



FACULTY OF ADVOCATES

Response to Scottish Parliament's Equalities, Human Rights and Civil Justice Committee Call for evidence in relation to civil legal assistance

The Faculty of Advocates ("the Faculty") is pleased to respond to this call for evidence. The Faculty has a long tradition of providing independent and objective legal advice to all, regardless of means, background or location.

Advocates are independent, self-employed lawyers who hold a public office; they are not in partnership with each other or with any law firm. They are regulated by the Faculty of Advocates and, ultimately by the Court of Session. In most cases, they are not instructed by clients directly but by solicitors, to act on behalf of their clients. They are required to undergo training and examination of their ability to learn, research and apply the law. They develop skills and experience in the presentation of evidence and legal argument. A key element of our work is identifying new areas for the development of the law and legal remedies. Advocates are instructed in cases where there are important consequences for the person seeking their input or where there is a matter of special difficulty, sensitivity, complexity or novelty, or a combination of these.

The provision of public funds through legal aid can make a critical contribution to the services we can provide to those that are financially or socially disadvantaged. Our expertise is available in a range of situations from opinions on the prospects of success or on points of law to the full presentation of cases in the supreme courts. Providing our resources to the widest cross section of the community has been, and it is submitted should continue to be, an essential component of the administration of justice in Scotland, to the whole legal community and to the public. One of the great strengths of the legal aid system should be flexibility. It should enable the purchase of as wide a variety of legal services as possible from all sectors of the legal market in as many different settings as possible. Another strength is the ability to recover the expense of litigation from the unsuccessful party and thus reduce the ultimate financial cost to the public purse.

1. What are the current barriers to accessing civil legal assistance? Can you give examples from your own experience, or refer to any research in this area?

Unlike solicitors or advice agencies operating in the third sector we do not operate on the “front line” of service delivery. Nonetheless, we do have some insight into the current difficulties accessing civil legal assistance.

One serious current problem is the lack of cover in certain areas of Scotland, notably in the Highlands and Islands (including Inverness) and in Dumfries and Galloway. Members of Faculty have been told by clients of their having to telephone or email as many as 100 or more solicitor firms, across the whole of Scotland, before they have found a solicitor willing to take on their case on legal aid. This causes hardship for those already facing serious crises in their lives. It is not difficult to imagine that some will be sufficiently discouraged to give up. Those who face additional challenges such as disability or digital exclusion will find their situation even more difficult. The problem in Inverness appears to have become particularly acute over the last 12 months. There is very limited provision in relation to family law cases particularly in disputes involving financial provision on divorce/cessation of cohabitation with the local CLAO often at capacity and unable to take on further work. Mental health law and adult incapacity are also areas of law where there are few solicitors in Inverness, and also in Aberdeen.

The basic problem – difficulty finding a solicitor to take a case on legal aid – exists because solicitors say they are unable to provide an adequate service under the current legal aid arrangements. Remuneration on a block fee basis means that essential aspects of the work required such as ingathering background financial information and documentation, and negotiation, are not funded.

We foresee that this issue is going to become worse, not better, over the coming years without structural reform. Young solicitors are increasingly turning away from a career in civil legal assistance, to better remunerated roles including in the public sector, such as the Children’s Reporter.

2. Do you have any suggestions for shorter-term improvements (not involving changes to the Legal Aid (Scotland) Act 1986) which could be made to the current system for civil legal assistance?

We consider that others, particularly clients (as the public user of the services) and solicitors on the front line of that service delivery, will be better placed to advise on shorter-term improvements which might be made.

We think that better signposting of the availability / capacity of solicitors willing to take on civil legal assistance work by the Scottish Legal Aid Board and the Law Society of Scotland may assist. In our view, too much of the burden of finding a solicitor currently falls on the client in the first instance. It cannot be reasonable to expect ordinary litigants, who are often experiencing significant trauma or distress already because of their legal problem, to search for the legal equivalent of a “*needle in the haystack*” in the form of a solicitor willing to take on

their case. That is particularly so if data on availability/capacity in the system (if it does exist) sits in the hands of organisations responsible for service delivery.

3. Is grant funding from the Scottish Legal Aid Board helping to support access to justice? Can you provide examples of any successes or problems with this funding stream?

We consider others are better placed to comment. We have no direct experience of the effectiveness of this funding stream.

4. What do you think are the strengths and weaknesses of the current system for providing civil legal assistance?

As we outline above, we consider that the current system is structurally weak, and its current delivery model may be unsustainable in the longer term. What is needed is lawyers willing to do the work and a system designed to ensure long-term, sustainable service delivery by them.

5. What do you think would be the strengths and weaknesses of reforming civil legal assistance along the lines recommended in the Evans Review ("Rethinking Legal Aid", 2018)?

Legal aid allows thousands of people to have proper and fair access to justice. It is an essential component of the rule of law. The Evans Review was welcome. It reinforced the scope and the merits of Scotland's legal aid system.

The greater flexibility recommended by the Evans Review should be seen as a strength, but if the concerns of lawyers, who work hard at providing the service daily, are not considered, the existing structural weaknesses in the system may be exacerbated.

6. What are your priorities for longer-term reform?

In our view, structural reform is required to bring a system designed in the 1980s up to date for modern 21st century Scotland.

There is a disconnect between modern litigation, which is front-loaded to encourage advance preparation and settlement, and the unreformed civil legal aid remuneration structure that is geared towards appearance in court. A remuneration structure that placed greater weight on preparation and resolution would provide a much better fit for the modern dispute resolution environment. This would assist earlier resolution and provide better value for the public purse. It would reward efficiency and economy.

7. Do you have any other comments?

N/A

