

## THE GLASGOW BAR ASSOCIATION

### RESPONSE BY THE GLASGOW BAR ASSOCIATION TO THE INDEPENDENT STRATEGIC REVIEW OF LEGAL AID.

#### The Association:

- 1) The Glasgow Bar Association is an independent body that for over half a century has been active in promoting, representing and protecting the rights and interests of its members in the practice of law and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society. It advocates on behalf of access to justice. It considers and monitors proposals for law reform and, if necessary, formulates responses to such proposals. In addition the Association operates an extensive professional development programme for members.
- 2) The Association currently represents the interests of around 450 members. They pay an annual membership fee. These are solicitors, solicitor advocates and trainee solicitors who are largely

court practitioners in Glasgow and the West of Scotland in the criminal and civil fields. It has two members of staff and its committee members are voluntary.

- 3) Members or members' firms receive fee income from both Legal Aid and from private client funding.
- 4) Solicitors in criminal cases appear in court on a daily basis conducting trials, procedural diets, deferred sentences and indictments, representing accused persons at all levels up to and including Sheriff and Jury where a judge has the power to send an accused into custody for up to five years. Sheriff and Jury trials in Scotland in the sheriff courts and summary trials are routinely and almost exclusively carried out by solicitors. Solicitors are involved in and appear at all stages of all criminal cases from citation or custody through to trial. In addition solicitors prepare cases and instruct counsel or solicitor advocates in the High Court of Justiciary. Solicitor advocates also conduct cases in the High Court of Justiciary.
- 5) In the civil courts, tribunals and at hearings solicitors deal with cases at all levels and of all types and routinely conduct proofs and all other appropriate procedures on behalf of clients, these include for example family cases, referral matters involving children, immigration procedures, mental health cases, and freeing for adoption cases which often involve consideration of complex evidence.
- 6) The office of the Glasgow Bar Association, its library and staff are based within Glasgow Sheriff Court at 1 Carlton Place, Glasgow. It's committee meets within the court on the first Monday of each month.

7) The Glasgow Bar Association works closely with other bar associations and faculties around Scotland, with the Law Society of Scotland and with the Law Society's Legal Aid Negotiation Team. It meets with the Scottish Legal Aid Board on a quarterly basis.

8) In preparing this response the Association has:

i) Met informally with Martyn Evans the chairman of this Independent Strategic Review and did so at Glasgow Sheriff Court on Friday June 2, 2017.

ii) Considered in detail the comprehensive response submitted to this review body by the Law Society of Scotland.

iii) Considered in detail the comprehensive response submitted to this review body by The Faculty of Advocates.

iv) Maintained contact with and consulted with the Law Society of Scotland's Legal Aid Negotiating Team in regard to this review.

#### Recommendations:

9) The review has been established by the Scottish Government with the aim to fulfil a 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".

10) The Association adopts, supports and commends the submission by the Law Society of Scotland to the independent review body and does not therefore intend to rehearse the material already contained in that submission.

11) The Association respectfully hopes that the review body and its members will consider:

- i) In detail the complexities of the myriad branches of the law that are funded by legal aid and that this in itself is a Herculean task.
- ii) The labyrinthian rules, regulations and processes involved in the administration of legal aid, in its various forms, and how it impacts on these legal processes and that this is also an extremely difficult task.
- iii) In real terms the meaning of the phrase “access to justice” as it is understood from the perspective of the members of the public to whom legal aid is granted.
- iv) The extraordinary demands placed upon members of the Association in delivering the very high standard of service, support and advocacy that they provide and also appreciate how chronic underfunding and the exponential, and increasing, rise in bureaucracy has impacted upon the profession leaving it effectively in crisis and threatening the effectiveness of representation in the future.
- v) That the criminal law has become and continues to become increasingly complex and that solicitors must now of necessity deal with new laws, regulation and decisions on what the Association believes is an unprecedented scale.
- vi) 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 their demands on their solicitors.

- vii) The imposition of a significant body of new laws, blanket zero tolerance approaches, domestic abuse policies, the extension of the law and law enforcement agencies into social media and electronic communications has meant that the social composition of those who find themselves in the criminal courts appears to be undergoing a significant change with a consequent increase in demands from clients who are often encountering the criminal justice system for the first time and have extremely high expectations of the amount of time and effort legal aided lawyers will devote to their cases.
- viii) The widespread, almost universal use of electronic communications by the public whether by text, email, Whatsapp, Facebook has resulted in a significant erosion of the concept of solicitors working hours and firms are expected by clients to be available and respond around the clock.
- ix) The increasing complexity and severity of offences now prosecuted in the sheriff and justice courts, and the filter down effect within those courts of offences has created an overwhelming and unrewarded burden on members.
- x) That the Association's members and their firms must provide a round-the-clock rapid response service to deal with the demands imposed by detention, interview, advice and consultation when their clients are in custody and that the extremely significant financial, social burdens they impose have not been adequately recognised. The Association supports the ongoing efforts of LANT in this area.
- xi) That the Scottish Government through the Scottish Legal Aid Board effectively has a monopolistic relationship with the profession and that has resulted in a constant drive down of real funding which the profession has found extremely difficult to counter, partially due to the lack of effective and independent pathways to negotiation .

xii) That because of depressed salary levels within the profession, excessive antisocial and ultimately unrewarded time requirements of the job of legal aid lawyer in addition to poor, and extremely stressful working environments the profession is not only ageing, and failing to attract new entrants, but is unable now to economically provide traineeships for the minority who do want to enter the profession. Such is the scale of the problem that the Association is discussing with the Law Society the possibility of providing GBA traineeships to encourage people to keep entering the profession and to assist member firms who are trapped at a level of income where they cannot commit to the costs of a two-year traineeship, it being structured in an uneconomic fashion, but would benefit from trainee assistance in blocks.

#### INVITATION

11) Given that the Association has adopted the submission of the Law Society of Scotland it believes it can best assist this review body and advocate on behalf of its members in the following way:

\* By inviting the chairman Martyn Evans (and members of his committee if necessary) to Glasgow Sheriff and Justice of the Peace Courts to experience at first hand the realities of court work funded by legal aid.

Accordingly the Association will:

i) Endeavour to open up the daily court work of its members to the review body chairman to allow the various systems, challenges and difficulties in operation to be appreciated.

ii) Fully encourage Association members to assist in this process and to engage with Martyn Evans at court and to provide background on the real world of legal aid and members professional interaction with its administration.

iii) Provide information and support during this process to Martyn Evans, review body chairman.

12) The Association believes that to be effective this process and visits must be conducted informally and should take place over two days, at least.

13) The Association believes that the fewer the number of people participating the more normal and accurate and effective the experience will be.

#### REVIEW BODY QUESTIONS

14) Notwithstanding all of the above and the expectation that on the ground feedback will be received by Mr Evans the Association gives the following skeleton replies to the questions posed by the review body.

#### WHAT SHARED VALUES AND ETHOS SHOULD UNDERPIN LEGAL AID SERVICES AND HOW BEST CAN THEY BE EMBEDDED IN THE DELIVERY OF LEGAL SERVICES.

15) The Association believes that in a modern liberal democracy the erosion of civil liberties is challenged and checked on a daily basis in court by solicitors and this does not simply benefit an

accused, or litigant but benefits every member of society and indeed could be, and perhaps should be, seen as one of the cornerstones of our democratic process. This ethos should underpin the provision of legal aid services in effective terms by ensuring all members of society have the ability to effectively enforce their legal rights through the courts, or ancillary mechanisms, irrespective of their income and wealth. And that this means that the poorest in society should not be disadvantaged by the provision of legal aid that in real terms, and at a per case level, makes it uneconomic for solicitors to represent them and when they do represent them, makes it uneconomic to effectively prepare and conduct their case. The Association draws attention to the vast disparity that now exists between funding levels and hourly rates for cases in the private sector and legal aid.

HOW BEST CAN WIDER ORGANISATIONAL ARRANGEMENTS (INCLUDING FUNCTIONS, STRUCTURES AND PROCESSES) SUPPORT AND ENABLE THE EFFECTIVE DELIVERY OF LEGAL AID SERVICES.

16) THE Association believes that there should be closer organisational links between the various bodies involved in the criminal justice system and considers there are principally four groups involved in the day to day administration of justice at courts. The first three being; The Judiciary; the Scottish Courts Service and the Crown Office and Procurator Fiscal Service. Solicitors whether appearing in criminal or civil matters are the fourth cohesive group and they provide a unique and significant perspective on the practicalities and difficulties faced by the criminal justice system and as a consequence the delivery of legal aid services. 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. Criminal Justice Boards provide one example. At present these boards, of which there are six in Scotland, provide for monitoring of the criminal justice system at local level. They comprise of Sheriffs Principal, Police Scotland, Crown Office and Procurator Fiscal Service and Scottish Courts and Tribunals Service. As the fourth group involved in the day to day operation of courts are absent, and cannot advocate on their own behalf or of the court users they represent, it is of concern to the Association that at a basic level this alters and affects the flow of information such bodies receive and on which they base decisions and where they perceive problems to arise.

## HOW BEST CAN LEGAL AID SERVICES PROVIDE POSITIVE OUTCOMES FOR AND WITH THE PEOPLE OF SCOTLAND?

17) LEGAL AID services can best provide positive outcomes for the people of Scotland by ensuring that funding is available to properly prepare cases and to ensure effectively funded representation is available at necessary stages. A positive outcome could be anything from the enforcement of a right in a civil case to protection of rights in a criminal case, even where an individual may be pleading guilty. Equality of arms is a phrase that is regularly used to ensure that both sides in an action, be it civil or criminal, have access to the same information on which to prepare their respective defences/arguments. It should also apply to funding in a number of ways. There should be equality of arms in terms of the relevant resources available to the state and the individual for the presentation and preparation of any particular case. Funding for the Crown should not be allowed to significantly outstrip funding for Legal Aid which is available to prepare and present cases. There should also be equality of arms within society in as much as those with the greatest wealth in society should not be

in a position to fund and prepare a defence to a much higher standard than the poorest who must rely on legal aid.

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.

18) IT is the association's view that the current system of Legal Aid does allow solicitors to deal with cases in an extremely person centred manner and indeed that our members provide a very high level of effective support and representation to individuals. It is one of the association's concerns however, that there is currently little appreciation of the high level of necessary informal and formal interaction that takes place between solicitors and clients. What is also of concern is the move by the Scottish Legal Aid Board to transfer further bureaucratic burdens away from themselves and onto the shoulders of solicitors and their firms. It is paradoxical that while the board publicly insists it is in favour of streamlining the provision of services, which the Association welcomes, this streamlining is to be accompanied by imposing a new level of unnecessary record keeping and form filling on solicitors through its proposed and extremely prescriptive, code of practice. This of course is against a background of remuneration for the preparation and conduct of cases that is already completely inadequate. The Association is concerned that the knock-on effect of this will be to push small firms out of business, further hamper the profitability and effectiveness of medium sized firms and ultimately encourage the creation of factory firms whose resources will be directed at hitting the bureaucratic targets set by the board at the expense of providing exactly the level of service the board claims to be trying to achieve. It is, as the Faculty of Advocates has correctly highlighted in their submission, a drive to the bottom line and a real consequence of the

Government and the board's monopolistic control of legal aid and the lack of checks of balances to protect against this.

19) If Legal Aid were to be designed today then at its heart would need to be an understanding that there are real and important benefits to society as a whole, and to the civil liberties that affect all of us, from having an properly funded and supported legal profession. And therefore it is not simply an accused or litigant who benefits from legal aid. This should be couched in more meaningful terms than the relatively bland, abstract phrase: access to justice.

20) It would include a safety mechanism to ensure resources available to the state to prepare and prosecute individuals, even in the smallest of cases, can never be allowed to dwarf and outstrip the resources available for the preparation of the defence, and that the funding available to the poor must never be allowed through cuts, inflation, bureaucratic burdens, to erode the value of representation to a level where it is a fraction of that available to those who can fund their own defence.

21) It should ensure that statistics are not allowed to disguise the reality and that simply stating the total numbers of people funded by Legal Aid is high is meaningless and dangerous if the amount allocated to individuals and to their solicitors to prepare and conduct cases has become wholly inadequate.

22) It should ensure that there are inbuilt checks against the inevitable behaviour of monopolies, the Government and the legal aid board being such, to relentlessly drive their costs down beyond the point where legal aid services can be economically provided by anyone who is not operating at the

largest scale and the smallest margins and contain a recognition that quality of service, if not quality of administration, will ultimately suffer.

23) And there must be provisions to ensure that there is a recognition that drowning small, medium and even relatively large providers in bureaucracy can only result in the closure of firms, the loss of the personalised quality services they provide and the creation of impersonal factory firms.

24) Finally the Association believes that a reasonably funded and system of legal aid may cost society more in financial terms but that those costs will be hugely outweighed by the benefits to all members of society, not simply the accused or litigants, by checking and challenging any erosion of civil liberties, ensuring rights are maintained and that a system that allows all to be heard and represented will be maintained. In a modern liberal democracy this is a cost that is worth paying.

## MEMBERS RESPONSES

Below is a small sample of responses from our members.

\* “The importance of a proper fee structure is to achieve a number of crucial factors in having a properly functioning and sufficient quality legal aid system:

- a) to attract quality candidates who have qualified from university. The current disparity between legal aid payments and other areas of the law will dissuade graduates from undertaking legal aid work.
- b) to ensure that firms can afford to take on sufficient staff to allow the service provided to be good quality. The lack of increased payment coupled with rising costs puts firms under extreme pressure to maintain the high level of service that legal aid firms pride themselves on. The increase in SLAB administration also affects this issue.
- c) to ensure that solicitors themselves are not placed under financial concerns. It is crucial for any professional such as doctors, nurses and lawyers that they are focussed on their work. Worries about finances can put any professional under strain and can affect their work which can have an ongoing impact for their client/patient.
- d) a proper payment to reflect the difficult and crucial work carried out. On a day to day basis, lawyers deal with people's liberty and livelihoods. They work with clients with complicated issues such as mental health problems, drug and alcohol misuse and personality disorders, all of which makes the work all the more challenging.”

\* “We welcome the introduction of ABWOR to provide representation at children’s hearings. The individuals involved in these cases are often amongst the most vulnerable members of society. We consider that ABWOR should be extended to be available on an interests of justice basis for all pre-hearing panels which are fixed to consider procedural issues such as dispensing with children’s attendance at hearings. Often, these are important issues which may well give rise to points of appeal. Allowing legal arguments to be advanced at an earlier stage may reduce the volume of appeals.

“ We are conscious that the involvement of solicitors in children’s hearings has been viewed with some trepidation. In our view, the involvement of solicitors is crucial in protecting the rights of relevant persons and the children involved. Those solicitors should, however, be experienced children’s practitioners and the registration requirements put in place by SLAB are helpful.

“In certain cases, there may be a requirement for several applications to be made in short succession due to the nature of proceedings. One way to reduce the administrative burden on both solicitors and the Board may be for one application to be made at the time of a Child Protection Order being sought and for that grant to remain in place until at least the conclusion of the eighth working day hearing / hearings to consider further interim compulsory supervision orders.”

\* “In civil Legal Aid there should be greater scope for SLAB to have discretion in instances where case cost limits are exceeded by way of error by solicitors. We are aware of cases in which outlays which have had the prior approval of SLAB by way of grant of sanction have resulted in case cost limits being exceeded and the Board thereafter refusing to increase the case cost limit retrospectively. This does not appear to be based on the merits of the case but creates another way in which solicitors can be “tripped up” and penalised financially.

“The recovery or “clawback” rules which are in place should be reviewed. In particular, in cases involving repossession of heritable property, the present rules dictate that clients who have actions of repossession raised against them on the basis of mortgage arrears require to pay their solicitor’s advice and assistance account as they are deemed to have made a recovery if successful in retaining their home. In practice, this can often mean solicitors require to pursue clients who are in financial difficulty with little prospect of recovery at a reasonable rate.

“ The rates at which summary cause work relating to eviction cases is paid should be reviewed, given the importance of the subject matter to the clients. Often, in cases of eviction actions based on behaviour, these proceed to multi day diets of Proof, ultimately paid at a rate which is not commercially viable.

We agree with the Law Society’s suggestion that measures should be considered which would not require shorthand writers or sheriff officers’ fees to be paid from the legal aid fund.

We are conscious of the fact that firms undertaking legal aid work have required to take on additional administrative burdens in recent years. By way of example, we are required to print online mandates to be signed in respect of each application. Printing costs are now met by those firms. The recent shift to online accounts has resulted in time and money being spent to submit those accounts.”

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