

# Equality and Human Rights Commission Response to the Independent Strategic Review of Legal Aid Call for Evidence

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# Equality and Human Rights Commission Response to the Independent Strategic Review of Legal Aid Call for Evidence

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The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

As a GB body covering Scotland, England and Wales, we can draw on our experience of recent changes to legal aid in England and will comment on these where appropriate.

Question 1: What shared values and ethos should underpin legal aid services, and how best can they be embedded in the delivery of legal services in the future?

### **Access to justice – the importance of legal advice and representation**

Constitutional rights are meaningless unless there is an effective remedy which can be enforced. Legal aid provides the ability to enforce that right to make it real and access to legal aid is key to an effective justice system.

Legal aid reform is part of a wider question of access to justice and is interconnected to changes in legal processes, for example, the increase in court fees and the introduction of Employment Tribunal fees and changes to court procedures such as the new simple procedure. It is noted that the Scottish Government has made a commitment to abolishing employment tribunal fees and this is very welcome.

Simplifying procedures in court is one measure designed to promote access to justice. The simple procedure has recently been introduced in Sheriff courts and its effect is not yet clear. Making procedures

simpler though cannot by itself address the need for litigants to deal with substantive law. This can be complex, particularly in areas such as equality or human rights. If legal aid is not available, people are forced to deal with claims themselves. Party litigants are disadvantaged and there are wider knock on effects of a potential rise in the number of party litigants.

Any limitations on the availability of legal aid risk the creation of a two tier justice system which would limit the enforcement of rights to those who can afford it and closed to those who cannot, including those most in need of legal protection, and risk undermining the rule of law.

Further, any potential increase in the numbers of party litigants in civil courts or unrepresented accused is likely to have an adverse effect on the courts administration and efficiency. Any apparent savings to the legal aid budget could be offset by increased costs within the court system as cases are likely to take longer. Experience in England<sup>1</sup> suggests that where, following civil legal aid reform, there has been an increase in party litigants, cases that might previously have been settled at an early stage, are often now fully contested and require more judicial involvement, causing consequential delays in the justice system. Of particular concern is the risk that party litigants or unrepresented accused who have a learning disability, mental health issues or dysfunctional lifestyles are particularly demanding on judicial time and on the time of court staff. In cases where expert reports would otherwise be paid for by legal aid, there is a risk that in cases with party litigants sometimes the court has to make decisions in the absence of best evidence.

As well as the impact on the courts, the absence of legal representation will disadvantage those not familiar with court systems and the law and would be a stressful experience. Some potential litigants may have particular difficulties representing themselves. This may be for reasons related to their disability, for example, anxiety, a visual impairment, or a need for communication support; or for other reasons for example educational attainment, illiteracy, or ill health. For some, the prospect

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<sup>1</sup> Written evidence of the Judicial Executive Board of the Justice Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

<https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

of having to conduct litigation in person may mean they choose not to pursue access to justice. There are issues in particular areas which may arise should there be an increase in party litigants, for example in family cases where this might cause difficulties where a witness is being examined in court. Such problems may arise in cases where there has been domestic violence which would have a disproportionate impact on women.

The House of Commons Justice Committee Report March 2015 on the impact of changes to civil legal aid in England<sup>2</sup> stated that “evidence we have received strongly suggests not only a significant increase in parties without legal representation but also that litigants in person may be appearing in more complicated cases or be less able to represent themselves.”

**Equality and human rights law underpin legal aid services and need to be embedded in the delivery of legal services in the future.**

Any system of legal aid must recognise state obligations under Article 6 of the European Convention on Human Rights (the right to a fair trial) and obligations under European law and under international treaties for example the International Covenant on Civil and Political Rights and the specific conventions, the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Rights of the Child (CRC); the Convention on Elimination of all forms of Racial Discrimination (CERD) and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). The right to a fair hearing requires real and effective access to a civil court which in turn may require access to legal aid. Any steps to make economies in the provision of legal aid must be balanced against these human rights obligations under the European Convention on Human Rights and international treaties and European law.

Account must also be taken of obligations under Part 3 of the Equality

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<sup>2</sup> Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012

<https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

Act 2010, which relates to the provision of services and performance of public functions. Also relevant is the public sector equality duty contained in Section 149 of the Act, which requires public bodies and those carrying out public functions to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations when making decisions or formulating policy.

### **Human rights - Article 6**

Article 6 of the European Convention on Human Rights protects the right to a fair and public hearing. Article 6(1) provides that “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Under article 6, everyone charged with a criminal offence has minimum rights which include the right to defend her or himself in person or through legal assistance of the accused’s own choosing or, if she or he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

Article 6 does not provide expressly for free legal assistance in civil matters but the European Court of Human Rights has found that the right to access to a court contained in Article 6 (1) encompasses the right to free legal assistance in civil matters. In certain situations, for example where a case is very complex or a litigant has particular difficulty in representing themselves, and legal aid has not been available, the European Court of Human Rights has found violations of Article 6(1). In *Airey v. Ireland* [1979] 2EHHR 205 a victim of domestic violence had been trying to gain a judicial separation from her husband on the grounds of alleged physical and mental cruelty to her and her four children. She had been refused legal aid, and could not afford a lawyer. The European Court of Human Rights stated that Convention rights must be ‘practical and effective’ to safeguard an individual. It added that this was particularly important ‘in view of the prominent place held in a democratic society by the right to a fair trial.’ The Court found that while there is no general right to legal aid in civil cases, legal aid is required when legal representation is compulsory, because of the complexity or nature of the proceedings or the ability of an individual to

represent him or herself.

The Court has also found breaches in relation to the refusal of legal aid in civil cases, such as *Steel and Morris v. the United Kingdom* [2005] 41 EHRR 22 where the Court held that the lack of civil legal aid in that case was a violation of Article 6. The case concerned libel proceedings brought by the fast food chain McDonalds against the two applicants, who had distributed a leaflet severely criticising McDonalds' practices and food. They were refused legal aid and represented themselves through the 313 day long trial, the longest case in English legal history. The Court noted that the case was factually and legally complex, and that the volunteer lawyers and the extensive judicial assistance and latitude granted to the defendants did not substitute for counsel experienced in libel law. The Court held that 'equality of arms' was central to the concept of a fair hearing. Absolute 'equality of arms' was not required, provided both sides have a reasonable opportunity to present their case effectively. Access to legal aid for a fair hearing should depend on what was at stake for the individual, the complexity of the law and procedure and the person's ability to represent themselves.

The right to civil legal aid is therefore not absolute and may be subject to restrictions. Any restrictions in a scheme for legal aid though would require to be made in pursuance of a legitimate aim and to be proportionate. This needs to take account of the importance of what is at stake for the applicant; the complexity of the matter; and the capacity of the applicant to effectively exercise his or her right of access to court.

### **European Law**

Article 47 of the Charter of Fundamental Rights of the European Union enshrines the right to an effective remedy and to a fair trial in relation to EU law implemented by Member States. The text of the Article includes the following: 'Everyone shall have the possibility of being advised, defended and represented', and 'Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.' Any limitations on access to justice for people seeking to enforce equality/anti-discrimination cases based on EU law might well fall foul of this Article.

### **Public Sector Equality Duty**

This review has been established by the Scottish Government to “engage with the legal profession and others to identify during this year specific measures to reform Scotland’s system of legal aid”. In fulfilling its remit, the review will be subject to the Public Sector Equality Duty (PSED). The requirements of the PSED are explained in the following paragraphs.

The general equality duty under section 149 of the Equality Act 2010 requires public authorities such as the Scottish Government and those carrying out public functions, in the exercise of those functions, to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct
- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not
- Foster good relations between people who share a protected characteristic and those who do not.

The first need of the general equality duty (to eliminate unlawful discrimination ...) applies to nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. The second and third needs (advancing equality of opportunity and fostering good relations) do not apply to marriage and civil partnership.

The Equality Act explains that advancing equality of opportunity involves, in particular, having due regard to the need to:

- Remove or minimise disadvantage suffered by people due to their protected characteristics.
- Take steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people.
- Encourage people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.

The Act also sets out that:

- meeting different needs includes (among other things) taking steps to take account of disabled people's disabilities

The second need will be particularly relevant to the proposed reform of legal aid – the duty to have due regard to the need to advance equality of opportunity between people who share a relevant protected characteristic and those who do not. In reviewing the provision of legal aid, having due regard to the need to remove or minimise disadvantage suffered by people due to their protected characteristics, may for example be relevant:

in relation to disability–

- in the scope of civil legal aid provision, to ensure that the justiciable problems disproportionately faced by disabled people are included in scope, for example social security, community care, housing
- to ensure the structure of legal aid delivery is as accessible as possible: for example in its use of digital technology
- in the approach to charging. For example meetings with clients with certain communication support needs or mental illness may take additional time. The use of block or fixed fees can have an impact on the quality of advice and assistance and make it difficult for solicitors to discharge their duty to provide reasonable adjustments to clients. Fixed fees can create perverse incentives for organisations to “cherry pick” shorter, more straightforward cases and to delegate casework to more junior and less experienced advisers. This could have the effect of making it more difficult for clients to get appropriate advice and representation in discrimination and human rights claims, which are often relatively complex.

in relation to age –

- the particular needs of children and young people might require access to legal advice and information in a different way

in relation to race –

- in the scope of civil legal aid provision, to ensure that the justiciable problems disproportionately faced by particular racial groups are included in scope, for example immigration
- the provision of interpreters for access to advice and in court

in relation to sex –

- the scope of civil legal aid provision, for example availability of legal aid for victims of domestic violence, housing, debt and discrimination law.<sup>3</sup>

The Equality and Human Rights commission Research Report 99 “Equality, human rights and access to civil justice: a literature review” considers evidence that legal aid reform in England under LASPO may have a disproportionately adverse impact on children, disabled people, ethnic minorities and women, potentially limiting access to justice.<sup>4</sup>

The EHRC’s **Technical guidance on the Public Sector Equality Duty: Scotland** sets out:

- the duty places equality considerations, where they arise, at the centre of policy formulation, side by side with all other pressing circumstances (such as financial constraints), however important these might be.
- A public authority must consciously think about the need to do the things set out in the general equality duty as an integral part of the decision-making process.
- Having due regard is not a matter of box ticking. The duty must be exercised in substance, with rigour and with an open mind in such a way that it influences the final decision.
- There should be evidence of a structured attempt to focus on the

<sup>3</sup> Equality and Human Rights Commission Shadow Report to the UN Committee on the Elimination of Discrimination against Women

Follow-up procedure

<https://www.equalityhumanrights.com/en/publication-download/cedaw-shadow-report-legal-aid-reforms-and-womens-access-justice>

<sup>4</sup> For more information, please see Anthony, H. and Crilly, C. (2015), ‘Equality, human rights and access to civil law justice: a literature review’. Equality and Human Rights Commission Research Report 99.

The EHRC has also provided evidence on the impact of changes to civil legal aid in England in Treaty Body submissions: <https://www.equalityhumanrights.com/en/our-human-rights-work/monitoring-and-promoting-un-treaties>

details of equality issues.

In addition, the Scottish Government is subject to the specific duties which include a duty to assess the impact of applying a proposed new or revised policy or practice, against the needs of the general equality duty, in so far as is needed to meet the general equality duty<sup>5</sup>.

Accordingly, the review needs to ensure a sound evidence base. Adequate and accurate equality evidence, properly understood and analysed is at the root of effective compliance with the general equality duty and the specific duty to assess impact. This will allow better understanding of the effect of different proposals for reform of structures and processes, consider whether further research or involvement is necessary and consider whether there are ways of mitigating any adverse impact identified.

Question 2: How best can wider organisational arrangements (including functions, structures and processes) support and enable the delivery of effective legal aid services?

### **Early advice and early intervention in civil legal aid**

The most effective access to justice enables people to get early access to information and advice about potential legal problems. There is a role for improved public legal education. People are often unaware that they have a problem which legal advice and assistance can help them with. In discrimination law for example, people may not identify that the disadvantage they have suffered in the provision of services results from provisions which are discriminatory and that they may have a remedy under the Equality Act.

Public legal education can make use of improved digital technology (with due regard to ensuring this is accessible). Free resources can be provided to assist those able to self-help. Information can be provided about where to get further help. This will not be sufficient to resolve all matters where someone needs help but will assist some and accordingly may reduce the need for legal advice and assistance.

Early intervention combined with a holistic approach to legal problems

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The Equality Act 2010 (Specific Duties) Regulations 2011 as amended.<sup>5</sup>

can ultimately avoid escalation of problems which might otherwise become intractable. Early intervention can prevent problems building up until they reach crisis point, when the consequences are more serious at the same time as the person's ability and resilience to deal with them is perhaps at its lowest. An example is the provision of early housing benefit advice to a client who has a learning disability. If legal advice is available it can resolve rent arrears which would otherwise arise. If that advice is not given, rent arrears could result in action for eviction and potential homelessness. Legal advice might be available for eviction action or to challenge homelessness but earlier advice could have avoided the distress to the client and any potential impact on the client's health and wellbeing, as well as minimising the legal aid cost and court time. Early advice and intervention in cases such as this can avoid the shifting of costs to other public services such as social work and homeless services.

In family law, early advice and representation can ensure clients are better able to resolve matters sooner – they will have more realistic expectations as to the merits of potential court action and what might be reasonable terms of settlement. In employment, early advice is important for example for a disabled client asking about their rights to reasonable adjustments. Early advice is more likely to enable the client to negotiate with the employer and stay in work than advice provided after the client has been dismissed following a failure to make reasonable adjustments.

This approach has been described as being better to have “a fence at the top of a cliff [rather than] an ambulance at the bottom”<sup>6</sup>.

The benefits of early intervention are interdependent on the universal scope of legal aid and the availability of a holistic approach to tackling legal problems.

### **Scope of civil legal aid**

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<sup>6</sup> Report on the Impact of changes to civil legal aid under Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in England, the House of Common's Justice Committee HC 311, March 2015 p60  
<https://www.publications.parliament.uk/pa/cm201415/cmselect/cmjust/311/311.pdf>

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. A discussion paper published in 2015 by the Law Society<sup>7</sup> included a proposal to consider the removal of employment cases (although this was not subsequently included in the recommendations), but any such step is likely to have a chilling effect on access to justice for workplace-based discrimination cases and would also undermine compliance with international obligations. Allowing no legal aid for representation in the higher courts could be in breach of Article 6(1) ECHR for complex employment cases or where the client would have difficulties representing themselves. An article 6 challenge in the Employment Tribunal case of *Gerrie v. Ministry of Defence - Case No. 100842/99* and subsequent appeal (withdrawn) to the EAT we understand led to the subsequent introduction of civil ABWOR becoming available in Employment Tribunal cases.

Similar concerns would potentially also arise in particular in relation to any proposals to remove or limit from scope areas such as debt, housing/heritable property, education or social security. Any such reductions in scope would have a significant impact on the ability of people to access justice when breaches occur of their human rights, socio-economic rights protected by the International Covenant on Civil and Political Rights, and the specific conventions as referred to earlier such as the Convention on the Rights of Persons with Disabilities.

Any consideration of a system of restricted scope with an exceptional funding scheme to mitigate the effect of proposed exclusions, would have to ensure any scheme was human rights compliant to avoid legal challenges. There have indeed been significant concerns about such a scheme in England where the criteria for inclusion are seen as too strict and the process too complex. Initially there was no fee for completing the applications, solicitors were routinely refusing to undertake such applications. There have been a low number of applications since the inception of the scheme and a poor success rate. Successful legal challenges have been made : *Guidanaviciene & Ors v (Director of Legal*

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<sup>7</sup>Legal Assistance in Scotland Fit for the 21<sup>st</sup> Century Law Society of Scotland Discussion Paper <https://www.lawscot.org.uk/media/409526/legal-assistance-in-scotland-discussion-paper.pdf>

Aid Casework (2) Lord Chancellor [2014] EWHC 1840 (Admin). In that case the court noted that an application for exceptional funding can only result in payment for an adviser if funding is granted, which at that stage had occurred in only one per cent of applications. In R (Public Law Project) v Secretary of State for Justice [2014] EWHC 2365 (Admin), the High Court in England has noted concerns about the cost of satellite litigation in which claimants contend their entitlement to legal aid, and which may prove more expensive to the state in the long run.

In addition, we cannot be confident that such a scheme would in practice tackle the problem of clients being deterred from seeking advice or being turned away by advisers if the case is 'out of scope'.

Question 3: How best can legal aid services achieve positive outcomes for and with the people of Scotland?

### **Ensuring an adequate supply of suitable advice**

Access to justice is only achieved when people are able to find an appropriate and accessible adviser. Delivery of effective legal aid services requires legal aid to be available across Scotland including in more rural areas. Existing advice service provision in Scotland is not evenly spread across the country and not all advice agencies provide advice in all subject matters. In some areas, and not just the most remote areas, it could be very difficult indeed to get access to an advice agency to deal with particular issues such as immigration. Specialist advice and representation may be appropriate eg for Mental Health Tribunals or in relation to discrimination claims.

Holistic advice may be the most beneficial for the client and the most cost effective eg in identifying and advising on the range of problems encountered by a disabled person who might have remedies under equality law, benefits law and community care law. In establishing systems for providing legal aid, care should be taken to avoid the risk of referral fatigue, leading to clients giving up on their cases: people who are referred on to another agency may not pursue that referral and that risk increases the more steps in the referral chain. People who have a

learning disability, who have mental illness or who have communication or other particular needs as a result of disability are more likely to find this difficult. Victims of domestic violence or in other cases of urgency will need immediate access to advice and representation to ensure their safety and may need other advice in related matters such as housing, benefits and so on.

### **Sustainable legal aid**

At a strategic level, the structures for taking on legal aid work and the remuneration needs to be set at a level that makes the work sustainable for lawyers. If it is not, this risks at best a reduction in service provision and at worst a complete absence of provision in certain areas of law or in particular geographical areas. The structure of payments must give lawyers enough certainty about funding that they are prepared to take on legal aid work or people will be unable to access legal aid in practice.

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. There is a risk that if payment rates are not set at a reasonable rate, solicitors would only be able to provide legal aid advice and representation in a way which may affect the quality of service. This could for example be by relying on standard letters and template forms, using less qualified and experienced staff, or taking on excessively high workloads. The scheme for payment needs to cover all work reasonably and necessarily incurred for clients and recognize the requirements of clients who have particular needs for example as a result of disability. Disabled clients may require longer and more frequent meetings or communication support, or may require home visits for reasons related to their disability. Under the Equality Act 2010, solicitors must make reasonable adjustments for disabled clients and must ensure that they do not treat disabled clients unfavourably for a reason related to their disability.

The application process should be proportionate and avoid being unnecessarily bureaucratic or overly restrictive. If the application process in any particular area of law is too resource intensive for solicitors and prohibitively difficult for individuals unless they have support, this may lead to solicitors refusing to take on legal aid

applications and people being denied legal aid in practice. The prospect of dealing with abatements can be a factor discouraging solicitors from taking on legal aid work. The accounting process must be based on consistent application of clear guidelines to minimise any risk of abatements and the amount of solicitor's unpaid time dealing with them.

Structures and processes for legal aid provision must be designed to ensure that they recognise the duty to make reasonable adjustments<sup>8</sup> for disabled clients and potential clients. That duty applies to both the Scottish Legal Aid Board and to individual service providers such as solicitors. The duty is anticipatory and so steps can be taken in advance, for example: to make sure that application criteria and forms are as accessible as possible; to allow for any additional time which may be required to be provided as a reasonable adjustment (eg for a client who has a particular communication need).

Question 4: If you were designing a system of legal aid today what would you do differently from the current system to make it more effective and person-centred?

This is covered in other parts of our response.

The Review invites respondents to consider these questions, and to tell them about: Experiences of the operation of legal aid services - specific concerns which have been raised with the Commission:

### **Special Immigration Appeals Commission (SIAC)**

The rules relating to legal aid in Special Immigration Appeals

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<sup>8</sup> Equality Act 2010 section 20

Commission (SIAC) appeals are contained in the Legal Aid and Punishment of Offenders Act 2012 (“2012 Act”). SIAC has a UK-wide jurisdiction. The 2012 Act has no application in this respect to Scottish solicitors. The 2012 Act, as it applies to the provision of legal aid, only applies to Solicitors in England and Wales who undertake legal aid work. Scottish civil legal aid only covers specified courts and tribunals. SIAC is not currently listed in the relevant Scottish provisions.

This means that residents of England appealing to the SIAC are eligible for legal aid, while residents of Scotland are not. Consequently, Scottish residents (who are otherwise eligible for legal aid) have to instruct English-based solicitors in SIAC cases. The Commission’s view is that this legislative discrepancy is causing a range of disadvantages to Scottish residents. Several Scottish solicitors have contacted the Commission expressing similar concerns and citing particular clients to whom this disadvantage applies.

The Commission has been corresponding with the Scottish Legal Aid Board (since August 2015) and, thereafter, the Scottish Government (since March 2016) in an attempt to rectify this legislative discrepancy. To date, a satisfactory solution has not been achieved. The latest correspondence from the Scottish Government to the Commission, dated 20 April 2017, stated the Scottish Government’s intentions to try and progress this matter in May 2017.

### **Public Interest test**

It is important that potential litigants are able to take cases which would achieve a wider public benefit and that this opportunity is not denied on the grounds that others as well as the applicant *might* be able to pursue matters, even in circumstances where it is clear that they have not. This Wider public interest test is set out in paragraph 4.78 Civil Legal Aid Handbook:

“When considering the reasonableness test, a relevant factor may be that a case demonstrates a wider public interest. A wider interest may be presented in an application for matters such as judicial review, appeals or reparation where several cases arise out of the same incident, or where the outcome of the case may have a direct tangible benefit to the applicant and to others.

It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her..... If we are satisfied the case does demonstrate a wider public interest, we can, in the particular circumstances, treat this as a determining factor, even if the value of the claim is relatively modest. However, we must also consider questions such as prospects of success and cost-benefit..... Any application must address the tests in regulation 15 of the civil regulations. That regulation requires us to refuse applications for civil legal aid where the applicant has a joint or the same interest with others if we are satisfied that the applicant would not be seriously prejudiced in their own right if we did not grant legal aid, or it would be reasonable for the other people concerned to meet the expenses of the action.”

We are aware of applications for legal aid for Judicial Review being refused on the basis that the applicant is one of a large number of people affected by the subject matter of the complaint. One such rejection questioned why the application was the only legal aid application and if anyone else could pay for the Judicial Review. This was in circumstances where the subject matter of the complaint is so intrinsically linked to receipt of benefits anyone else with an interest would clearly also be financially eligible for legal aid and would not have funds for a Judicial Review.

### **Human rights claims**

We are also aware of difficulties which have arisen in applications for legal aid for claims involving an alleged breach of the Human Rights Act. In such cases, the remedy for the claimant is a declarator, as public recognition that the claimant's rights have been violated. The quantum for just satisfaction follows Strasbourg jurisprudence and is relatively low. We are aware of instances where SLAB decision makers have refused applications at first instance, having applied a cost-benefit analysis focussing on quantum. We believe this approach to be inappropriate for human rights based claims.

### **Asylum and immigration advice**

There is a concern about the potential impact of any dispersal of asylum seekers beyond the Glasgow area where most are currently

located. The system for covering legal aid for immigration and asylum advice needs to allow for the situation in Scotland where almost all solicitors working in this area are based in Glasgow. This is an increasingly specialised area of law. Should clients be moved outwith that area there will be a resultant increase in travel time for sufficiently expert solicitors to meet with clients. These clients will be among the most vulnerable, often with mental health problems or other health needs, many will be single parents who are mostly women and most will have limited access to funds so it can be expected they would have difficulty travelling for advice.

Access to legal advice and assistance can be particular difficulty for immigration detainees but is crucially important. Under Article 5, anyone deprived of their liberty must have the opportunity to challenge their detention. For most immigration detainees, an application for release on bail is the simplest way to seek their release. The Commission has raised concerns about the use of immigration detention and has called for<sup>9</sup> immigration detention as a last resort and for the imposition of a statutory time limit of 28 days (where currently the UK is the only country in Europe without a statutory time limit). Most people held in immigration detention rely on legal aid to access a lawyer to challenge their detention.

### **Clawback in employment cases**

There is concern about the impact of the introduction of clawback in ABWOR for employment cases. This means that legal fees are now deducted from any award for a successful claim. Tribunal claims can be complex, particularly in areas such as discrimination where advice and representation can incur significant fees. This may mean that the client is left with little after fees are deducted from the tribunal award. The potential clawback will also mean that some clients do not pursue claims which might otherwise have been made.

### **Mental Health and Adults with incapacity**

#### **Advice and assistance to people detained under mental health**

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<sup>9</sup> Equality and Human Rights Commission report for the UK's third assessment under the UN Human Rights Council's Universal Periodic Review (UPR) December 2016

**legislation.**

There is currently no financial eligibility test for advice and assistance in relation to appearance before the Mental Health Tribunal. However the financial eligibility test does apply to people detained under mental health legislation in relation to other matters. Financial assessment is difficult for people who are acutely unwell and not able to access documentation. In these circumstances, solicitors meeting clients for the first time cannot be sure whether advice and assistance will be granted or any contribution paid. This may mean solicitors are reluctant to take on work for clients in this situation.

**Adults with incapacity - Private trusts**

The current system restricts advice and assistance in relation to private trusts. This has a disproportionate impact on people seeking advice about disabled children or other family members. For such clients, their home may be their only asset and they may be eligible for advice and assistance without any contribution, but the amount of advice they can receive under the current system is unlikely to be enough to address all issues raised by their situation which would need to cover advice in relation to a trust.

**Adults with incapacity – Guardianship**

Financial eligibility requirements apply to guardianship applications except for those including a welfare element. If legal aid is not available to meet the costs of guardianship or other measures under Adults with Incapacity legislation, then local authorities may require to take steps under their duties to seek appointment of the Chief Social Work Officer as the welfare guardian. This in effect shifts the cost to a different public service with the obvious disadvantage that the adult is subject to having welfare decisions made by a public official rather than by a family member or someone already person known to them. Current practice limits payment of legal aid such that there is often insufficient time available for solicitors properly to advise their clients in relation to the options available and to tailor steps so that they are the least restrictive possible and take the adults views fully into account, in line with the general principles of Adults with Incapacity legislation. Nor is time recognised as being necessary to ensure at each stage that the

client has a full understanding of their obligations eg after appointment.

The Review invites respondents to consider these questions, and to tell them about: Views on the options for the future :

### **Methods of delivery**

It is suggested that a mix of methods of delivery is required and that there is no one size fits all model. Improved digital technology allows a range of approaches but these must ensure that legal aid is fully accessible and this is explored below. 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. There is a need for local advice networks across the country, providing face-to-face advice and representation to cover both generalist and specialist information and advice.

Lessons can be learned from the impact of the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LAPSO) reforms in England. For example, a telephone advice gateway was introduced by the LAPSO from April 2013. Analysis of the operation of that service has shown significantly lower level of uptake than predicted.<sup>10</sup> The Ministry of Justice has acknowledged that this method of delivery may cause access problems for clients with urgent or complex problems or with literacy issues, language barriers or an inability to pick up on non-verbal cues<sup>11</sup>. It is also recognised that people with mental health or cognitive difficulties could find it harder to manage their case or deal with any emotional distress arising from it. The Legal Action Group<sup>12</sup>, reports growing evidence that service users

<sup>10</sup> National Audit Office Implementing reforms to civil legal aid HC 784 November 2014

<sup>11</sup> Impact assessment on the provision of telephone advice.

<http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/ia-telephone-advice.pdf>

<sup>12</sup> Special report on the civil legal aid crisis Justice in free fall, December 2016

experience considerable difficulty in navigating and proceeding beyond the operator service. Their report quotes the National Audit Office report which noted that the Legal Aid Authority in England 85% fewer debt cases were processed than expected. More generally, the mental health charity Mind which operates its own telephone advice line has identified problems experienced by people with mental health problems, in using telephone advice services. A survey of Mind's telephone service found that 46% of inquiries were made on behalf of the client rather than by the client themselves, mainly because of communication difficulties linked with the person's mental health condition<sup>13</sup>.

### **The need for Legal Aid, public legal education and alternative forms of dispute resolution**

Legal aid should be available for issues which require legal advice. There will be a continued need for legal advice in these areas, and it is extremely unlikely there will be capacity within advice agencies to meet the need for expert legal advice. Any proposal to restrict the scope of legal aid would need to ensure availability of accessible, alternative specialised advice. Services such as law centres rely on legal aid, as well as other funding, and could be unsustainable if legal aid is withdrawn in these areas. Legal aid ensures the independence of advice agencies, such as law centres.

We support provision of alternative dispute resolution including mediation where appropriate. This needs to be adequately resourced.

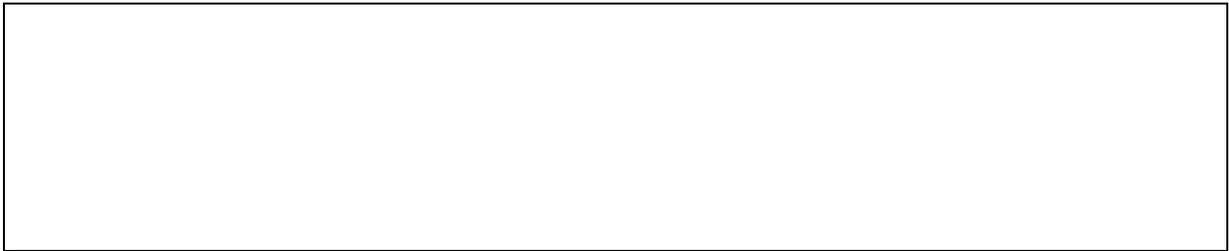
In the areas highlighted above, such as housing, debt, family law or social security law it is unrealistic to expect clients to access advice on a private client basis through alternative funding options such as speculative fee agreements, loans for legal services, and payment plans. Many clients will be on low income and will not be able to get loans. Many of these subject matters covered by legal aid are not suitable for speculative fee agreements or loans eg debt or housing eviction.

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<sup>13</sup> Written evidence of Mind to the Justice Committee inquiry into the impact of changes to civil legal aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Reference is made to the comments on Early advice and early intervention in response to question 2.

The Review invites respondents to consider these questions, and to tell them about: Examples of projects, services, innovations or improvement work, including evaluations or assessments, which may be relevant to the work of the review



The Review invites respondents to consider these questions, and to tell them about: Views on the obstacles to and opportunities for improvement;

Reference is made to the comments above.

