

**SCOTTISH GOVERNMENT: EXPERT ADVISORY PANEL  
CIVIL LEGAL AID**

**NOTES**

**INTRODUCTION: The Expert Advisory Panel was set up by the Minister for Community Safety to consider “the legal aid payment framework and advice for reform”.**

In connection with the work of the Expert Advisory Panel, I have drafted some rough notes on:

“The specific professional role of law centres within our judicial system, the benefits that the current payment framework bring, the inconsistencies and challenges that the profession encounters and what the Scottish Association of Law Centres’ members see as the priority for the Expert panel”

The notes are at a “high level” and are not intended to cover all the issues.

I do not discuss the specific needs of the legal profession as a whole: which are, of course, entirely legitimate and need to be addressed.

These notes are particularly orientated towards the concerns of law centres **tackling the unmet legal needs of those in disadvantage.**

The primary areas of work are housing, homelessness, specialist areas of family law, mental health, immigration/asylum and general social welfare law.

A. The specific professional role of law centres.

Law centres are charitable organisations tackling the unmet legal needs of those in disadvantage.

The Payment Panel is, of course, addressed to the legal aid payment framework.

It is, however, worthwhile explaining, briefly, the structure of law centres first.

Law centres are charities, generally ultimately accountable to non-lawyers: often including community and “consumer” representatives. Under current

arrangements, such an organisation cannot directly employ solicitors who are also using the legal aid system.

Accordingly, all law centres in Scotland employ a **firm** of solicitors, which is independent professionally and independently insured and regulated: a firm which generally functions vis-à-vis the public as a private firm of solicitors.

The particular organisational feature of this framework is direct accountability to a charity, as well as grant givers (of which more, much more, later), as well as professional independence.

The role of the charity is to provide direction, funding and accountability. The charity maintains the centre's vision and provides very much more accountability than could possibly be achieved by a private firm, whose ultimate (but, of course, not sole) objectives are profit.

Generally the effect of this is that law centres, in tackling "the unmet legal needs of those in disadvantage", aim to address **market failures**: particularly the gaps that affect the communities or individuals for which they care.

Most law centres have three key features.

- The first is that the areas of unmet legal need identified coincidentally are those areas of law that have developed along with the welfare state in the past 50 years or so. In general, although not exclusively, the remedy is to a specialist tribunal and, possibly, a statutory appeal or Judicial Review to the Court of Session. The main exception is, of course, public sector housing law, which goes through the Sheriff Court. These remedies are largely funded by the legal aid system through one version or the other of the Advice and Assistance scheme, ie fairly skimpily. A fundamental issue is that, without any justification, these areas have low status. They have been called the 'Cinderella' areas.

The arrangements are very different from more traditional areas of law where the Advice and Assistance scheme is only aimed at starting a case off: in reparation and family, for instance, the Advice and Assistance scheme will speedily move on to the much more generous support of full Civil Legal Aid. Another feature is that, on success through a tribunal system in a money case, the unsuccessful party will not be liable for the successful party's expenses ie the client pays all their legal costs in many cases. These arrangements can work, in many circumstances, it means

that the relationship of solicitor and client can end up by being quite different from standard litigation.

### Background to the financial impact of the above

Key features of the Advice and Assistance scheme include significant financial constraints:

- initially, an authorised expenditure of generally only £95,
- an hourly rate of slightly over £50 maximum,
- half rates for first year trainees,
- no fee for legal research or complexity
- and a set of caps to the maximum payment per case which it can be difficult to overcome.
- clawback

Working a normal week, with appropriate support, “downtime” and training, it is difficult to gross fees of more than £30,000 to £40,000 a year.

Significant amounts of work are not remunerated at all and inevitably there are significant “abatements” to accounts. In the past, this area of work was supported by cross-subsidisation. This is now much more difficult. Current practice to make it commercially viable is, now, however, sometimes at the expense of best practice, or lifestyle, or both, ie solicitors risk ending up working too fast for too many hours travelling too far. In the most highly stressed areas, they tend not to last very long. Private firms, of course, encounter the problems caused by the Advice and Assistance scheme in the same way as law centres. They both, of course, oftentimes employ highly committed and skilled lawyers, however, if financially supported only by the Advice and Assistance scheme, work conditions can be very harsh. This is, at the end of the day, probably not a criticism of anybody: it is largely the financial reality. It does have to be said, however, it is difficult to make a detailed analysis as, unusually for a public service, the accounts of individual supply units (law firms) are not available.

Quite how much profit is extracted from firms operating in the ‘Cinderella’ areas is not only not known, accordingly, but also goes along with the almost complete absence of any trade union consciousness far less presence.

The ‘Cinderella’ areas particularly affect the most vulnerable clients,

whether they be asylum seekers, trafficking victims, low paid workers, homeless, victims of crimes of violence or people with housing problems.

Court reform (reducing the number of better remunerated Ordinary actions), the generally increasing complexity of the law and the need for increased specialisation have meant that cross-subsidisation of the Cinderella areas has declined sharply over the last five years.

It is, accordingly, not unsurprising that there is unmet legal need in these areas as generally undertaking work in a civilised way solely remunerated by Advice and Assistance does not meet its costs. Of course, even if it did meet its costs, many private firms would find private fee paid work at two, three or four times the Advice and Assistance rate rather more attractive anyway.

- As a consequence of the dependence for Cinderella work on Advice and Assistance, the second feature is that, in order to survive, most law centres not only use the Advice and Assistance scheme but also receive **grants**.

Most law centres' core funding is from local authorities (predominantly Glasgow City Council) and the Scottish Government. Law centres also apply for Trust and charity funding, however, this tends not to have the same level of reliability that local authority and Scottish Government funding has.

SLAB also provides funding for some specialist projects.

Provision of law centres however is patchy to say the least.

- The third feature of law centres' work is their engagement in legal areas where there is lack of traditional interest, an unidentified new remedy, some novelty or an area where "adjustments" are necessary as a consequence of clients with protected characteristics. This includes, but is not restricted to clients with severe mental health issues, including anxiety as well as language or cultural differences.

One example of novelty was when law centres started off, there were very few firms doing defender rent arrears' cases and this is still largely the case.

Another example is that law centres were among the first to address the needs of people with an incapacity or mental health problem. Law centres were among the first to provide "downmarket" Financial

Guardianships and detention representation. Law centres, at points, have undertaken a disproportionately large amount of Judicial Review.

This is in spite of the fact that some of these areas are satisfactorily paid and if private firms are interested they can move into these fields commercially.

This raises a key point: law firms profit seek and merely paying enough for them to survive will not always mean that they will do the work. A law centre committee on your back is another matter. It maintains the vision.

### **Who are the law centres?**

It is worthwhile having quick gander through the identities of the ten law centre or law centre type organisations in Scotland and, broadly speaking, what they do. This is just a crude summary and much of the fine detail will be missed out! I should add that not all the law centre type organisations are members of the Scottish Association of Law Centres, although we hope to correct that.

To avoid large amount of repetition, I will firstly defined my terms.

When I refer to “**housing**”, I refer to the following areas of work:

- Defended eviction in the public sector: generally for rent arrears or, to a lesser extent, anti-social behaviour. This is highly adversarial requiring detailed defences. In my view representation needs to be by someone who, qualified or not, is part of a full legal team including experienced solicitors.
- Defended mortgage repossession: almost entirely for mortgage arrears.
- Private Rented Sector: a range of issues going to the tribunal, including deposits, repairs and some defended eviction for rent arrears.
- Homelessness: including excessively lengthy stays in temporary accommodation, no temporary accommodation or no permanent accommodation, as well as rough sleeping. Generally leading to threats of Judicial Review and, sometimes further.
- Disrepair, allocations, neighbour disputes.

- Individuals with no or confused or difficult immigration status: a vast range of housing difficulties.

Whilst housing law is complex and involves high volume and high responsibility, there are few private firms who act for tenants but large number of whom do so for landlords.

It is worth providing some detail here.

The Civil Justice statistics for 16/17 (published 28<sup>th</sup> August 2018: Scottish Government) comment that eviction cases make up 19% of all civil court cases initiated in 16/17 (that is 14,304).

Over half of eviction cases were found for ‘Pursuer’ and 87% of cases were undefended (page 37).

In other words of those 14,304 over 12,000 of the tenants probably did not obtain representation. It appears that the over 7,000 would have lost their homes, probably unnecessarily.

There appears no direct way of establishing who provided representation in the smallish balance left. It must have been largely 4 or 5 law centres as well as possibly SLAB’s Civil Legal Assistance Offices. Some organisations provide representation by non lawyers and do not go to proof: figures on this issue would be useful. Possibly their work sometimes comes into the ‘undefended’ category.

It would, I believe, be fair to say that there needs to be substantially greater provision of law centres in this area and in my view this field represents the major justice deficit in Scotland. Whilst the figures have not always been available, this has probably been the case for several decades, it should not continue to be ignored.

When I refer to **immigration**, this would largely be:

- Advice and representation people to vulnerable asylum seekers, including those with high needs owing to religious or ethnic sensitivities or mental health issues.
- Trafficking victims with no status in the UK and an inability to return to their original home.

- Women and children of an insecure status owing to domestic violence or related matters.

**Mental health** law, of course, includes:

- Defended detentions and related compulsory treatment orders.
- Disputed Guardianships.
- Family disputes, housing difficulties.
- Discrimination and equalities.

All law centres apply human rights law to their area of specialism and increasingly equalities/anti-discrimination law. In almost all fields, law centres encounter sharply increased mental health and anxiety problems on the part of their clients, whether they are specifically coming within mental health law remedies or not.

Thus a quick gander through the ten law centre or law centre type organisations in Scotland and, broadly speaking, what they do:

- Castlemilk Law Centre: housing, Social Security, some employment law and debt law, some family and Criminal Injuries Compensation. Strong involvement in food banks and ‘outreach’.
- Govan Law Centre: housing, debt, Social Security and a specialist education law project. It has had a very strong PR presence which helpfully raised awareness of issues.
- Fife Law Centre: housing, Social Security, employment law and some general social welfare law. A wide geographical spread.
- Dundee Law Centre: housing, Social Security. Consistent court involvement for many years.
- Legal Services Agency (“LSA”): housing, some Social Security, mental health and incapacity, Criminal Injuries Compensation, immigration, some general social welfare law, equalities (in housing, CICA and social security).
- Shelter Scottish Housing Law Service: housing law (homelessness, defended eviction and private rented sector). Strong involvement in

policy and equalities.

- CLAN Childlaw: Children's Hearing matters, some family. Training and education.
- JustRight Scotland (incorporating the legal component of the Scottish Women's Rights Centre): immigration, preventing domestic violence and some housing.
- Ethnic Minorities Law Centre: immigration, discrimination and some employment.
- Airdrie CAB: North Lanarkshire Community Law Centre (debt and housing).

Law centres range in size from one solicitor in one office to up to 18 distributed across two offices.

Many law centres run free advice lines, training, seminars and publications. All have extensive outreach programmes.

In addition, law centres undertake a fair amount of lobbying and campaigning. In this, LSA has been very effective, indeed, some of the remedies that we deploy, for instance, the original Mortgage Rights Act, came from this lobbying.

Other examples include change through litigation, which has been responsible for significant changes to two sets of UK codes (Criminal Injuries Compensation and the Immigration regulations) within the last six months.

The Scottish Association of Law Centres has, of course, also been involved with a substantial amount of lobbying: not only as regards legal aid! This has included reforms to housing law and supporting class actions, for instance.

So, broadly speaking, law centres' professional role within the system is to address remedies which, whilst of importance to the client, are not sufficiently funded to prove attractive to private firms, either because the amount that can be earned is simply too modest, or because commercial or better remunerated areas push the less remunerated out. Law centres are, however, accountable to funders, members and Boards for what we do. That makes a real difference.

As I have said already, it is notable that virtually none of these remedies existed 50 years ago, whilst the better paid areas of law were in full swing well before then (family, commercial, conveyancing, reparation etc.). Indeed, the most high volume and, in some respects, complex Cinderella area: defended eviction in the public sector: only came into being as late as 1980.

## B. The benefits that the current payment framework brings.

Law centres currently receive funding for case work in a jumble of ways, only one of which is the legal aid system.

Whilst economies of scale, lower overheads and, of course, no profit taking can assist to reduce costs, broadly speaking, no law centre would exist without grants from local authorities or government.

For instance, Legal Services Agency is fairly fee conscious, however, in, say, the field of housing law, our grant, largely from Glasgow City Council, is about 25% more than our legal aid income. This is fairly typical of law centres, although I am not privy to all the details.

Each law centre is different and that is one of the strengths of the movement but it suffices to say that they all operate in accordance with a mixed economy model.

It might be thought that this would be a prelude to a moan about legal aid rates: and there certainly are challenges.

A mixed economy set up has marked advantage and has kept plenty of law centres, although most certainly not all, going without financial collapse for very much longer than many Civil Legal Aid firms. Castlemilk Law Centre is into its fifth decade, LSA its fourth (nearly), whilst Ethnic Minorities Law Centre, Govan Law Centre and Shelter Scottish Housing Law Service are not far behind.

Whilst most grants have remained static, law centres have sometimes been able to obtain further grants for further areas of work.

In most of the areas of law centre work, policy makers at national or local government level are fully aware of the crucial role that we play and have, at least so far, no intention of letting us disappear: although concerns have arisen.

So, speaking broadly, it appears that a core grant system, providing it is maintained and reliable is a sound foundation for building legal aid income.

One might ask, why bother with legal aid at all?,

Legal aid has a number of fundamental features which enable law centres to, in some areas, provide a service that would be completely impossible otherwise.

#### C. The legal aid system.

- Pays for outlays, medical reports, architects reports, photographs and so forth: crucial in the armoury of the good lawyer in virtually every field.
- Meets the cost of Counsel. Law centres have an excellent relationship with the Scottish Bar.
- Pays for interpreters and translators in the very high volume indeed.
- Fundamentally for litigation, when a full legal aid certificate is available, this protects against the award of expenses against an unsuccessful legally aided litigant (for example, defended eviction).

Legal aid is obviously also an important guarantee against failure in the funding of lengthy and complex cases that would be virtually impossible otherwise. LSA has just seen the success of its case regarding Criminal Injuries Compensation to the Supreme Court. This will not cost legal aid a penny but could not possibly have happened without legal aid.

One cannot imagine an exclusively grant supported body being able to deploy these sorts of resources and take these sorts of risks.

Legal aid also means supply can expand as demand does and extra resources brought in (trainees being a very important example).

#### D. What if grants don't exist or are removed?

The fundamental challenge to anybody concerned by tackling unmet legal need is that, if grants are not available or are removed or reduced, the legal aid system can only supply a very modest cushion. Any examination of the way of working of virtually all law centres would show that, if the grant is removed, notwithstanding legal aid, the service will disappear too. Law centres in general would not be prepared to work at the constant sprint combined with cherry picking only the most remunerative work which is required for anyone undertaking Cinderella area work funded by the Advice and Assistance scheme only.

The fact that a grant is necessary, largely from the local authority, means that the tackling of legal need Scotland is heavily dependent on local authority decision making, although, of course, the Scottish Legal Aid Board's Civil Legal Aid Assistance offices deal with this in balance to some extent.

On this analysis, a mixed economy system is a requirement for tackling the unmet legal needs of those in disadvantage. Manipulating the market will be no answer unless legal aid payments on an hourly basis increase very substantially. To put this another way, I would reckon that Advice and Assistance payments should increase to more like £70 or £75 to meet costs, but that still **would not be enough to ensure that unmet legal need disappeared as better paid work would still push less well paid work out.** To avoid this, you would need to pay more like £100 to £150.

The advantages of the mixed economy arrangement are substantial: what surely is required is some sort of formal commitment to maintaining this and ensuring that there is no postcode lottery.

#### E. The priority for the expert panel.

The obvious first priority is the unsatisfactorily patchy nature of law centre provision.

Leaving aside SLAB's Civil Legal Aid Assistance offices, there are no law centres outside the central belt and Dundee. Attempts to maintain very small outfits in North Ayrshire, Dumbarton and Paisley met mixed success and we probably need to recognise that organisational size and consistency of funding were an issue here. Whilst Edinburgh has the benefit of some specialist projects, it has no generalist law centre. Edinburgh law centre strategy could do with a re-think.

In addition, there are some areas of law in which there probably is significant unmet legal need but in which there is little law centre activity, even within the central belt.

Some of these gaps include:

- Employment rights.
- “Domestic” tribunals, such as disputes before the SSSC.
- There is a proposal to set up an environmental law centre and Legal Services Agency is beginning to explore this area.

- Law centres are generally collectively beginning to explore “adventurous” public law remedies, however, fairly obviously, there are no organisations akin to Liberty, the litigation arm of CPAG or Public Law Project in Scotland.

Where does this leave us?

Law centres are very aware that “legal aid” covers a broad area.

Some areas of work are highly remunerative, some areas simply act as an “insurance” against failure in areas that are otherwise well remunerated, some areas are at least partially commercially viable and some areas not at all.

As a society committed to human rights, a “postcode” lottery is wrong. It is wrong that people at the end of the queue (generally the most vulnerable) cannot get services that others can.

It is wrong that a public service is provided by private firms with so little accountability. In general, of course, the quality of the Scottish legal profession is high. However, the consistency of coverage, accessibility for clients needing more time and patience and the availability of specialist remedies should all be subject to planning and accountability in just the same way as other public services are.

Law centres have been reasonably effective at identifying need, oftentimes long before “the market” did and we believe this is an important component of our work.

Law centres appreciate the long term support and flexibility that grants provide, as opposed to the oftentimes grinding nature of piecework based legal aid system.

So, we would, at the end of the day, aspire to a funding system that can support the particular way of working of law centres, as well as on an individual case work basis.

To put this another way.

It is quite clear that, on the one hand, market failure is not just a question of the amounts of money, ie level of legal aid for any particular topic, **the type of funding makes a difference.** Grants aid a developmental approach and support accountability.

On the other hand, a law centre movement only based on grants would not have the necessary flexibility for, particularly, litigation and outlays that the legal aid system so vitally supplies.

Given that as a society committed to the assertion of human rights for all, we would call for, in particular, a national grant system as well as an individual case legal aid system based on the fundamentals of the current arrangements.

PDB/SB April 2019