Scotland with care and sensitivity in the coming years (Council of Europe, 2016).

Demand and supply

Although the mixed model of publicly-funded legal assistance itself enjoys broad support, there are significant challenges in the current delivery arrangements around Scotland. Solicitors register to provide legal aid, and this brings with it the freedom to conduct as much, or as little, legal aid as that solicitor or firm wishes. There is no mechanism to deal with an oversupply, for example, by reducing the number of solicitors registered, or to stimulate more legal aid activity when there is unmet need, apart from employing solicitors. I was told that there is an over-supply of criminal defence lawyers in some parts of the country, and an under-supply of civil lawyers

with particular specialisms in others. There are currently no proactive powers with which to shape the system to meet need or gaps in provision.

There are issues raised with the review about the availability of legal assistance, particularly in rural areas. For many reasons, it may be difficult to access a private solicitor able or willing to take on a case, despite the fact they are registered to provide legal aid. Publicly-employed solicitors provide a service to support the private solicitor service in operation across the country.

The use of employed solicitors in criminal actions is a sensitive one for private solicitors. In a shrinking market where fewer crimes are prosecuted, some view employed solicitors as unwelcome competitors with a significant advantage due to their position as employees of the legal aid authority. Publicly-employed solicitors

have been resisted strongly in the past by some parts of the legal profession, but they are now more generally accepted. In areas of shortfall of service provision the PDSO is vital to ensuring access to justice.

There is less resistance amongst criminal defence firms to the Solicitors Contact Line providing initial legal advice for people in a police station. The contact line is viewed as a welcome resource for solicitors who would otherwise have to provide advice in a police station out of hours, or at times when they are in court or dealing with casework.

Some concerns were expressed to me by solicitors that, while there are over 500 firms registered in Scotland for criminal legal aid, the PDSO receives a third of the duty allocations in the areas in which it operates, and that this might not be equitable.

'Ensure that the system of criminal legal aid is not tied too closely to any particular model of provision but is instead flexible enough to adapt as the legal profession continues to change.'

(CROWN OFFICE AND PROCURATOR FISCAL SERVICE, 2017)

Supply variation

The legal framework for payment of legal aid fees to solicitors does not currently allow for any variation to address supply issues. For example, it is not possible to set different fees for solicitors serving a particularly remote community or to support the availability of specific legal specialisms. In rural areas, the problem may be a lack of volume of work: a solicitor who conducts the occasional legal aid case will not find it profitable. For example, if they are unfamiliar with the rules and processes surrounding legal aid, or if the type of case is different from their normal privately funded caseload. This can make legal aid work unattractive, which reduces the accessibility of legal services for that local population. Similarly, a solicitor with a particular legal specialism may not be willing provide an outreach service in

an underserved if the upfront investment costs (establishing an office and client group) are too high and or risky.

Traineeships in criminal defence firms

There was concern expressed to me that there were insufficient graduates willing to become trainee defence solicitors, or possibly insufficient places for those who did want to become a trainee (Lord President, 2017). On the other hand, the Law Society of Scotland's website offered a more nuanced view.

'We know, though, that many law students want to work in criminal defence. Survey after survey tells us that lots of new lawyers want to end up practicing at the criminal bar. At the same time, many working in the sector tell us that it is difficult to take on a trainee for a number of reasons. That said, it simply isn't true that there aren't any traineeships with criminal defence firms - there are but they aren't as easy to find out about, nor as common as those at larger, commercial firms.'

(MARRS, 2015)

It was clear that the structure of private criminal defence firms, mostly sole practitioner businesses, mitigated against traineeships on the basis of lack of time on the part of the sole practitioner to supervise a trainee. Also, the business model of these firms created a potential threat that a successful trainee might, in time, set up a rival sole practice and so take clients from the original practice. The Law Society of Scotland made suggestions to me around allowing trainees to undertake a wider range of legal aid-funded work, and others suggested that legal aid grants should be made to the applying firm rather than the individual solicitor. These suggestions appear to be issues more aligned to the regulation of legal businesses and the public interest.

As this review has noted earlier, the statutory framework that underpins the current service in Scotland produces too rigid a structure. The service (and therefore the service providers) find it hard to 'fail fast', iterate and improve, because many adaptations to the service mean a long process of review and approval and often the final agreement of the Scottish Parliament. Change can therefore be time-consuming and resource intensive. The burden falls on service providers who are involved in consultation, the Scottish Legal Aid Board, Scottish Government officials and the Scottish Parliament. This pace of change impedes innovation if the service is unable to adapt in a timely fashion. There may also be regulatory reasons that inhibit innovation.

This issue should be considered by the Independent Review of the Regulation of Legal Services in Scotland and recommendations made. I have therefore passed these suggestions to the review of Regulation of the Legal Services (Scottish Government, 2017d).

Working together to improve services for people

The current model of delivery of publicly-funded legal assistance is fragmented with many providers of different types of legal aid and advice, and the service appears to be driven by the available supply rather than identified need. In addition, the statute underpinning the Scottish legal aid service sets out a rigid framework for payment that does not allow for innovation, or flexible funding models that address need more effectively.

The Equality and Human Rights Commission response to the Call for Evidence to the review stated:

'A mix of methods of delivery is required and that there is no one size fits all model. Legal aid policy should take a holistic view of legal needs and access to justice and reflect that often people have a clustering of legal problems with related issues to resolve.'

(EQUALITY AND HUMAN RIGHTS COMMISSION, 2017)

Central planning

Centralised planning and funding of publicly funded legal assistance was suggested to me on a number of occasions. However, that would be very difficult to achieve, would cut across the role of local government and would be disproportionately disruptive for the possible gains. What is now needed is evidence-based disciplines to harness the strength of the pluralism of services currently on offer. The disciplines I suggest include:

- effective quality assurance;
- proactive provision by way of grant funding or direct employment where there are significant shortages;
- contractual conditions for the receipt of fees and grants;
- minimum service level agreements and clear outcomes; and
- non-payment of fees where there is either non-compliance or poor service.

Some of these already exist, some are self-imposed by professional bodies and associations, others are less well-used or non-existent.

Community planning

Community Planning Partnerships (CPP) provide a local context for the provision of publicly funded legal assistance. Community planning is the structure within which public bodies work together and with local communities to design and deliver services that make a real difference to local people's lives, and is a key driver of public service reform at local level. It provides a focus for partnership working driven by shared leadership, directed towards distinctive local circumstances. Partners work together to improve local services, ensuring that they meet the needs of local people, especially those people who need those services most (Scottish Government, 2016c). Local advice action plans should be developed within each CPP, or groups of CPPs, where appropriate.

There should be advice and guidance about how best to develop these plans. The legal profession

should be encouraged to be an active participant in developing and monitoring the plans. The objective would be to build on the mixed delivery model for the provision of publicly-funded legal assistance: a model where the various providers have a stronger partnership that can aid referrals where necessary. All the partners should understand their role in a local holistic model of publicly-funded legal assistance, and the role of others.

A feature I would be keen to see in any local action plan is something called in other jurisdictions 'any door will do'. Simply put, this means that any local advice service receiving an enquiry about legal assistance would be required to at least signpost and, better still, refer the client where that service was not able to help. To be effective, an accurate database of local service and referral protocols would have to be developed. Some are concerned the General Data Protection Regulations (GDPR) (European Union, 2018) may make developing effective databases and efficient referral more difficult.

Solicitors could encourage the take up of alternative dispute resolution services. Embedding alternative dispute resolution (ADR) in the service should allow for efficiencies of scale, and potentially reduce legal costs. A critical mass is needed to get best value from ADR, and that is not possible under the current arrangements. The use of alternative dispute resolution should be a viable and consistent alternative to courts beyond family cases, and mediation should be embedded in the legal assistance service. The role and contribution made by law centres and the third sector should be clearly articulated, and their position as equal partners in the delivery of publicly-funded legal assistance established.

Holistic support

Evidence to me suggested that many criminal defence solicitors have the skills and, more importantly, the trust of their clients, to provide more holistic support for their clients, providing

links to other public and third-sector support services. This is particularly the case with their vulnerable clients and repeat offenders.

The evidence to me from the Scottish Legal Aid Board identified three assisted clients who had 194 grants of criminal and civil legal aid over a five-year period. Such high use clients, their families, and the communities they live in, would undoubtedly benefit from being more closely in touch with the support services available. Providing this kind of holistic support is not recognised within the funding of public legal assistance, and society is not making best use of the influential role a criminal defence lawyer could have on a client's wellbeing. A mixed delivery model that more clearly and consistently supports and funds partnerships across the advice and public service landscape could have a significant impact on lives, and in progressing rehabilitation and behaviour change.

'Currently, (criminal) legal aid tends to incentivise "case disposal". It offers no encouragement to assist people with their (often chronic) needs. That some practitioners sometimes do their best to help people in this way is generally despite legal aid remuneration, and wider system drivers, not because of them. Currently, legal aid drivers are set up to, in effect, discourage such assistance, and the conscientious lawyer is in effect penalised. The counter-argument, of course, that professional ethics and the market ensure that this cannot happen, is rather over-stated.'

(TATA, 2017)

Oversight and assessment

The reactive nature of publicly-funded legal assistance, and the wide range of clients and issues presented, creates challenges to strategic planning. For some service users, a solicitor is the natural first port of call, and court action the best route for seeking resolution. For others, a local citizens advice bureau will be the 'go to' place when help

is needed. In either circumstance, the needs and preference of the client may require input from others in the system.

Responsibility for the oversight of publicly-funded legal assistance and for assessing local action plans must rest with a central body, with powers to monitor the delivery of the service. Currently, the Scottish Legal Aid Board is able to gather information on how the system is working. It is overseen by an independent board which includes both legal and non-legal members. Its knowledge of the legal system is underpinned by the production of excellent data on trends in legal aid applications, service providers, and the cost of cases which has been very helpful to me for this review.

However, it has no real power to assess, demand or manage delivery of legal aid by private self-employed solicitors. As a result, the system is passive and, unusually for a public service, unable to construct delivery models that will ensure that public legal assistance is available to deliver best results for the user. That needs to change. We need clarity around the range of needs that the legal assistance service should meet, plans that can ensure certainty of service delivery, and powers to adjust the delivery model as necessary. The information from local action plans should be collated into a new online and telephone service to signpost members of the public who need access to publicly-funded legal assistance.

This could change the way in which solicitors' fees are calculated. For example, there could be flexibility to pay different fees to solicitors conducting legal aid if that is needed to ensure

that there is access to legal services either in a geographically challenged area of Scotland, or in areas of case law that are not readily available across the country. This variable system of fees should be built into the new fee setting arrangements that are recommended in my review. Providers and funders need to build a locally coherent, consistent and equitable system of public legal assistance.

The future of the mixed model

Internationally there are different variants of the mixed model of delivery. Some, like the Netherlands and Finland, keep triage and early advice for salaried paralegals or lawyers, and representation for both salaried and private lawyers. Others, like Ireland, deliver the bulk of civil legal aid through salaried lawyers employed by the Legal Aid Board, while criminal legal aid is provided by private lawyers. The Australian programmes allow a fair degree of competition between the salaried lawyers and their private counterparts. Each form of delivery has significant strengths and weaknesses.

Private lawyers may be influenced by market considerations which could lead to a lack of geographic coverage. Salaried lawyers, on the other hand, may struggle to optimise the time spent on each case. Whilst I recommend the retention of a mixed model of legal aid provision, I recommend that an early task should be to examine international experience of the mixed model to see whether the balance of the mixed model that currently exists in Scotland could be improved on.





Strategic Aim 3

Support and develop an effective delivery model

Rethinking effective delivery

The delivery landscape for publicly-funded legal assistance is complex and diverse. Diversity can be a strength, as different users require different interventions. But at present the system does not operate as a whole. My recommendations aim to bring the different providers closer together but not to collapse the model into a single service. In the future, it should be easier for the private, public and third-sector providers to work together and to learn from each other at a local level.

I recommend greater alignment and strategic planning at local level. At present, publicly-funded legal assistance services operate somewhat removed from public services as a whole. Given the impact on individual and community wellbeing, I would like to see these services given greater prominence in local public services planning processes.

The focus on users and simplicity also has an impact within delivery. From that perspective, more signposting, referral and easier access to services is required, again facilitated by stronger local, cross-sector connections.

Strategic Aim 3 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
25	Provision for publicly-funded private solicitors should continue.	✓			
26	The mix of demand-led and targeted legal assistance should be maintained. This model should include 'judicare' provision alongside publicly-delivered, grant aided and independently-funded services.	✓			Third sector
27	Third-sector organisations working with client groups with complex criminal or civil legal issues should be able to provide publicly-funded legal assistance.	✓			Third sector
28	Solicitors providing publicly-funded legal assistance should be located within third-sector organisations which have a significant civil case workload.	✓	✓	✓	Third sector
29	There should be a strategic litigation forum with a range on interested parties to identify and prioritise publicly-funded group actions.	✓	✓	✓	Third sector
30	There should be a new online and telephone service to signpost members of the public who need access to publicly-funded legal assistance.		✓		

Strategic Aim 3 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
31	The Citizens Advice Information system should be made available to all publicly-funded legal aid and legal assistance firms and organisations.		✓	✓	Citizens Advice Scotland
32	The in-court advice service should be replicated in all six sheriffdoms.				Scottish Courts and Tribunal Service Third sector
33	Publicly-funded legal assistance services, both criminal and civil, should be based on a local action plan created in partnership with each Community Planning Partnership. The local action plans should set measurable outcomes for publicly-funded legal assistance services. All local action plans should include a policy that 'any door will do'.		✓	✓	Third sector Local authorities Community planning partnerships COSLA
34	Where appropriate, the local action plans should explore the potential for criminal defence solicitor firms to be supported by advice and support services to provide their clients with the holistic services they may require.		✓	✓	Third sector Local authorities Community planning partnerships COSLA
35	Under local action plans the criminal defence lawyers, local authorities and appropriate third-sector agencies should establish a local support and referral procedure to support services for clients of the criminal defence bar who are multiple users of legal aid.		✓	✓	Third sector Local authorities Community planning partnerships COSLA
36	Consideration should be given to how best to fund the criminal defence bar in initiating and facilitating these referrals.	✓			
37	Referrals to legal services by advice services should be to the most effective firm or service in the experience of the local advice service.		✓	✓	Third sector
38	The new Scottish Legal Assistance Authority should examine international experience of the mixed model of service provision with a view to formulating a position as to whether the current balance of the mixed model in Scotland needs refinement.		✓		



STRATEGIC AIM 4: Create fair and sustainable payments and fees

Views of lawyers on fees

Many solicitors and advocates are clearly frustrated with the level of fees for providing legal aid, and the solicitor representative body, the Law Society of Scotland, is a committed lobbyist on the subject on behalf of its members. This frustration seems to frame, indeed dominate, the relationship between the legal profession, the Law Society of Scotland, the Government and the Scottish Legal Aid Board.

The Lord President of the Court of Session remarked in his evidence:

'Access to justice, as a principle, depends upon the remuneration of legal aid services being regarded as commercially attractive to the legal profession.'

In a 'judicare' system, which the Scottish system has historically been, this is undoubtedly correct. Many in the legal profession have asserted that the fees for legal aid work are too low, and at a level that is now threatening the commercial viability of their businesses. There is no doubt that for many lawyers undertaking a substantial amount of legal aid work, the level of their fees is the defining issue for my review. For them, the level of fees they receive, and how easy it is to claim them, has a direct impact on whether legal aid will be available.

'Legal aid work whether civil or criminal legal aid, needs to be sufficiently well paid that solicitors can provide a professional level of client service and make enough profit to continue in business.'

(EQUALITY AND HUMAN RIGHTS COMMISSION, 2017)

The Law Society of Scotland, bar associations and the Faculty of Advocates have argued for increased legal aid fees in the media, social media and directly to the Scottish Government, Scottish Parliament and to me. However, the Law Society of Scotland did *'not feel it is appropriate to suggest (to my review) specific fees for an increase'* (Law Society of Scotland, 2017a).

They also argue that their members are subsidising legal aid costs.

'Firms that undertake a mix of legal aid and privately funded work have reported that their privately funded work subsidises the cost of working for legal aid rates.'

(LAW SOCIETY OF SCOTLAND, 2017A).

Private solicitors and Advocate fees

Total payments made	2012/13	2013/14	2014/15	2015/16	2016/17
Solicitor advocates	£4.5m	£4.3m	£3m	£2.8m	£3m
Advocates	£18.3m	£14.5m	£12m	£14.5m	£15m
Solicitors	£115m	£117m	£108m	£105m	£102

(Scottish Legal Aid Board, 2017a)

The legal profession's argument for increased fees, couched in terms of a general and across the board increase in all fees, is unlikely to find public support when there is a perception that some legal aid lawyers appear to be well rewarded.

'For a small number of Scotland's leading lawyers, **legal aid helps provide a very nice living indeed** (my emphasis). More than £5 million was earned in legal assistance fees by 20 advocates in 2016/17 - an increase of 20% on the previous year but outside of this well-remunerated elite, **Scotland's legal aid system is in crisis** (my emphasis).'
(MARSHALL, 2017)

The issue of fees has been raised regularly at a political level and during parliamentary scrutiny and debate, even when fee levels are not central to the issue under debate. It has even been the cause of disruptive action by some solicitors. The Law Society of Scotland pointed out the substantial real term decline in total expenditure, but it does recognise that this expenditure is demand led, so the reduction may be in part related to less demand or restricted supply.

'In 1994-95 the total expenditure on legal assistance was £132.1 million. According to an inflation calculator which uses official UK inflation data to show how prices have changed, £132.1 million would equate to around £247.2 million today. Like all public services legal assistance in Scotland relates to the budget which is not fixed but is flexible to meet demand.'
(LAW SOCIETY OF SCOTLAND, 2017A).

As the Scottish Legal Aid Board points out, and focus group participants confirmed, there can be supply problems in a system where there is no contract for services between the Scottish Legal Aid Board and registered legal aid solicitors.

'There is no obligation on a solicitor to accept instructions from a client, even where that person and their case would in theory meet the eligibility tests and where the firm is registered.'

(SCOTTISH LEGAL AID BOARD, 2016B)

There are currently three main methods of setting fees for solicitors:

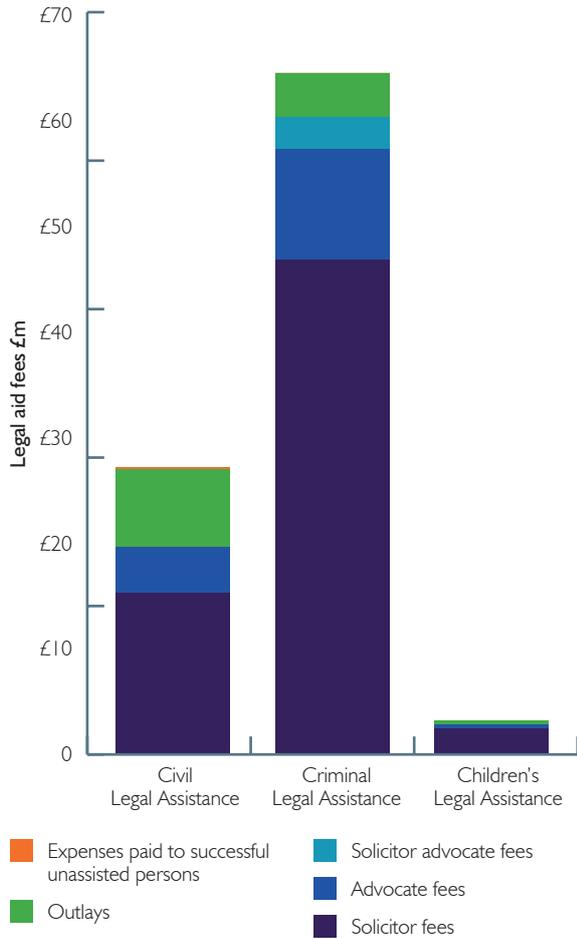
- Block fees: an inclusive or block fee is a prescribed fee for all work done in connection with a defined stage in the proceedings, regardless of the amount of work undertaken in the particular case, for example, an instruction fee in a civil case, or a prison block fee in a solemn criminal case.
- Fixed payments: a fixed payment tends to be a fee per case and is closely associated, at least in the Scottish legal aid system, with the fee for the conduct of a summary criminal case, although there can be add-on fixed payments for additional work in connection with a trial, deferred sentence etc.
- 'Time and line' fees: a detailed, or time and line, fee is based on a detailed break-down of each item of work done in the proceedings, which may be time or task-based, such as drafting a document, per page or per sheet.

The methods for setting advocates' fees are the same as solicitors and are a matter of Scottish Government policy.

Submissions to me raised a range of issues related to fees, including:

1. The static nature of the level of fees, some of which have not been uprated since 1992.
2. The lack of responsiveness of legal aid fees to the changing nature of legal case preparation and court representation.
3. The lack of a structured process for the review of fees.
4. The cash flow challenges for small and large businesses reliant on legal aid funding.
5. Travel time attracts only half fees.
6. The fee structure is overly complex.

Legal aid fees - 2016/17



Advice and Assistance and ABWOR 2016/17



The legal profession's key argument is that the lack of uprating and responsiveness to the changing nature of their jobs has led to their incomes from legal aid work falling to unacceptably low levels, to the extent that the viability of their businesses are now at serious risk. The proposal from many in the legal profession, and from all their representative bodies, is for a general increase in legal aid fees for both civil and criminal work.

In contrast, the Scottish Legal Aid Board advises that its data shows that it is an oversupply of solicitors in some areas that has led, at least in part, to falling incomes, more competition for less work, and ultimately fuelling the call for increased fees.

User views on fees

In contrast to the provider view, some focus group participants were very concerned about the costs of lawyers. They expressed concern about taking a dispute to court because of the perceived high cost of lawyers, uncertainties about the cost, and the length of time taken to resolve disputes through court action. Court was seen by participants as a last resort. Participants also thought that if court action was necessary, there should be a rigorous approach to providing high quality legal advice and representation.

There were of course also very positive views of solicitors who had made very considerable differences to their clients' lives.

'She was great. Because I was working at the time I wasn't entitled to complete legal aid but she helped me get as much as I could at that time, which helped me an awful lot, and that was purely down to the lawyer: without her I wouldn't see my kids as much as I do.'

FOCUS GROUP PARTICIPANT IN GLASGOW

This phenomenon of a general lack of trust in lawyers, but approval for one's own legal representative was very apparent to me, as it is to the legal profession. Nevertheless, it remains a serious conundrum. It forms a backdrop to any public debate on the level of legal aid fees and potential support for any increase in fees. A focus on messaging and advocating to the public about the quality, social value, and effectiveness of the services of legal aid lawyers could greatly improve negative public perceptions.

Views of the third sector

The third sector added their voice to arguing for fee increases. Shelter Scotland expressed concerns over the level of legal aid fees.

'Experience of legal aid for housing cases is that we require grant subsidy to be able to take on cases in the first place as the fees being paid via legal aid are too low to cover our costs of providing representation.'

(SHELTER SCOTLAND, 2017)

'Legal Aid has been crucial to our vision. Whilst oftentimes providing a service based on Legal Aid has been very difficult, the net result has been more secure services and more secure employment.'

(LEGAL SERVICES AGENCY, 2017)

Evidence to support fees being increased

To support the argument for a general and substantial legal aid fee increase, the Law Society of Scotland commissioned research to establish the impact of current fee levels on solicitors' income. Otterburn Legal Consulting undertook the research on the financial health of legal aid firms in Scotland and reported in February, 2017 (Otterburn Legal Consulting, 2017). The Law Society of Scotland published the report with

the comment from the then President, Eilidh Wiseman that it *'didn't make comfortable reading'*. The headline points that the Law Society of Scotland's press release highlighted were:

- **The owners of the smallest firms that participated, with fees of under £100,000 per year, were earning just £6.67 per hour, a level below the living wage.**
- **Many practitioners in both the criminal and civil field are undertaking work which they are not being paid for.**
- **Partners in specialist legal aid firms are earning on average £10,700 per year making a profit of £4.19 for every hour they work.**

(LAW SOCIETY OF SCOTLAND, 2017C)

The basis on which these assertions were made is hard to follow even on a very close reading of the report. I sought access to the background data used in the Otterburn Report to reach these conclusions, but was informed that the Law Society of Scotland did not have access to the data and could not grant permission for me to gain access *'due to data protection considerations'*.

I was therefore restricted in my ability to assess the evidence. It was clear that a small proportion of firms responded to the survey (57 out of around 800 approached) and three of those did not provide financial information. This represents just 7% of the number of solicitors registered to provide legal aid. In fairness, the authors of the report note that *'in other research contexts the response rate might be considered low, it is actually very similar to surveys within the legal sector undertaken on behalf of the Ministry of Justice (MOJ) and the Law Society of England and Wales (LSEW)'* (Otterburn Legal Consulting, 2017).

Assumptions appear to have been made in the report and notional calculations used to reach the hourly rate, rather than figures provided by respondents. The Otterburn Report also appears to demonstrate that most firms responding and undertaking legal aid work are profitable, with a

median annual profit per equity partner of around £80,000. Firms which specialised in legal aid were found on average to be slightly more profitable than firms with a higher share of private fee income. And firms which undertook most legal aid work – accounting for over two-thirds of the legal aid income generated by legal aid specialists – were most profitable

While this was an admirable attempt by the Law Society of Scotland to quantify the commercial viability of conducting legal aid work, and contribute to the debate on fees, the basis on which the report conclusions have been reached cannot be considered a strong evidential basis on which to conduct effective negotiations.

What the Otterburn report brings into sharp focus is the lack of real evidence of the costs associated with conducting legal aid work, and the costs of time spent by solicitors conducting legal aid cases.

The Otterburn Report therefore does not provide a convincing argument that solicitors' fees for legal aid need to be increased across the board. Indeed, the argument is severely weakened by its methodology, the low level of response, data analysis and the partial advocacy of its findings. However, it should be recognised that the Otterburn Report contains valuable comment from participants in respect of the challenges of carrying out legal aid work and many of these comments are reflective of evidence submitted to this review, particularly around abatements, undue bureaucracy, expert fees and sustainability. The review hopes it can do some justice to these concerns.

The Scottish Legal Aid Board annual reports list the fees paid out to Advocates and solicitor firms. The 2016/17 report (Scottish Legal Aid Board, 2017a) shows that the legal aid fees paid to the top earning Advocates ranges from £168,000 to £505,000 and top earning solicitor advocates range from £50,000 to £222,000. The fees for top earning solicitors' firms, civil and criminal, range from £698,000 to £1.9 million. Again, it is hard to justify a general increase in fees when all those identified above would also receive an increase in their fees from the current very substantial levels.

Comparing the costs of prosecuting to the costs of defending

During the consultation process, my attention was frequently drawn to comparisons between funding for the Crown Office and Procurator Fiscal Service (COPFS) and the Criminal Legal Aid (CLA) expenditure. Statistics drawn from the annual reports of COPFS and that of the Scottish Legal Aid Board showed the cost of COPFS increased whilst the cost of Criminal Legal Aid decreased. This review has reported on the falling rate of prosecutions and the increasing complexity of cases being prosecuted involving in particular sexual crimes and domestic cases. It was argued by those drawing my attention to these figures that it was significant that while the COPFS costs had risen (in response to complexity etc.) the defence costs to prepare and defend those increasingly complex cases had fallen. It was suggested strongly to me that the significance of the comparison was that it demonstrated clear underfunding of Criminal Legal Aid fees. I therefore undertook further analysis.

Analysis

In 2016/17, COPFS expenditure was £109 million. The CLA expenditure was £85 million. This (and the trend) does appear significant and led to further analysis by the Review.

COPFS in the financial year 2016/17 had three strategic objectives:

- To ensure criminal cases are effectively and independently investigated and prosecuted or have other proportionate action taken in the public interest.
- To ensure that victims, nearest relatives and witnesses and those accused of an offence are treated with dignity and respect.
- To ensure that deaths which need further explanation are appropriately and promptly investigated

	2016/17			CLA 2016/17
	Gross	Income	Net	Net
Crown Objectives				
To ensure criminal cases are effectively and independently investigated and prosecuted or have other proportionate action taken in the public interest.	£96.5m	(£1.3m)	£95.5m	-
To ensure that victims, nearest relatives and witnesses and those accused of an offence are treated with dignity and respect.	£3m	-	£3m	-
To ensure that deaths which need further explanation are appropriately and promptly investigated	£10.5m	-	£10.5m	-
Net Operating Costs	£110m	(£1.3m)	£109m	£85m

In the financial year 2016/17, COPFS received a total of 206,662 reports. A total of 10,931 of those were death reports. The remaining 195,731 were criminal reports. In total, 72,597 of all reports were marked for non-court action following consideration by a prosecutor. That is around 35% of all cases dealt with by the prosecutor which will have little or no impact on the CLA expenditure. However, costs are still incurred by COPFS for the consideration and administration of those cases. There are approximately 500 lawyers employed by COPFS which equates to 413 cases processed annually per prosecutor.

This leaves 134,065 cases marked for some form of proceedings which would entitle them to CLA. As of March 2017, there were 1,210 individual solicitors registered with the Scottish Legal Aid Board to provide criminal legal assistance (equating to 111 cases per solicitor). This figure has remained steady since 2012/13 despite a reduction of 47,662 cases proceeding to court in the same period.

A further 29,937 of those cases were subsequently marked for no further action prior to a court verdict being determined, leaving a total of 104,128 case being processed to a final verdict/plea acceptance. COPFS in its role as the public prosecutor it is liable for witness expenses including travel and accommodation. While the

defence have some witness costs they are not on the same scale. Crown casework also includes Fatal Accident Inquiries, H&S inquiries, and Civil Recovery work. All of which are more likely to be covered by civil legal aid than criminal.

There are further expenditures which the CLA would not be liable for e.g. vehicle seizure and storage costs, mortuary costs, or the remit to physically generate every complaint, indictment, witness citation for each case. Criminal firms do not have this outlay.

Conclusion

This comparison of COPFS and CLA is attempting to compare two entirely different categories – apples and pears. CLA is provided to criminal defence solicitors to represent their client during the lifetime of the prosecution against them and appeals stemming from that prosecution. It has to be assumed that the CLA is mostly spent for the defence under objective 1 below. The discrepancy of expenditure is therefore around £10 million before the witness expenses are considered. I conclude that given the wider role of the COPFS the comparison of costs between COPFS and CLA do not offer persuasive evidence of a clear and general underfunding of Criminal Legal Aid fees.

The impact of changes in law or procedure on legal aid

There are certain changes or developments in procedure and practice which have an impact on the legal aid budget.

Early guilty pleas

There are many complex issues in relation to early guilty pleas, requiring significant safeguards, but public policy at present appears to be (rightly) that legal aid payments should reflect the earliest point a person could show remorse and avoid trauma for victims and expense across the police and justice system. It may be that the earliest point for an admission of guilt and remorse will shift to the police station interview where there is now a requirement for access to the assistance of a solicitor to be offered to the interviewee if requested. At the time of drafting, legal aid fees for police station interviews was the subject of dispute between the legal profession and the Scottish Government.

Police station advice

The right of people detained at a police station to request a private consultation with a solicitor is a critical and relatively recent element in criminal defence (UK Supreme Court, 2010). The importance of the role of the solicitor at the stage of investigation and interview by the police was underlined by Lord Carloway in his review of 2011 when he stated

'Returning to the general theme of when and where the trial takes place, the Convention (ECHR) jurisprudence dictates that the trial no longer starts at the door of the court but at least by the time the suspect is in some form of custody.'

(LORD CARLOWAY, 2011)

The Carloway review was commissioned to advise on reforms required to address the decision of the UK Supreme Court in the case of *Cadder v HMA* (UK Supreme Court, 2010). This case held that the

Scottish provisions then in force allowing a suspect to be interviewed without access to a solicitor were incompatible with a person's human rights under the European Convention on Human Rights. There has been wholesale change to the arrest and detention procedures for those in police custody, extending the rights of access to legal advice to include:

- persons held at a police station whether interviewed or not;
- attendance at the police interview, whereas the Criminal Procedure (Legal Aid, Detentions and Appeals) (Scotland) Act 2010 permitted a 'private consultation' with a solicitor, and
- mandatory personal attendance by a solicitor for children up to the age of 16, young people between the age of 16 and 18 subject to a supervision order (including an interim order), and vulnerable adults (section 33 of the Criminal Justice (Scotland) Act 2016).

When the Police Station Duty Scheme was established by the Scottish Legal Aid Board in 2011, it was intended as an interim scheme, and it was understood that all aspects including feeing arrangements would be reviewed once the outcome of Lord Carloway's review was known. That review was published in November 2011.

The tension between the profession and the Government which now underscores the delivery of this crucial aspect of criminal legal assistance, illustrates the difficulties caused by the absence of a stable evidence-based system to set and review on a regular basis the fees for legal aid work, which has the confidence of all parties.

The changing nature of prosecution and crime

Some important evidence to me has drawn attention to the changing nature of crime and criminal prosecution. There has been an increase in cases involving sexual or domestic abuse, and cases where children are vulnerable witnesses. These cases can be complex and time consuming, requiring sensitive handling. There have been changes in the prosecution and presentation of sexual crimes which do not seem to have been

reflected in the legal aid structure. For example, children and vulnerable witnesses are often now called to give evidence in summary trials.

Solicitors must approach obtaining evidence from such witnesses by lodging an application to the court in terms of Section 275 of the Criminal Procedure Scotland Act 1995 to ask certain questions. The solicitor receiving a summary fixed fee receives no additional payment unless exceptional case status is granted. It is now a common occurrence for the defence and crown to be dealing, in a summary criminal court, with a range of what the crown refers to as Advance Notice Trials because of their complexity, gravity or the vulnerability of witnesses. The Glasgow Bar Association (2017) observed in their evidence:

'The criminal law has become and continues to become increasingly complex and solicitors must now of necessity deal with new laws, regulations and decisions on what the Association believes is an unprecedented scale...' and further that:

'The creation of Disclosure Scotland has significantly increased the consequences of a criminal conviction, even at a relatively minor level, for significant numbers of members of the public. It can and does lead to the loss of employment, removal from the job market and consequentially increases the stakes for the accused and therefore the demands on their solicitors.'

The most serious criminal cases in Scotland are prosecuted before a jury either in the high court or the sheriff court. In 2004, the sentencing powers of a sheriff in solemn procedures was increased to five years' imprisonment. This resulted in an increase in solemn business in the sheriff courts, as cases which would have formerly been tried in the high court are now regularly indicted to the sheriff court. While sanction can be granted by the Scottish Legal Aid Board for the instruction of counsel in sheriff and jury cases, the evidence from the Glasgow Bar Association was that sanction for counsel is granted in a small proportion of cases, and I am advised that the vast majority of solemn cases in the sheriff court are conducted by solicitors.

An area of specific concern raised in written evidence to me is the significant disparity in fees

between those payable to counsel (advocates and solicitor advocates) and solicitors. A solicitor in the sheriff court will receive a block fee of £38 to prepare for a Section 76 hearing (an accelerated guilty plea), and then time and line for time spent waiting at court and conducting the hearing, at a rate of £12.20 and £18.30 per quarter hour respectively. The fee for an appearance by counsel either at the sheriff court or at the high court conducting a Section 76 hearing is £1,250.

Changes in legal aid funding

Legal aid fees have been revised and updated at various points over the recent past, including in the following areas.

'No uprating in legal aid since 1992'

The Law Society of Scotland and some of its members claim that there has been no uprating of legal aid fees since 1992. However, this claim is misleading as it relates only to detailed criminal fees set out in the 1992 regulations. The understanding at the time was that these detailed tables of fees would, in future, be increasingly rarely used. Contrary to the 'no uprating since 1992' assertion, 2003 saw a 21% increase in detailed fees for solicitors. In 2009, there was a further 10% increase in detailed fees, backdated to 1 April, 2008.

The 1992 rate applies to around 5% of all income from criminal legal aid fees, and this will diminish further as criminal fee reforms are taken forward. The remaining 95% of fees have been subject to several changes since 2004. Fees were increased by 15% for advocacy work and 5% in respect of waiting time and meetings with a client in 2004. A further 8% increase was applied to advocacy work in 2005, along with 12% for other work. A new fee structure in 2010 increased fees by 7%. In 2008, criminal advice and assistance fees were increased by 10%. In 2010, solicitors' fees for police station were increased by one-third.

Summary criminal legal assistance reform measures were harmonised and fees for guilty pleas in the sheriff court increased from £70 to £515. These

were reduced to £485 in 2011. Guilty pleas in the Justice of the Peace court were increased from £70 to £150 in 2008 and remain unchanged. The reduction in fees for guilty pleas in the sheriff court was agreed with the Law Society of Scotland on the understanding that private solicitors would retain 65% of the duty work in the areas where the PDSO operated as opposed to the 40% which had originally been proposed.

Block fees

A revised civil block fee structure was introduced in 2003, resulting in a 21% increase in fees. A feature of this was that a solicitor could no longer opt to charge block fees in a case where there had been little work, or opt for detailed fees when there had been a lot of work. In 2007, further changes were made to the block fee structures, increasing solicitors' fees by an estimated £1 million. This was through an increase of 21% in solicitors' fees for summary cause and an increase for undefended divorce actions. In 2009, the block fee unit increased from £19 to £21, backdated to work done after 1 April, 2008.

Many of the recent reforms and changes have tried to simplify fees, increasingly using blocks or fixed or all-encompassing fees. This has relieved bureaucracy and cost for the profession, with some solicitors finding that they no longer need to pay law accountants for certain types of fee work, such as summary criminal fees. Such fee reforms also reduce costs for the Scottish Legal Aid Board and reduce the potential for disagreements between the profession and the Scottish Legal Aid Board. Moving away from traditional 'time and line' charging mechanisms, such as paying for the amount of time spent on letters, also encourages greater efficiency.

The approach of the Scottish Government has been to simplify the fee structures for solicitors through the adoption of block fees, and in recent times this was done on a 'cost neutral' basis. The greater clarity and reduced bureaucracy of block fees have generally been welcomed by the profession.

Solemn criminal legal aid

Solicitors carrying out criminal legal aid work resisted the move to block fees. As a consequence, a hybrid structure was implemented combining block and detailed fees for solemn criminal work, which provided a 7% increase on fees. During the negotiating period, there was a 23% increase in fees for advocates. The hourly fee rates for advocates are around £50, ranging from £58.12 an hour for children's proceedings, to £38.58 for the first 30 minutes for civil legal aid. Another regular source of adverse comment is that travel time is paid at 50% of the non-advocacy rates.

For solicitors providing legally aid criminal work, there are a number of factors that impact on income. The falling crime rate is a major factor (see graph on the following page), leading to a fall in demand for criminal legal services in recent years, without any matching reduction in the supply base. This has created oversupply in certain geographical areas. There are also significant changes to the justice system which affect the way in which courts deal with crimes. Many offences are being dealt with very differently, moving from the high court to sheriff court, justice of the peace court and by alternatives to prosecution.

'A large number of firms undertake low volumes of criminal legal aid. If relying on criminal legal aid for all of their income these firms would not be very profitable.'

(SCOTTISH LEGAL AID BOARD, 2014A)

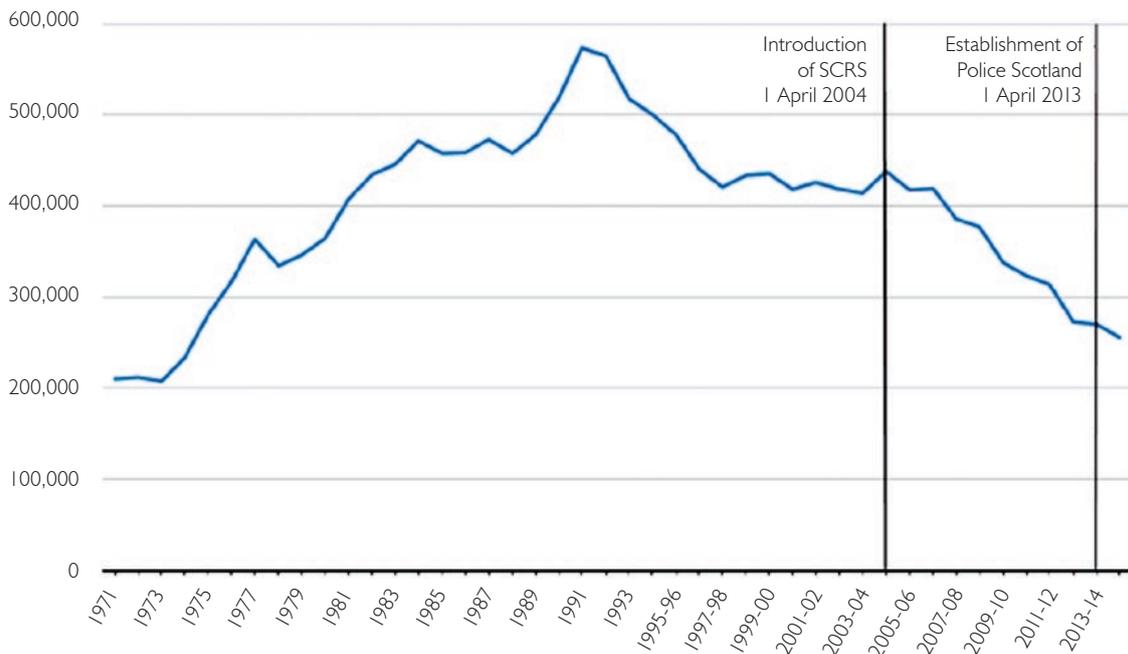
The Law Society of Scotland recognises these issues.

'There has been a debate around the size and scale of traditional law firm structures, particularly the role of sole practitioners or small firms within the legal aid sector and the efficiencies of scale that might be achieved by larger practice units.'

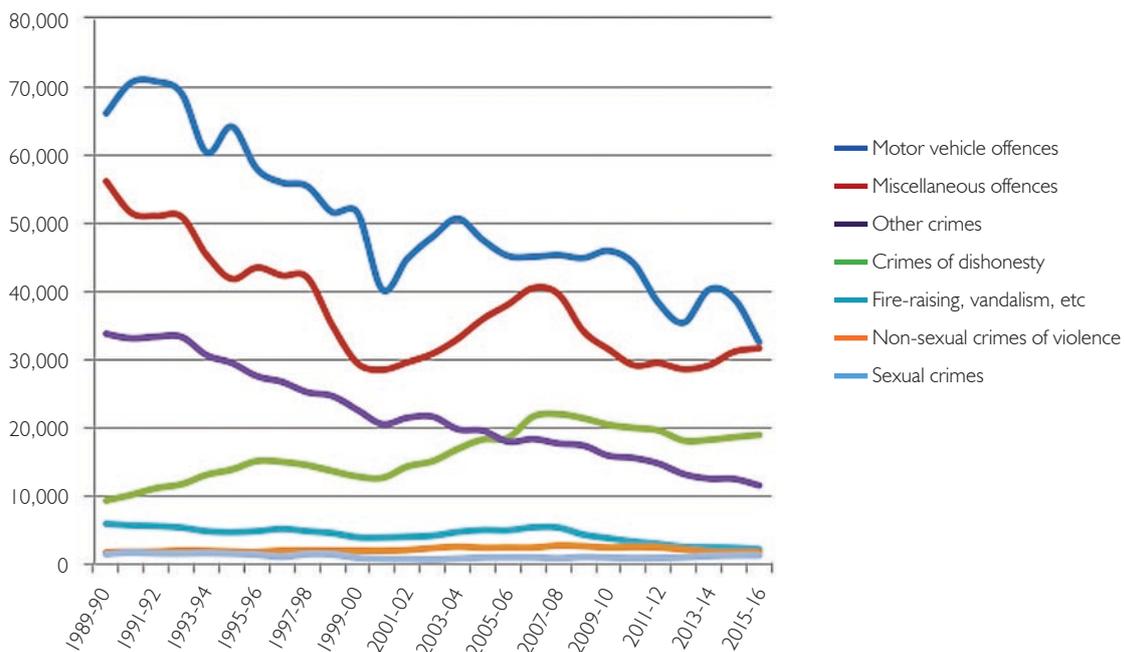
(LAW SOCIETY OF SCOTLAND, 2017A)

The way in which prosecution is pursued is also changing, with a trend towards fewer court actions, fewer fines and more community sentences (see graph on the following page).

Number of recorded crimes



People convicted by main Crime/Offence, 1989-90 to 2015-16



People convicted by main penalty

Sentence type	2006-07	2015-16
Custody	16,764	13,735
Community sentence	16,074	18,943
Other sentence	16,758	17,354
Financial penalty	84,820	49,918

All of this is having a real effect on workload for criminal defence solicitors. Put simply, there are fewer clients who need advice and fewer still who need representation in court actions. However, those cases that do proceed to court can be more complex and long-running. Therefore, the business model for criminal defence solicitors is very different from that as little as 10 years ago,

and looks set to continue to change in the next 10 years as the drive towards redirection and better rehabilitation continues; the proposals arising from the Evidence and Procedure review which reported in 2015 are actioned; and the Scottish Courts System Integrated Case Management System has an effect.

Contracting for criminal defence legal aid providers

In its paper, *A Sustainable Future for Legal Aid* (Scottish Government, 2011a), the Scottish Government set out its intention to move towards a contractual relationship with criminal legal assistance suppliers rather than the case-by-case arrangements currently in place. The focus on criminal legal assistance reflected the powers available in the Legal Aid (Scotland) Act 1986 which does not allow contracting for civil legal assistance.

The Scottish Legal Aid Board was charged with undertaking a scoping exercise to develop options and advise Scottish Ministers. The Board undertook an engagement exercise with the legal profession to gather information that would inform advice to Scottish Ministers. The advice subsequently submitted set out a number of challenges in moving forward with contracting for the provision of criminal legal assistance. Contracting in itself would not achieve significant savings; it would need to be accompanied by some form of fee control, either through new regulations or by competitive price tendering.

There were challenges in undertaking a procurement exercise for what is essentially a demand-led service. The indirect relationship between the supplier of legal services (the solicitor), the recipient of those services (the client) and the funder produced additional complexities. The Board would need to enter a procurement process without a clear sense of how many full-time equivalent solicitors would be required to deliver the full range of criminal legal assistance services in each court location. It would therefore prove difficult to assess how many contracts would be required or the overall capacity required.

Developing a tender document could be challenging, particularly given the diverse nature of business models in the criminal legal assistance landscape. There was limited experience of procurement within the firms specialising in criminal work. There was therefore a high risk that tenders would not be acceptable, making it impossible to award the necessary number of contracts. As a result, Ministers took the decision not to proceed with the contracting proposals.

My conclusion is the wholesale contracting of legal aid services is unlikely to be effective or efficient. However, I have made a range of recommendations around fee setting, memorandums of understanding, and local variation, which will attempt to address the balance between the public interest of the funder and the private interest of the provider.

Civil legal assistant grants

Total civil legal assistance	2012-13	2013-14	2014-15	2015-16	2016-17
	£98,621	£90,853	£82,262	£80,963	£81,423

Civil legal assistance

Grants for civil legal assistance fell by 17% over the last five years; this is similar to the number of applications received which fell by 18% over the same period. However, the Scottish legal aid board annual report 2016/17 shows that after three continuous years of falling grant volumes in civil legal aid, there was a 5% increase in the number of grants in 2016-17. This has been brought about predominantly by the continuing trend of year-on-year growth in the adults with incapacity subject matter and by internal process improvements which have subsequently led to a 3% increase in the number of initial decisions taken during the year.

Legal aid payments

The way in which legal aid is delivered has not responded to changes in the level and nature of civil and criminal cases, and one of the reasons for this review is to consider how best a publicly-funded legal assistance service can be rethought to ensure it can keep up with the pace of change of both the justice system and society of the future.

'It is striking the extent to which the Legal Aid system has sometimes not responded to the changing demands and needs in Scottish society and tends to financially remunerate best the most traditional areas of work.'

(LEGAL SERVICES AGENCY, 2017)

'There is a disconnect between modern litigation, which is loaded towards advance preparation and settlement, and the legal aid remuneration structure which is geared towards appearance in court.'

(FACULTY OF ADVOCATES, 2017)

Although the ECHR and the Sustainable Development Goals require appropriate and competent legal representation, particularly in criminal cases, they do not specify that advocates, and far less QCs, are required, as opposed to solicitors or solicitor advocates. Instead, in almost every case, the Scottish Legal Aid Board has to authorise the instruction of counsel. Equality of arms might argue that where the crown chooses to prosecute a case with senior counsel or a law officer then the Scottish Legal Aid Board should sanction the instruction of a QC for the defence but the Regulations (HMSO, 1996) and Guidelines (Scottish Legal Aid Board, 2017c) do not require this, except that the Regulations do entitle a person accused of murder to be defended by a QC if they so wish. Moreover, the Guidelines do suggest that equality of arms is something that the Scottish Legal Aid Board will take into account when deciding whether to sanction the instruction of senior counsel. Since legal aid fees for senior counsel are the same irrespective of experience and reputation, as are the fees for junior counsel, it has been considered to be a strength of the Scottish legal aid system that those accused of a serious crime can instruct the most able counsel. I received no suggestion that this position should be changed.

Setting solicitors' legal aid fees

The way in which fees are negotiated is unstructured and seems to be based on two competing arguments. Firstly, what solicitors consider to be 'fair remuneration' is related to the cost of providing legal services, and the level of income derived from clients who pay privately. The second and counter argument is what the Scottish Government can afford within the constraints of its allocated budget, and taking account of public sector pay policy. It should also be noted that the level of fees for legal aid are set by the government and not the Scottish Legal Aid Board. Yet throughout the

review it was the Board which was criticised over the level of fees. All negotiations take place against a backdrop of general public indifference at best and cynicism at worst.

'I think, they have a lot of responsibility with people's lives to a certain extent, but does it warrant the fees that they do charge? Because I've never seen a poor solicitor...I don't think they should be charging what they charge.'

FOCUS GROUP PARTICIPANT IN PETERHEAD

From the outset, the feeing structures accepted the relative importance which the legal profession assigned to particular items and areas of work, and the prevailing method of feeing on a mixed time-based account, with adjustments to reflect the importance the profession and courts place on advocacy. At the start the government accepted the market rate as an appropriate benchmark against which to pitch legal aid rates, at 15% below that benchmark. The reduction was intended to reflect the reduced risk of work not being paid for by a private client.

Scale fees for solicitors were abolished in Scotland in 1984, and in 2005 the Law Society of Scotland withdrew the annual table of recommended fees for solicitors' services. The relationship between the legal aid rate and the scale fee was thus lost in 1984, and since then the legal aid hourly rate which has reflected public sector pay restraint has not kept pace with the private legal fees that the profession have charged on the open market to one-off individual clients. Repeat private or corporate clients are usually in a better place to negotiate a lower fee.

'Experience shows that someone who uses the same commodity frequently can develop into a skilled buyer, in contrast with the individual who makes one such purchase in a lifetime. In contrast with a private individual using a lawyer once, for example, Trade Unions and insurance companies, which frequently use lawyers in the UK, have contracts so that the lawyers:

- are expected to charge significantly lower rates than on a case by case basis (because they are assured of a volume of work); and
- they know that the continuation of a contract depends on their performance (if they incur heavy expenditure on a number of lost cases they risk losing the contract).'

(SOCIAL MARKET FOUNDATION, 1994)

Top-up fees

It has been suggested to me that solicitors could invite their legal aid clients to pay a private top-up fee for additional work. The suggested additional work could be to engage an advocate where the merits test does not justify it, weekend work or anti-social hours work by the solicitor. Such top-up fees are currently unlawful under legal aid legislation. Their introduction might have the effect of reducing the quality of service provided to clients who could not afford to pay for the additional fee. Moreover, the argument presupposes that efficient solicitors cannot provide a quality service on current legal aid rates. If additional resources are required, it might be thought that the appropriate way forward would be to implement the legislation allowing the introduction of criminal contributions. Further, top-up fees would allow individual members of the profession to set the level of additional fee required rather than levels of contribution uniformly applied based on ability to pay. Finally, top up fees would introduce complexity in feeing and the clawback when I am recommending the simplification of the legal aid scheme. Accordingly, I do not recommend the introduction of such top-up fees.

Who 'owns' the client and legal aid fee?

I was advised by some practitioners that a legal aid grant is associated with the nominated applying solicitor rather than the employing firm so a client base belongs to an individual solicitor rather than a firm. Others advised that in practice, it does not work like that as employed solicitors' contracts prohibit them transferring their clients, legally aided or not, to a new business. However, perceptions have real consequences and whatever the true position the uncertainty adds to the commercial risk in running a legal aid-funded business. The matter of fact should be settled and clearly communicated. It would appear to assist in building greater business stability if the award of legal aid was to the nominated firm.

Cash flow

While not linked directly to fee levels, cash flow is a challenge for all businesses. While a legal business may be viable on paper, the time between taking on a case and payment of fees can have a critical and negative impact on cash flow.

Solicitors can be involved in a significant degree of work, and potential outlays, before it can claim the appropriate fee from the Scottish Legal Aid Board. This can be particularly burdensome when the case is a long-running one and the solicitor has had to meet the cost of expert witnesses or other outlays in advance. Many solicitors raised this during my review, and provided examples where it was a very considerable time before the full fee for a concluded case was received.

'There are horrendous cash-flow difficulties.'
(LEGAL SERVICES AGENCY, 2017)

The research, carried out by Otterburn Legal Consulting for the Law Society of Scotland noted that:

'The lack of interim payment for many cases has a significant impact on cash flow. A number of respondents considered the introduction of interim arrangements as an important step towards a more sustainable system of legal aid.'
(OTTERBURN LEGAL CONSULTING, 2017)

One respondent commented:

'No account is taken of the fact that we require to wait to the end of the case to receive payment. In private cases payments to account are made. In matrimonial work, this can mean that agents wait many years for a payment which further diminishes its value. Private clients are fed on a regular basis and legal aid does not provide any opportunity for that under advice and assistance or legal aid where there is a potential of recovery.'

Family law is a significant area of legal assistance spending. In financial provision cases, the consequence of SLAB's policy on recoupment for advice and assistance means that, often, solicitors are not able to secure any payment for pre-litigation work - which can often include bearing the costs of significant outlays such as actuarial reports and valuations of property - until the entire case has concluded. That can be a year or more in contentious cases.'

(OTTERBURN LEGAL CONSULTING, 2017)

There is a process through which a solicitor can seek an interim payment from the Board when particular criteria have been met. However, this is not particularly popular with solicitors as the interim payment received can be reduced at the final account. The reasons for this approach are sensible: as the Board is managing public funds, it must ensure that these funds are being properly expended in line with the statutory framework. However, it would be reasonable public policy to make advance payments to providers where legal aid is a significant proportion of the business undertaken, and they are known to make accurate claims for fees. This could help ease the business burden experienced during the time between taking on a client, that case being concluded, and payment received.

Morale among legal aid lawyers and public trust

During the review I was struck by the extent of low morale expressed by the legal aid solicitors I met and also the lack of public recognition of the valuable work undertaken by those who deliver legal aid-funded services. Solicitors are of the view that the low morale is a consequence of feeling undervalued as a result of the Scottish Government's position on fees. However, reforming the way fees are set will not in itself address the issue of low morale in the profession. This is an issue in which the Law Society of Scotland, as the professional organisation, has a critical leadership role. The way in which the profession views itself influences the way in which others view the profession. I am concerned that focus group participants thought that top quality lawyers were more likely to work privately than choose to do legal aid work.

'Legal aid lawyers, like they are the bottom of the barrel, but I don't think that is necessarily the case.'

FOCUS GROUP PARTICIPANT

Another common view among at the focus groups was that in a court case between one party represented by a legal aid lawyer and the other by a 'fancy expensive', lawyer there isn't real equality of arms for the two parties.

'If you can afford a lawyer you will get a better service than legal aid that's the perception.'

FOCUS GROUP PARTICIPANT

These are both unfair and untrue comments. However, while they remain, such perceptions undermine a wide range of public and social interests as well as the private interests of legal aid businesses.

Public messaging about solicitors who provide legal aid should be rebalanced to illustrate the positive impact solicitors can have on lives, and the value of carrying out legal aid work. On this latter point, much was said about a potential future shortage of solicitors delivering legal aid. While fees and income undoubtedly play a part in the attractiveness of legal aid work, being valued and respected are also important. Positive public messaging has a strong part to play in increasing the appreciation of legal aid lawyers and the critical part played by the rule of law in a fairer Scotland. The public should for example also know more about the pro-bono work of the legal profession.

'One of the pro-bono schemes developed is the Free Legal Services Unit (FLSU) run by the Faculty of Advocates. The FLSU is a facility which enables volunteer advocates (both qualified and trainees) to provide certain free legal services to clients who have been referred to them through an approved charitable advice agency. This pro-bono service is commendable and invaluable to the clients who receive assistance.'

(CITIZENS ADVICE SCOTLAND, 2017)

Evidence and assertion

I tried hard to find persuasive evidence in the responses to the review that there should be a general increase in all legal aid fees. I could not. A general increase would benefit some already very well-rewarded practitioners. I was also not persuaded by what was presented to me on the incomes of legal aid solicitors as the basis for fee increases. What was presented also pointed to some high-income legal aid practitioners, as well as some who were clearly struggling. I was not persuaded by the 'proxy measures' presented to me (eg the comparison with COPFS costs) as the basis for increasing legal aid fees. No 'proxy' measure was persuasive.

Despite this lack of persuasive evidence, I was struck by the overriding focus on legal aid fees.

I think there may well be something in the case that some fees, in some circumstances, should be adjusted. However, I was also worried that in making the tactical case for increased fees for legal aid lawyers, in the ways they have done, the profession is losing the strategic argument with the public about the value of publicly-funded legal assistance to the rule of law and access to justice. I was also worried that what was most often put to me as 'evidence' is more akin to strong assertion with anecdotes.

It is clear that the way in which fees are set could be improved greatly. A process for taking a strictly evidence-based approach to fee setting should be agreed between the main partners: the Scottish Government, Scottish Legal Aid Board, the Faculty of Advocates and Law Society of Scotland. The evidence underpinning negotiations and agreements should be independent with data drawn directly from the Board, advocates and solicitors accounts and workloads. This access to accounts and workload data will be highly intrusive for private practices and will require a very wide range of trust and consent. The review process should incorporate a timetable for regular reviews.

The outcomes of this process should be agreed to be binding on all parties and accepted by solicitors and advocates. This is a major risk for the Scottish Government (and tax payers) who would have to bear the cost of any increased fees recommended. Some have suggested to me an independent process could follow the model of Sheriff Officers and the judicial fee rates which are set and reviewed by the Costs and Funding Committee of the Civil Justice Council and given force by Act of Sederunt. My preference would be for an open tender process for each review. Having a process of review based on independent evidence and assessment has the potential to ease tensions when discussing many other issues relating to legal aid and wider publicly-funded legal assistance.

It is hoped that this independent, evidence-based approach will take some of the heat out of the working relationships. Underpinned by the other recommendations in this report around clarity of purpose of publicly funded legal assistance, the needs of the user, flexible delivery models, this process of evidenced negotiations aims to deliver fair and sustainable remuneration for service delivery and a good quality, high-functioning service.



Strategic Aim 4

Create fair and sustainable payments and fees

Rethinking payments and fees

Fees for legal aid are a highly-contentious issue and I heard many views on the topic. It proved impossible to find robust sources of persuasive evidence for a general increase in fees. However, I conclude there may well be something in the case that some fees, in some circumstances and in some areas should be adjusted. The current ad hoc nature of fee setting adds tension and works against the need for agreed evidence. At a system level consistency of approach is required to facilitate a more balanced conversation.

I recommend a robust and independent evidence-based process for reviewing and agreeing fees with the outcome binding by all parties. That is intended to benefit funders and service providers, both private and third sector. But I ask in return for flexibility and clarity over what service the public can expect. In the long-term, these recommendations seek to build trust with the public and improve confidence in the profession. They should also create fair and sustainable fees.

Strategic Aim 4 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
39	Legal aid awards should be to nominated firms rather than solicitors and a mechanism should be established to pay a proportion of legal aid quarterly in advance to law firms and advocates with a good track record of claims over the previous two years.	✓			
40	There should be a campaign to raise public awareness of the vital public service that both criminal and civil legal aid solicitors provide, and active steps should be taken to support improved morale in the profession.		✓	✓	
41	A robust and independent evidence-based process for reviewing and agreeing legal aid fees should be established and it should include the actual incomes of legal aid-funded lawyers and law firms.	✓			
42	The structure, timetable and process for this evidence-based review should be agreed before the end of 2018.	✓			
43	The fees for the criminal judiciary legal aid service should be a priority issue for the first review.	✓			
44	The fees for an early guilty plea should be a priority issue for the first review within this criminal legal aid fees review.	✓			
45	Solicitor fee regulations/arrangements should allow for the flexibility to pay higher fees from the legal aid fund in designated geographic areas and/or areas of law in order to ensure access to services.	✓			
46	Any law firm or advice service receiving funds from the legal aid fund should have a clear memorandum of agreement setting out the extent of the service they will offer including their willingness to take a minimum number of appropriate referrals.	✓	✓	✓	Third sector
47	As part of the memorandum of agreement for receiving fees from the legal aid fund, firms and solicitors should commit to engaging and working in partnership with stakeholders and the local bar.			✓	Third sector
48	A timetable for a regular review of fees should be established following the initial review.	✓			
49	In moving ahead with the more flexible funding model, there should be established a three-year grant funding model for the non-legal aid parts (third-sector grants) of publicly-funded legal assistance.	✓			



STRATEGIC AIM 5: Invest in service improvement and technological innovation

An effective modern, user-focused public service provider has two key attributes, commitment and willingness to innovate. While there should be no doubt about the commitment of the providers of publicly-funded legal assistance in Scotland, there appears to be a worrying lack of innovation given the scale of the service. I found a degree of both wariness and weariness among service providers on the question of technology and innovation. Criminal legal aid practitioners in particular appeared sceptical about the feasibility of technical innovation, and cynical that it would help them do their jobs more effectively.

In contrast the Legal Education Foundation has written: *'Technology will change all our lives. Its impact on access to justice is no less certain'* (Legal Education Foundation, 2016). They identified the following themes as the most important:

- artificial intelligence
- automated document delivery
- community delivery
- digital courts and tribunals
- guided pathways
- innovative virtual practice

As this review noted earlier, the statutory framework that underpins the current service in Scotland produces too rigid a structure. The service finds it hard to learn quickly from mistakes and improve, because many adaptations to the service require a long process of review and approval, and often the final agreement of the Scottish Parliament. Change can therefore be time-consuming and resource-intensive. The burden falls on

service providers, the Scottish Legal Aid Board, Scottish Government officials and the Scottish Parliament. This pace of change impedes innovation. There may also be regulatory reasons that inhibit innovation. Any such regulations will be identified by the Independent Review of the Regulation of Legal Services set up in 2017 (Scottish Government, 2017d).

Legal assistance providers are not alone in struggling to innovate. Innovation requires risk-taking; the risks can be financial; they can involve the allocation of scarce staff time; and, of particular relevance to public sector services, can involve reputational risks. For these reasons, the public sector as a whole finds innovation a real challenge. In 2014 NESTA (a global innovation foundation based in London) published a report *Innovation in the Public Sector* (Mulgan, 2014). They found that the *'overall lack of seriousness about innovation across the (public) sector is striking, and contrasts starkly with wider business'*.

Improving flexibility

Future reforms of the statutory basis of publicly-funded legal assistance should build a more flexible, permissive service. While key aspects of the service should still require independent prior scrutiny, government support and Scottish Parliament approval, other issues that relate to the proper management of the service should be dealt with at an administrative level. A permissive service will require proper controls and accountability for decisions made, but this can be made to work.

A more permissive service would most likely require adaptations to the role of the Scottish Legal Aid Board which operates the service based on the statutory powers available to it and the statutory controls that exist. A modern legal assistance authority should have responsibility for the identification of the key features of a well-functioning service of publicly-funded legal assistance, and it should have both the responsibility and the power to encourage innovation in both delivery and design. The Scottish Legal Aid Board should be charged with ensuring that the service is user-focused and responsive to user needs and experiences. It follows that a legal assistance authority should have the power to make necessary adjustments to the system to ensure it meets changing needs and emerging priorities. It should be proactive in responding to ideas for service innovation and be willing to invest in experiments and change. Local government is supported by the Improvement Service (IS), the national improvement organisation for local government in Scotland. The Scottish Legal Aid Board should work in partnership with the Improvement Service to understand how knowledge hubs and innovations exchanges, to name just two Improvement Service processes, work in practice and how they might be adapted to publicly-funded legal assistance services (Improvement Service, 2017).

Questions about the scope of legal aid and eligibility criteria should continue to be subject to approval by the Scottish Parliament. In addition, Scottish Ministers should retain the power to make legal aid available where statute does not allow it (HMSO, 1986). A recent example of the use of this power was in relation to making provision for the availability of legal aid to represent individuals who wished to defend applications to access sensitive documents (HMSO, 2017).

Encouraging innovation

Joseph Schumpeter (1942) applied the term 'creative destruction' to the dynamic

of a market economy. Not only does new technology displace the old, the new company displaces the old. Innovation mostly comes from entrepreneurs outside established businesses, engaged in an endless succession of experiments (Kay, 2012). These experiments can often fail. In the private sector, fortunes can be made or investors' capital lost entirely in this process. The public sector cannot hope to replicate this pace of change and level of risk to achieve the disruptive innovation demonstrated by their private-sector colleagues. The challenge in a publicly-funded service is to reward innovative and efficient providers without at the same time subsidising those who will not or cannot change. In the private sector, not adapting and changing leads to the 'destruction' of shareholder value that Schumpeter identified. In the public sector, a lack of innovation leads to a slow decline in service quality and eventual crisis.

Richard Susskind in his work *Tomorrow's Lawyers* (2017) points to the universal tendency for clients and funders in the modern era to expect greater productivity from their lawyers for less resource. The government funders of legal assistance programmes are no different. For Susskind, standing still is not an option. The lawyer of the future will have to embrace change, and technology will have a very large part to play in the changing forms of all legal practice, including publicly funded legal assistance. Within 30 years, the average desktop computer is predicted to have more processing power than all of humanity combined – in such a context, Susskind considers it inconceivable that the legal world will escape unscathed.

Document assembly

Outsourcing and unbundling of discrete parts of legal transactions is now routinely practised by large private-sector law firms to reduce cost. Forrest Mostyn (Mostyn, 1995) having carefully analysed routine forms of legal work, concluded that not all of it had to be done by the partner. Some could be delegated to a paralegal and

some to the client – thus reducing cost and harnessing Rosenthal's research finding that where lawyers and clients work in partnership, the outcomes are maximised (Rosenthal, 1974).

Mostyn envisaged that unbundling would be of particular help to self-help citizens. For more than a decade, the A2J software developed by Chicago-Kent College of Law in the USA, has enabled self-represented individuals to access, at an affordable price, the forms and styles needed for simple transactions or low value litigation using automated document assembly. Similar low cost, fixed-price packages are offered by Co-op Legal Services, linked to a telephone hotline for advice. Other providers, sometimes in association with legal expenses insurance firms, offer legal advice by email on a subscription or fixed-cost basis.

Triage, intake and referral

An early adjunct to self-help packages in the USA was the creation of state-wide portals for intake and referral. The US Legal Services Corporation made this a priority in 2013 with the aim of providing an automated triage process which would direct those requiring assistance to the most appropriate sources of help. Using a combination of cognitive computing and expert systems, the package interrogates the user, gathers information about their circumstances and can fix appointments for users. Variants of this approach have been used in British Columbia (MyLaw BC and Solution Explorer). Family law firms in Victoria, Australia use such systems to enhance the client intake process – the online guided interview enables the prospective client to provide information in their own time and pace, and to receive information as to possible options before they meet with a lawyer. Victoria Legal Aid has developed a triage package for individuals with problems that are not eligible for legal aid – providing relevant information and referrals to suitable organisations.

'The Nadia project is funded by the Australian government to give advice on a disability benefit. It does not operate specifically within a legal aid context, but falls into the same category as other developments such as the Rechtwijzer, an interactive programme developed by the Dutch Legal Aid Board to assist users through relationship breakups; interactive advice provision, MyLawBC, developed by the Legal Services Society of British Columbia; The Justice Education Society of BC's avatar 'Jes' used in some of its videos; chatbots like 'DoNotPay' developed by Joshua Browder; and the A2J self-help provision developed by the US Centre for Computer Assisted Legal Instruction (CALI).'

(LEGAL AID FOUNDATION, 2017)

There is also a free online service for Australians who wish to plead guilty to theft, driving, assault, and drug or drink/drug driving charges in the magistrates' courts. The service is designed to help those without a lawyer to inform the court of relevant circumstances in relation to sentencing. If the online interview indicates that imprisonment may be a possible sentence, – the user will be referred to a lawyer.

Legal information and advice

There is increasing 'channel shifting' towards reliance on online information and self-help in every day transactions. Channel shifting is the design and marketing of effective and efficient channels of customer contact for the organisation in question. The mygov.scot website was launched in September, 2015 with the ambition to be a one-stop online gateway for citizens and businesses to access information on all public services, designed around the needs of users. The aim is that people will find trustworthy information and links to reliable sources of help that are endorsed by government through this national publishing platform.

The focus group participants were in favour of an online source of information and support which they can trust, which is well researched and comes from an official source or trusted brand. The comments highlight the desire by participants for more neutral and objective ways into the system. People suggested a mix of face-to-face, telephone and web-based support for both advice and information.

'(There is) nothing concrete, like a government website, or I couldn't find it anyway.'

FOCUS GROUP PARTICIPANT IN RENFREW

Through the mygov.scot website, information pages are available on a number of civil and criminal justice topics, including debt and bankruptcy, housing repossession, relationship breakdown, alternatives to raising a civil action and legal aid, as well as information for victims of crime and witnesses to a crime. Around a quarter of the 2000 web pages on mygov.scot include information on justice issues. The next topic to go live will provide information for the public about what happens when an arrest takes place and people come into contact with the criminal justice system.

It should be easier for the public to access as an objective place to go in response to: 'Where can I get advice for a legal problem?' There may be issues about the public being able to identify their problem as being justiciable, and also about how widely to draw the boundaries on a landing page. Webchats, videoconferencing or optical document readers could supply options to extend such a portal.

As discussed in Strategic Aim 1, individuals with justiciable problems have a need for 'just in time' information and advice as to their options, including practical information as to their legal position. Citizensadvice.org.uk is an accurate and highly-regarded but conservative, source of legal information. International examples include Community Legal Education Ontario (CLEO) which helps people work through legal problems in simple steps, offers practical guides and checklists and provides signposting information for referral. Legal Aid Ontario and legal aid in Kenya have both

developed apps to deliver similar services, while British Columbia's Ask JES (Justice Education Society) combines legal help guides, videos and 'live chat' or email about particular problems.

'There are two future critical moments to come in the development of interactive advice. The first will arrive when highly respected, but conservative sites like Citizens Advice move towards being more interactive. The second will manifest when relatively static guided pathways, pre-determined for a limited range of users, are blended with artificial intelligence to provide infinitely flexible means of conveying information and advice tailored to the needs of individual users.'

(SMITH, 2017A)

These developments are for citizens in need of legal help. In England and Wales the Legal Education Foundation has a website to provide a platform for practising lawyers, academics, and the third sector to form an on-line community to share best practice in assisting litigants in person (Smith, 2017a).

Virtual law firms

For some law firms, the logical extension of these technological advances is to reduce overheads by practising without a physical office or large numbers of support staff, relying on an interactive website and communicating with the client by telephone, email and Skype. Scott-Moncrieff and Associates Ltd is one such legal aid firm practising predominately in the London area with around 50 lawyer consultants.

'Lucy Scott-Moncrieff set the firm up in 1987, after the birth of her first child, as she wanted the flexibility of self-employment to combine work with motherhood. At that time, she was starting to specialise in mental health and human rights law, and for several years the firm expanded into other areas of social welfare law as word of mouth spread about the freedoms and benefits of working for a virtual law firm.'

(SCOTT MONCRIEFF & ASSOCIATES, 2017)

Such examples of virtual practice or e-lawyering go far beyond encouraging clients to interact with the firm by email. It is a form of legal practice which helps lawyers who for family or other reasons wish to work flexible hours, and can help to break down the barriers caused by the geographic location and office hours of traditional legal practice. Such an approach may well come more common in both private and third-sector practice over the coming 10 years.

Individualised help with legal processes

Even more challenging for the legal profession are cognitive computing packages that take the user through a whole legal transaction from triage to outcome, without the need for a lawyer. The most advanced of these was the Dutch Rechtwijzer. Established by the Dutch Legal Aid Board as an innovative response to the 'more for less' challenge, this took the user who was considering a divorce or separation through an online guided interview leading to the drafting of a separation agreement. Users of the package were directed to mediation in appropriate cases.

'The Dutch Rechtwijzer, after a short pause, has been reborn - with, at least initially, a stronger Dutch orientation and less of the international razzamatazz. There has been some tweaking of the product - but the changes are designed only for improvement. The basic package remains untouched. Behind the scenes, the organisational structure has been streamlined in order to add flexibility.'
(SMITH, 2017B)

A particularly innovative feature was that when the document drafting software produced a separation agreement that the users were happy with, it was sent to an independent lawyer to check that its provisions were fair to both parties. This is an example of a truly disruptive

technology in that it did not merely automate an existing process, but used the opportunities of technology to produce a new and innovative form of service. Rechtwijzer attracted global interest and admiration from legal aid authorities and spawned similar packages in British Columbia (MyLawBC), Victoria and England and Wales.

Online dispute resolution

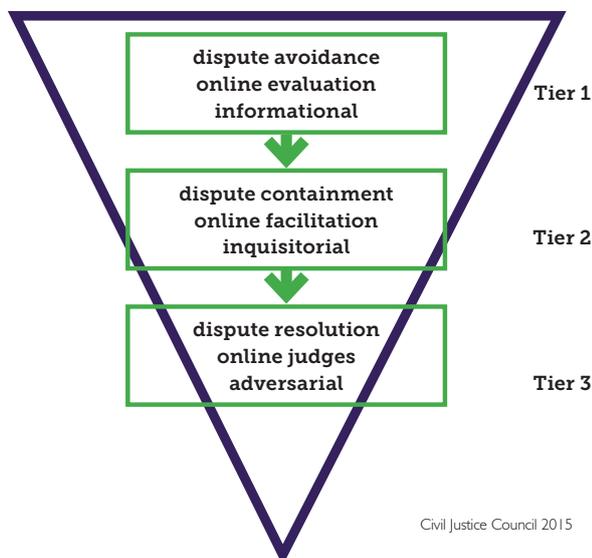
Rechtwijzer, discussed above, incorporates an element of online dispute resolution. Initially, court interest was in 'back office' computing – electronic case and project management. These featured in a range of digital justice initiatives in western countries, but suffered from repeated failure to invest. An experiment in expert systems was the electronic Sentencing Information System built for the high court by Strathclyde University (Hutton, et al., 1996). More recently, the Scottish Digital Strategy contains a major proposal to transform court processes through an electronic Integrated Case Management System (ICMS) (Scottish Government, 2017h).

Technology can be harnessed at a number of stages in litigation to support the values of just, proportionate and accessible courts (UK Ministry of Justice, 2016). Money-Claim online was launched in 2002 in England and Wales, enabling those with unpaid debts up to £100,000 to pursue and enforce claims online without legal help. On-line filing of actions has also emerged in a number of jurisdictions. The 2017 Scottish Digital Strategy envisages a Civil Online portal which will enable litigants to submit simple procedure cases online, lodge and oppose applications online, track cases online and update the ICMS with documents in the case (Scottish Government, 2017h). The Scottish Civil Justice Council considers that there should be:

'... a system-wide shift, from a default of paper-based processes with occasional options for electronic processing bolted on, to a presumption that every procedural step in litigation should be conducted electronically.'
(SCOTTISH CIVIL JUSTICE COUNCIL, 2017)

The operation of legal aid will have to mirror the procedural changes in the courts, but the Council notes that party litigants and the digitally excluded are likely to encounter access issues if a paper-based procedure is not retained.

Video links to prisons and police stations have the capacity to reduce costs and non-attendance rates for accused in custody. In larger or more complex cases, document display systems, electronic presentation of evidence, electronic document discovery, electronic bundles of documents and legal authorities (now routine in the UK Supreme Court), and the application of machine intelligence to the scrutiny of massive documentary records are now frequently in use. The Evidence and Procedure Review in 2015 recommended using technology to ensure that evidence is gathered early in the proceedings, reducing the need for witness appearances in court. This will boost the case for virtual courtrooms and further reduce legal aid expenditure on witnesses and waiting time. However, the new emphasis on the early availability of evidence and the need for solicitors to analyse this evidence at an early stage and then communicate with the client about an appropriate plea before engaging with the Crown Office and Procurator Fiscal Service may have an influence on the factors to be taken into account in applying the interests of justice test (Scottish Courts and Tribunals Service, 2017a).



Online dispute resolution received a further boost from the Susskind report on online courts. This recommended a three-tier service:

- Tier 1 is triage and dispute avoidance.
- Tier 2 is online facilitation where non-lawyer mediators and specialists will reduce or eliminate the range of issues dividing the parties – dispute containment.
- Tier 3 involves judges working online using documents and evidence provided electronically with provision for video or telephone conferencing.

The proposals in Richard Susskind's report were largely endorsed by the Briggs report (Lord Justice Briggs, 2016) on online courts in 2016 – not least because of the potential savings that might accrue. In various jurisdictions, on-line courts have begun to appear, and the success of on-line dispute resolution has been evidenced by the success of the eBay dispute resolution system which handles around 60 million disputes a year globally. In the foreseeable future, artificial intelligence diagnostic tools will assist litigants in presenting their case and predictive programmes will forecast the likely outcome of a case. Without the flexibility argued for in this review any legal assistance authority will struggle to keep up.

Resourcing innovation

Innovation needs commitment, buy-in and resources, both financial and human. When it's associated with IT innovation, that resource can be costly, with benefits not realised for some time. Publicly-funded legal assistance is no different, and the investment constraints present significant challenges in developing innovative approaches to service delivery. Private firms investing in innovation, whether IT related or not, aim to develop a business that can outperform their competitors and generate greater profits. They risk the human and financial capital needed and hope to realise the benefits in a shortest space of time, and so recoup their investments.

In the publicly-funded legal assistance sector, the diverse nature of service provision, and the low

staffing numbers do not lend themselves easily to freeing up the human resource needed to innovate. In addition, the financial investment is hard to find. This could be seen as a form of market failure, where the operation of a market results in a net loss in social welfare.

Corporate social responsibility

Corporate social responsibility (CSR) is sometimes referred to as 'corporate citizenship' and can involve *'incurring short-term costs that do not provide an immediate financial benefit to the company, but instead promote positive social and environmental change'*. (Investopedia, 2017). Successful commercial law firms in Scotland might like to consider working with the Law Society of Scotland or individually to provide financial support or support in kind through their staff to help build 'just in time' legal information and advice products in the social welfare field. Over the near future, there will be a growing number of such products in more commercial areas of law, which could be commercially successful and repay the time and money need to build them. There may be social welfare products in larger legal jurisdictions, where small amounts of income from a very large number of users could similarly make the products a viable commercial proposition, albeit still with considerable risk of failure. However, in a small jurisdiction that is less likely to happen and hence the need for CSR and public investment.

CivTech

The Scottish Government has set up the CivTech challenge scheme to harness new technology by driving innovation in the public sector by working in collaboration with the private sector (Scottish Arbitration Centre, 2017). The CivTech 2.0 challenge has selected relationship breakdown as its first topic (Scottish Government, 2017i). This single life event is complicated and generates a high level of searches on Google. It often has links with other topics such as housing rights, legal rights about children, and benefits. Information on these topics comes from multiple sources across a range of organisations and service providers. The Scottish Government has invested £30,000 in this project, which was met from the budget allocation for the previous financial year.

This CivTech 2.0 challenge seeks to make connections with services that already exist and ensure that people are aware of their options, from the informal, such as alternative dispute resolution [ADR], and to the formal, such as court proceedings (Scottish Government, 2017i). They are involving stakeholders, in particular frontline service providers across the third sector, to help refine the challenge and develop the solution. This challenge demonstrates how powerful a combination of human expertise, relatively small amounts of funding and private/public partnership can be.



Strategic Aim 5

Invest in service improvement, innovation and technology

Rethinking improvement and innovation

I find that significant change management support is required for the publicly-funded legal assistance service. The challenges of the near future will require all of those currently involved in the system to innovate and for innovation to be funded and rewarded. That should be done through an allocation of funds that will help provide seed funding to develop innovative approaches to service delivery through support for service providers. The saving in the legal aid budget (identified earlier in the review) should be invested in service improvement and innovation within publicly-funded legal assistance.

Strategic Aim 5 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
50	The Scottish Legal Assistance Authority should work in partnership with the Improvement Service to understand how knowledge hubs and innovations exchanges, to name but two, work in practice, and how they might be adapted to publicly-funded legal assistance services.		✓		Improvement services Improvement Services for local government
51	There should be an active public policy to promote a 'channel shift' for signposting, referrals, advice and information from the current default of face-to-face and telephone to on-line, while ensuring that face-to-face remains for vulnerable groups or those who struggle to access digital technology.	✓	✓	✓	Third sector
52	Citizens Advice Scotland should be assisted financially and with expert help to make its online advice interactive for the public.	✓	✓		Citizens Advice Scotland
53	The regular review of fees should include a focus on technological change and how that is impacting on the operation of the system, and any changes this then requires.	✓	✓		
54	The saving in the legal aid budget (identified earlier in the review) should be invested in service improvement and innovation within publicly-funded legal aid and assistance.	✓			
55	There should be competitively procured investment in 'just in time' legal information and advice online platforms. These online platforms should be jointly developed with legal professional pro-bono assistance in kind, and commercial legal firms should be encouraged to consider funding these as part of their corporate social responsibility activities.	✓	✓	✓	
56	Successful commercial law firms in Scotland should consider working with the Law Society of Scotland or individually to provide financial support and/or support in kind through their staff to help build 'just in time' web-based legal information and advice in the social welfare field.			✓	Third sector



STRATEGIC AIM 6: Establishing effective oversight

Implementing the vision of my review will require both policy change and an organisation to deliver that change. At present, the Scottish Government is responsible for setting the policy, and the Scottish Legal Aid Board is charged with delivering it.

The responses to my call for written evidence contained some muted negative comments about the Scottish Legal Aid Board, mostly relating to allegations of unnecessary bureaucracy and the attitude of the Board towards legal practitioners. However, when discussing the Board's role and work privately there was a greater degree of overt negativity and even animosity. It has to be said, though, that there were also some very positive comments from the legal profession about the work and value of the Board.

Scottish Legal Aid Board has been required to reduce its costs over the last 10 years. While there has been some year by year variation over that time the current outturn costs are now around 10% lower (without inflation).

Some of the criticisms are unfair. For example, frequently expressed frustration over delays in processing legal aid applications are not solely down to the Board. Gaining access to the information from clients by solicitors and then passing that on to the Board appears, from these statistics below, to be a far more significant cause of delay.

There is always likely to be a degree of tension between a body which decides on the legal merits and the value of a claim for legal aid fees, and the

SLAB grant in Aid outturn and funding	Outturn	
	07/08	16/17
Staff costs	£8.4m	£8.8m
Running costs	£3.9m	£2m
Capital expenditure	£0.3m	£0.1m
Total before pensions	£12.5m	£10.8m
Pensions	£0.6m	£1m
Total GIA spend	£13.2m	£11.8m

Timescales in processing legal aid

	SLAB processing (average)	Total Duration (average)
Civil legal aid	19 days	47 days
Summary criminal legal aid	0.8 days	9 days
Solemn criminal legal aid	0.2 days	5 days

(Scottish Legal Aid Board, 2017b)

applicants. However, much of what appears to lie at the root of the frustration with the Scottish Legal Aid Board was the level of legal aid fees. Fees are a Scottish Government policy issue and not set by the Scottish Legal Aid Board. This was not often recognised by the lawyers I spoke to, or even by some of their representative bodies. In contrast, the Scottish Legal Aid Board appears to be held in high regard by those who are involved in the third-sector advice service grant-funded projects.

The relationship between the Scottish Legal Aid Board and Law Society of Scotland does not appear to be a strategic one. Again, the issue of fees seems to dominate and it would be to everyone's advantage if that relationship could be improved. The same tension does not appear to exist between the Scottish Legal Aid Board and the Faculty of Advocates, nor with advice providers that receive grant funding. My recommendation for an evidence-based process for future fee setting is intended, in part, to assist in resetting the relationships between the Board and the legal profession's representative bodies.

The relationship between the Scottish Legal Aid Board and the Scottish Government is a strong and constructive one. Importantly, the Scottish Government has confidence that the Scottish Legal Aid Board is assiduous in its oversight of value for money within the system. That means that the Scottish Legal Aid Board not only has the trust of the Scottish Government, but that its advice to Ministers has credibility.

'It (SLAB) has an ongoing and vital role in safeguarding public money. It saves the taxpayer more than £40m a year by only granting applications that meet the statutory tests, controlling ongoing costs of cases and minimising fraud and abuse of legal aid.'

(SCOTTISH GOVERNMENT, 2011A)

Options for the future

Looking to the future, it is right that I considered the main options for implementation and delivery of policy within its remit. There were three broad options open to me:

1. Return delivery of legal aid to the Law Society of Scotland
2. Take delivery of legal aid into the Scottish Government
3. Retain delivery of legal aid by some form of arm's length body (ALB)

In 2011, a Committee of the Law Society of Scotland argued for option 1, a return to the Society of the powers of the Scottish Legal Aid Board over legal aid (Law Society of Scotland, 2011). This would take us back to the situation before the Royal Commission on Legal Services in Scotland, which reported back in 1980. It would be a very retrograde step and would be likely to significantly reduce public trust and Scottish Government confidence in the administration of legal aid. I reject that option. This leaves options 2 and 3.

There are examples of a legal aid funding body being brought inside the Government, which is option 2. The clearest and closest example is in England. The Legal Service Commission (LSC) was established under the Access to Justice Act 1999 to run legal aid in England and Wales. The status of the Legal Services Commission became problematic *'through a lack of clarity around the policy role of Ministers and the Ministry of Justice (MoJ), as well as problems associated with accountability'*. (UK Ministry of Justice, 2011)

The Legal Service Commission was abolished in 2011 and all relevant functions and responsibilities for the administration of legal aid were transferred to the Lord Chancellor, that is, taken into the UK Government as in option 2. In creating the Legal Aid Agency, the policy aim was:

'... to tighten financial control of the legal aid budget (funded through Ministry of Justice), improve accountability for policy decisions, as well as linking legal aid policy-making in the context of wider justice policy issues, and reduce organisational barriers.'

(UK MINISTRY OF JUSTICE, 2011)

The Bach Commission on Access to Justice was founded at the end of 2015 to develop *'realistic but radical proposals with cross-party appeal for re-establishing the right to justice (in England) as a fundamental public entitlement, equivalent to that of education or healthcare'* (Lord Bach, 2017). The Fabian Society acted as the secretariat to the Commission. Its final report was published in 2017. The Bach Commission recommended the Legal Aid Agency should be replaced with a body at arm's length from government. They were concerned that the erosion of high-quality, independent decision-making, whether real or perceived, had significantly damaged the integrity of the justice system and access to justice in England.

Most European jurisdictions, with the exception of Finland, reduce the risk, perceived or real, of government interference with individual legal aid grants by creating functional distance between policy setting and implementation. The International Legal Aid Group (ILAG) general view is that legal aid authorities which are outside government are in a stronger position to engage with the media, form alliances with other stakeholders, respond critically to consultation papers, and to appear before parliamentary committees. This independence is strengthened in Scotland by the CEO of the Scottish Legal Aid Board being the accountable officer to the Scottish Parliament. I do not recommend option 2, taking the function of the Scottish Legal Aid Board into the Scottish Government.

Arm's length body

The Institute for Government published a report in 2010 entitled *Read Before Burning*. The report examined the value to society of what have been rather disparagingly called QUANGOs (Quasi Autonomous Non-Government Bodies Organisations). The Institute preferred the term arm's length body.

'We use the term "arm's length bodies" (ALBs) to refer to organisations that are part of the state but do not operate within traditional departmental structures.'

(INSTITUTE FOR GOVERNMENT, 2010)

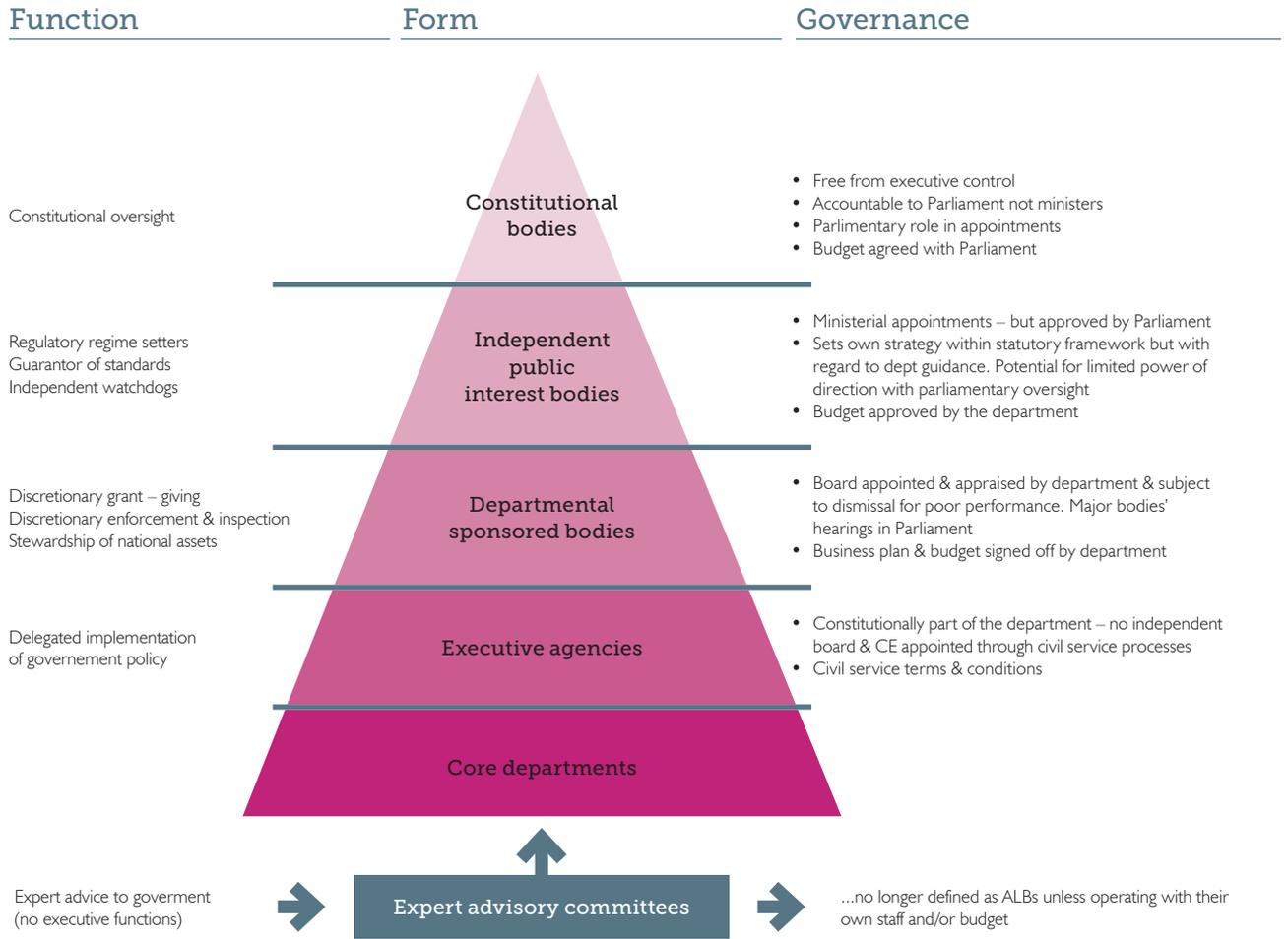
I also prefer the term arm's length body. The Institute for Government concluded there should be three broad categories of ALBs:

1. Constitutional bodies which would answer to Parliament, not ministers;
2. Independent public interest bodies (regulators, standard setters and watchdogs of government activity) which needed to be protected from ministerial interference; and
3. Departmental sponsored bodies which would perform functions on behalf of a department – but have some discretion and, where it made sense, for staff not to be departmental civil servants.

The figure on the following page gives an outline of their thinking.

Any legal aid authority must have the trust of the sponsoring government department. Paradoxically, this means that the more independent the legal aid authority is of the Government, the closer contact it must have. In a demand-led, uncapped system, the application and accounts decisions of the legal aid authority can legitimately result in expenditure exceeding the provision for legal aid made by government, but the authority has to ensure that the Government is kept aware of the situation.

A new taxonomy for arm's length bodies



Source: Institute for Government

The authority based in an effective legal aid body is balanced by the need for regular and open contact on the basis of 'no surprises', particularly on budget issues.

In addition to its funding role, a legal aid body can also be a source of support and information for the legal profession, providing advice on accessing legal aid and how to navigate through the complex fee structures. A consequence of the role it plays and the responsibilities it has is that a legal aid body will have important oversight of the way in which the legal aid and assistance service works. It knows what the strengths of the system are, and where it could be improved. That brings with it a keen understanding of the needs of the users and the ways of working of the service providers.

Not only does a legal aid body deliver Scottish Government policy, it has a statutory duty to advise Ministers on how that policy is working. Delivering these responsibilities can be challenging – on the one hand, acting as gatekeeper to legal aid and on the other, as holder of the purse strings. It has a responsibility to those who deliver legal aid, and also a responsibility to ensure that requisite standards are met. Above all, it should have a focus on the interests of the public and individual citizens as user of legal aid.

A legal aid body will have unequalled oversight of the way in which the legal aid service works, both for the user and for service providers. It gathers and publishes data. The recommendations made by me recognise that oversight, and aim to harness it for the good of the user. It is a public body, and along with other bodies, must work collaboratively and deliver best value.



Strategic Aim 6

Establishing effective oversight

Rethinking oversight

It is time to attempt to give greater flexibility to the delivery of publicly-funded legal assistance policy and to find way to improve relationships with the profession and raise the profile of legal help and support services with the public. If the ambition of this review to have a user-focused service is to be realised, then an independent public interest body must drive that change. It would, therefore, be valuable to signal the changes recommended in this review by transforming the Scottish Legal Aid Board into what I have tentatively called the Scottish Legal Assistance Authority. The change would be significantly more than tokenistic. The new Authority would have real and new powers, and duties which are reflected through many of the recommendations in the previous sections of the review.

I am recommending that the statutory framework for legal aid is revised. This is an opportunity to ensure the framework gives the new Scottish Legal Assistance Authority powers to drive legal assistance service provision across Scotland in an active and effective way. The Scottish Legal Assistance Authority should have greater strategic responsibility for support and improve the quality and effectiveness of the mixed model of service provision, including the third-sector advice services. In delivering the new responsibilities, the new Authority should also operate as a facilitator, drawing together the various interests across the advice and information provider services to create a shared vision and shared ownership of the new legal assistance service. Working collaboratively can only strengthen the positions of all involved in the system and drive up the public trust of the system.

In short, the new Authority should be an 'independent public interest body' in the taxonomy of the Institute of Government. This will be a risk for the Scottish Government but the rewards will outweigh the risks. The reward is intended to be a Scottish Legal Assistance Authority that can ensure the outcomes from the National Performance Framework are delivered.

Strategic Aim 6 recommendations and lead agencies		Scottish Government	Scottish Legal Assistance Authority	Legal profession	Other
57	There should be a new arm's length public delivery body called, in this report, the Scottish Legal Assistance Authority.	✓			
58	The new Scottish Legal Assistance Authority should have overall responsibility for the delivery of publicly-funded legal assistance, along with powers to monitor and quality assure delivery, monitor access and adjust the delivery model in response.	✓			
59	The new Scottish Legal Assistance Authority should provide Parliament with a memorandum on the likely financial and service impact of any new Bill with regard to legal aid and legal assistance.	✓	✓		
60	The new Scottish Legal Assistance Authority should have a statutory responsibility to monitor expenditure for the purpose of putting in place spending controls.	✓			
61	The new Scottish Legal Assistance Authority should have statutory responsibility to monitor and report on expenditure and take up of publicly-funded legal assistance.	✓			
62	The process for making changes to the publicly-funded legal assistance service should be more flexible and permissive, providing the new Scottish Legal Assistance Authority with more powers to make evidence-based and justified adjustments to the system.	✓			
63	The new Scottish Legal Assistance Authority should be required to deliver changes to the system within a consultative, transparent and accountable process.	✓			
64	All board members on the new Scottish Legal Assistance Authority should be appointed under public appointment rules.	✓			
65	The new Scottish Legal Assistance Authority should lead efforts to ensure that the availability of publicly-funded legal assistance is more visible to the public.	✓	✓		
66	The new Scottish Legal Assistance Authority should establish a consumer interest panel.		✓		
67	The new Scottish Legal Assistance Authority should draw up guidance and advice for the creation of local advice service plans by Community Planning Partnerships.		✓		Local authorities Community planning partnerships

Appendix 1:

Respondents to the call for evidence

- Andrew Muir
- Mr Barry J S Gale
- Citizens Advice Scotland
- Clan Childlaw
- Crown Office and Procurator Fiscal Service (COPFS)
- Mr David Bell
- Edinburgh Bar Association (unpublished at their request)
- Equality and Human Rights Commission
- Faculty of Advocates
- Family Law Association
- Glasgow Bar Association
- Judges of the Court of Session
- Law Society of Scotland
- Legal Services Agency
- McKenzie Friends Plus
- Mental Welfare Commission for Scotland
- Relationships Scotland
- Scottish Arbitration Centre
- Scottish Association of Law Centres
- Scottish Environment Link's Legal Governance Subgroup
- Scottish Women's Aid
- Shelter Scotland
- Shetland Women's Aid
- Support@Work

Appendix 2: Organisations involved in discussions with the review

Aberdeen law project	Money Advice Scotland
Age Scotland	People First Scotland
Big Lottery	Public Defence Solicitors' Office
Child Poverty Action Group	Police Scotland
Citizens Advice Scotland	Queen Margaret University Dispute Resolution Centre
Civil Legal Assistance Office	Relationship Scotland
Clan Childlaw	Royal Faculty of Procurators in Glasgow
Community Justice Scotland	SACRO
Con Cunningham Solicitors	Scottish Arbitration Centre
CoSLA	Scottish Association of Law Centres
Crown Office and Procurator Fiscal Service	Scottish Courts and Tribunal Service
Dean of Faculty, Edinburgh	Scottish Legal Aid Board
Edinburgh In-Court Mediation	Scottish Mediation Network
Families need Fathers	Scottish Public Services Ombudsman
Glasgow Bar Association	Scottish Refugee Council
Glasgow City Council (community justice)	Scottish Society of Solicitors in the Supreme Courts
Haddington In-Court Advice	Scottish Women's Aid
Includem	Scottish Women's Rights Centre
Independent Living in Scotland	Shelter (Scotland)
Judicial Institute for Scotland	Sheriff Courts, (Glasgow, Kilmarnock and Perth)
Law Society of Scotland	Society of Advocates (Aberdeen)
Legal Education Foundation	Strathclyde Law Clinic
Legal Services Agency	Turning Point Scotland
Legal Spark	Who Cares Scotland
McKenzie Friends Plus	Women's aid groups in Shetland, Aberdeen, Edinburgh and Grampian.
MECOPP	
Mental Welfare Commission for Scotland	

Appendix 3: Early resolution and advice programme (ERAP)

Programme / Stream	Lead agency	Project name	Court Location
ERAP Stream 1	Haddington CAB	Haddington In-court Advice Project	Edinburgh Sheriff Court (for East Lothian clients)
ERAP Stream 1	Ross & Cromarty CAB	North Highland Housing and Homelessness Project	Tain, Wick and Inverness Sheriff Court (for North Highland clients)
ERAP Stream 1	CHAP	Ayrshire Homelessness and Prevention Service	Kilmarnock and Ayr Sheriff Courts
ERAP Stream 1 & 2	Dumfries & Galloway CAS	Dumfries and Galloway In-court Advice Service	Dumfries and Stranraer Sheriff Courts
ERAP Stream 1	Argyll & Bute CAB	Housing Debt & Money Advice Service	Completown Sheriff Court, Dumbarton Sheriff Court, Dunoon Sheriff Court and Oban Sheriff Court
ERAP Stream 1	Moray CAB	House Keeping	Elgin and Inverness Sheriff Courts (For Moray Clients)
ERAP Stream 1	Shelter	Shelter Scotland Housing Law and Debt Advice Project	Dundee, Perth, Stirling, Falkirk, Alloa, Forfar Sheriff Courts Jedburgh and Selkirk Sheriff Court
ERAP Stream 1	Castlemilk Law and Money Advice Centre	Housing Debt and Money Advice Project	Glasgow Sheriff Court
ERAP Stream 1 & 2	Airdrie CAB	North Lanarkshire Community Legal Services Project	Airdrie Sheriff Court

Programme / Stream	Lead agency	Project name	Court Location
ERAP Stream 1	Community Housing Advice Initiative (CHAI)	EHAP Court Representation & Money Advice Service	Edinburgh Sheriff Court
ERAP Stream 1	Frontline Fife	Fife Advice Partnership	Kirkcaldy, Dunfermline and Dundee Sheriff Courts for Fife Clients
ERAP Stream 1 & 2	Hamilton CAB	Your Home Your Money	Hamilton and Lanark Sheriff Courts
ERAP Stream 1	Gordon Rural Action	Gordon Rural Action In-Court Advice and Representation Service	Peterhead, Banff and Aberdeen sheriff courts for people living in Aberdeenshire
ERAP Stream 1 & 2	Western Isles CAB	Western Isles Court Services Project	Stornoway and Lochmaddy Sheriff Courts
ERAP Stream 1 & 2	West Lothian Council	West Lothian Court Project	Livingston Sheriff Court
ERAP Stream 1 & 2	East Ayrshire Council	Kilmarnock In-Court Advice Project	Kilmarnock Sheriff Court
ERAP Stream 2	Dundee CAB	Tayside In-Court Advice	Dundee, Perth, Arbroath & Forfar Sheriff Courts
ERAP Stream 2	Citizens Advice Edinburgh	Edinburgh In-Court Advice Project	Edinburgh Sheriff Court
ERAP Stream 1 & 2	Orkney CAB	Orkney In-Court Advice Project	Kirkwall Sheriff Court
ERAP Stream 1	Renfrewshire CAB	Greater Renfrewshire Advice for Debt and Eviction (GRADE)	Paisley Sheriff Court

Appendix 4:

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