

## MEETING – 8 JANUARY 2020

### **INTRODUCTION**

Observations that I make in this paper are those of a civil legal aid solicitor. They are not necessarily representative of anybody or group of solicitors.

I found the meetings to be informative in many ways, particularly of how other sectors deal with the issue of “pay”.

### **BACKGROUND**

There is a general acceptance that the legal aid spend is on a downward increase. Certainly on the basis of lowering criminal prosecutions it could be understood why the spend is going down. That however is not representative of civil cases. Civil legal aid applications have risen over the course of the last 5 years (whilst acknowledging that Advice & Assistance applications are down). There remains a steady requirement for civil Advice & Assistance to be provided.

It appears to be acknowledged that (through the Peer Review system) solicitors are performing well. There is a general satisfaction with work provided.

What must also not be lost sight of is that of the civil legal assistance spend in the last year 2018/2019 of the gross figure of £50,863,000.00 there was “a recovery” of £10,291,000.00 so the net civil assistance figure reduces to a figure just over £40 million. Meantime the grants of civil Advice & Assistance continue at over 60,000 per annum yet civil Advice & Assistance cases paid is just over 50,000 suggesting that on average 10,000 grants per annum of civil Advice & Assistance which on average remain unpaid and to which no accounts have been submitted.

One concerning statistic is the amount spent on outlays. Currently (in the year 2018/2019) the figure spent on outlays was £13,588,000.00. This figure is 11% higher than 5 years previously. It is unclear from the statistics how many reports this refers to. Concern from civil solicitors is that there is a lack of control in relation to outlays. Only in certain areas it is the “figure” fixed by SLAB e.g. mental health reports.

*The figure of outlays represents more than one quarter of the gross legal aid spend per annum.*

### **THE CURRENT SYSTEM AND INTERACTION WITH LEGAL AID FEES**

There is no doubting that the current system is a complicated one. There are many different ways that fees can be charged depending on the nature of the case, it all adds up to a complicated system of feeing.

There is however much made of the use of the word “anecdotal”.

There is nothing “anecdotal” about lack of increase of fees generally over the course of the last 20 years.

It may be said that in 2003 there was a significant change to the way that civil legal aid was paid ie under block fees as opposed to time in line. It will be interesting to note what the average case was paid at pre 2003. Certainly the trend in the course of the last 5 years is downwards in terms of average case cost.

Taking one of the most commonly used time charges in civil Advice & Assistance, a solicitor is paid per quarter of an hour (or part thereof) “£13.14”. So a solicitor who conducts a meeting with a client for an hour is paid “£52.56”.

Travelling (if necessary in such an Advice & Assistance case) is paid at half of that rate ie £6.58.

There is nothing anecdotal about these figures. There are “real”.

## **IN COMPARISONS WITH OTHER AREAS – SHERIFF OFFICERS**

Sheriff Officers play an important role in the justice system. Whereas it is acknowledged that Sheriff Officers fees are dealt with in an entirely different manner in 2002 the fee for serving a charge was £72.90. That figure has recently been increased to £103.78.

Service of an interdict in 2002 was charged at £104.65 and is now £151.64. Effectively there has been the best part of 50% increase in fees for Sheriff Officers since 2002. I am not aware that there has been any suggestion that in order to assess what fees Sheriff Officers should be paid that there has been some wide ranging investigation undertaken of their business practices.

## **PAYMENT MODELS**

On a personal level I suspect that the profession would be surprised that one view that “as long as solicitors continue to do the work” could be advanced as a reason for non-review of the current model.

It is also clear that the vast bulk of legal aid work (both criminal and civil) is undertaken by a number of firms doing high volume work. There are many others who may well be registered to provide legal aid but do so to a limited degree and if all firms who provided less than £25,000 worth of legal aid work were removed from the statistics then the likelihood is that legal aid is being provided by some core firms.

The Law Society have provided “anecdotal evidence” of the difficulty of retention of trainees and indeed generally legal aid solicitors. It might be useful for some evidence to be obtained as to why legal aid solicitors do not remain within the profession.

What is also non-anecdotal is the age of the legal aid profession. Work has already been undertaken about this. The demographic is certainly that the average age of the legal aid lawyer is getting older. If there are to be solicitors working in legal aid in the future then one component of this has to be that they have a future. That future must

also provide for appropriate working conditions. Working conditions require that solicitors do not have to work an excessive amount of hours to cover other costs.

## **EVIDENCE BASED PROCESS AND METHODOLOGY**

I have tried to consider how an evidence based process and methodology can be achieved. It is not straight forward.

It in fact poses more questions than it answers:-

1. Are firms entitled to make a profit?

If the answer to the above is “yes” then what profit are they entitled to achieve?

2. How do you assess what is a “viable” payment?
3. Is private income to be a subsidiary for legal aid work?
4. What would “opening the books” of a solicitor’s practice actually show?
5. Is there not sufficient information contained within the civil legal assistance office in order to make an assessment of an average case cost. Although it is acknowledged that the civil legal assistance office does not undertake the broad range of cases, there would certainly be information about the amount of cases undertaken, the cost of rent, staff costs etc to make an assessment. Indeed an analysis of CLAO would not be conflicted with any private income.

In conclusion one might ask the following questions:-

1. Is it possible to find evidence to determine the right price?

If so what could that evidence be?

2. Are solicitors entitled to make a profit?
3. Do working conditions “particularly in terms of working hours require to be factored in?
4. Should a firm’s private income be a factor in any assessment?

## **OTHER ISSUES**

## 1 Outlays

Solicitors often have to meet upfront outlays because there is no mechanism to be reimbursed immediately.

Fundamentally I see no reason why a solicitors practice is are holding significant debit balances having paid for outlays that they are not in a position of recovering. Solicitors should not be funding the public purse.

### Current Regime

This may need to be clarified but my understanding is that under advice and assistance there is a provision for reimbursement of an outlay but the outlays has to be clearly above £150 and in addition there can of course not be an issue of clawback arising.

If a legal aid certificate has been granted again a reimbursement can only be sought where the outlays total more than £150. Of course no reimbursement can be obtained where emergency legal aid is being provided.

This presents a variety of issues:

1. There are issues such as the obtaining of marriage certificates, birth certificates etc normally which cost in the region of £15 and unless a party is married with nine children you are never going to hit the £150 limit.
2. Medical reports. Generally a GP report will be up to about £100. Again not sufficient to obtain a reimbursement.
3. Sheriff Officers' fees. In civil these can be significant. On many occasions they are raised in interdict proceedings where emergency legal aid is operating.
4. Expert reports. These are obtained under both advice and assistance and under legal aid. It has become more frequently nowadays for experts to indicate that they will not provide a report until the outlay is paid.
5. Indeed by its very nature reimbursement suggests that payment of an outlay has been made.

If there was “private client reality” operating then the client would be requested to provide the funds to cover these outlays, or a funding loan would be obtained or some other mechanism would be available to ensure the solicitor is not carrying the debit balance for the outlay.

There may be a variety of ways to deal with reimbursement of outlays and not a singular answer:

#### 1. Birth, Marriage and Death Certificates

The Registers of Scotland is presumably a Government agency. With the Scottish Courts Service where a party has emergency legal aid or a legal aid certificate an exemption form is put forward and the Scottish Courts’ “bill” for whatever fee it be, writ fee, motion fee etc is exempt.

If a party was subject to advice and assistance or alternatively had a legal aid certificate or emergency legal aid why can there not be a reciprocal arrangement with the Registers so that no fee is chargeable where a certificate is sought.

#### 2. Doctors’ reports

It is doubtful whether a reciprocal arrangement such as an exemption form would work with GPs where a medical report is being sought but one answer would be to lower the reimbursement level to over £50. That presumably would cover most GP reports.

#### 3. Sheriff Officers’ fees

There is perhaps a greater discussion to be had about Sheriff Officers’ fees in the future. There should be a provision for Sheriff Officers submitting a fee note to the Legal Aid Board directly for payment. Clearly there would have to be either emergency legal aid or a certificate in place. The Sheriff Officer should have that information and be able to submit an invoice directly to the Legal Aid Board and the Legal Aid Board can pay it.

#### 4. Experts

There needs to be a “legal aid” approved list of experts in various fields. These experts would then have a fee that they would charge for the provision of a particular report and they would know how to prepare that and the fee note.

Again they would submit their fee note directly to the Legal Aid Board with the appropriate reference for advice and assistance or legal aid. Clearly there are issues of clawback that will arise. However most settlements will proceed through the solicitor. If the solicitor recovers the money the solicitor pays the Legal Aid Board back the outlay.

It is now time that solicitors stopped having to fund outlays in the legal aid system. Faculty are now paid directly by the Board.

### **ABATEMENTS/ UNPAID OUTLAYS**

There is a hidden figure which will not be seen in any set of SLAB accounts. Often the solicitor puts in an account there are frequently abatements. Abatements are time consuming and generally where small in nature the solicitor will simply accept them. Indeed there used to be a system where the solicitor would accept up to 5% or thereby of abatements.

However there are also occasions when outlays are not paid. This could be for a variety of reasons. For instance that the amount of increased authorised expenditure under advice and assistance was not sufficient. If you say to the Legal Aid Board that you are applying for legal aid and get an increase to apply for legal aid but then go and get a medical report to assist your application for legal aid the objection would be taken to the outlay for the medical report.

There are all sorts of outlays that are incurred by solicitors which require either an 18(1)(b) grant or a sanction grant thereafter.

In cases solicitors have to get child welfare reports. If you do not have the correct sanction or enough sanction or don't have an 18(1)(b) then it will not be paid. As a result solicitors pay outlays that are unrecoverable from the Board. They have done work that is unrecoverable from the Board because of abatement of fees.

This represents a significant saving to the public purse.

If solicitors were paid a block payment to undertake a certain amount of cases then this problem would not arise. However it is a real issue for solicitors.

