

# Strategic Review of Legal Aid – Background Information

## How Is Legal Advice And Legal Aid Delivered?

### WHAT IS ‘LEGAL’ INFORMATION AND ADVICE?

- 1 It is important to be clear about the boundaries of what we mean when speaking about publicly funded legal advice, as this determines the scope of what will be considered in the context of this Strategic Review. Using the term ‘legal’ advice to many suggests a more restrictive interpretation than is intended.
- 2 The working description of legal advice that will be used is:  
  
*‘advice on justiciable problems’,*  
  
or, in other words,  
  
*‘advice on matters that raise a legal issue or on matters that, if not resolved earlier, could ultimately result in court action or some other form of legal procedure (e.g. tribunals) being initiated’.*<sup>1</sup>
- 3 This therefore includes information and advice about the law and alternative means of resolving legal problems, help in preventing or resolving disputes about legal rights and obligations, and help in enforcing decisions. It also includes advice which is often not described as ‘legal advice’, but may be talked of for example as welfare rights advice, money and debt advice, housing advice, consumer advice, etc.

### Providers of legal advice and information

#### *Civil*

- 4 When the description of legal advice as above is used in the context of advice on civil matters, it quickly becomes clear that this encompasses not only a very broad scope of advice, but also a very broad range of advisers.
- 5 The ‘Paths to Justice Scotland’ research, undertaken by Professors Hazel Genn and Alan Paterson a few years ago<sup>2</sup>, looked at what people in Scotland do about going to law. It showed that when people want advice on problems with a legal aspect they use a very wide variety of sources.
- 6 Legal advice, information and representation are provided by a huge range of agencies and organisations, many of which are not necessarily recognised as doing so. The choices people make will be determined by a number of factors – such as what is available to them locally, who they feel comfortable in approaching, who they trust, and the type of assistance they require.

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<sup>1</sup> This working definition is based on the term ‘Justiciable event’ used by Prof. Hazel Genn and Prof. Alan Paterson in their ‘Paths to Justice Scotland’ research. Genn and Paterson defined ‘justiciable event’ as ‘a matter experienced by a (person) which raised legal issues, whether or not it was recognised by the (person) as being ‘legal’ and whether or not any action taken by the (person) to deal with the event involved the use of any part of the civil justice system’

<sup>2</sup> Paths to Justice Scotland, Hazel Genn and Alan Paterson, Hart Publishing, Oxford, 2001

- 7 The research tells us that the most common sources of advice are solicitors and Citizens Advice Bureaux. However, there is a wide variety of other sources of advice being used, ranging from the police to trade unions, local authority departments, housing associations, insurance companies, advice agencies, welfare rights and trading standards officers, law centres, voluntary organisations and interest groups, social workers, and court staff.
- 8 At present we do not have a consistent national overview of what advice services are provided, where and by whom. It has proved difficult and very resource intensive even to gather such information with some degree of accuracy for small local areas. Such ‘supply mapping’ has been carried out in the context of our local pilot partnerships. That process and previous research have confirmed that the picture of provision is a complex one.
- 9 In this Strategic Review we consider *publicly funded* legal assistance. Where people get assistance from a solicitor, and this is supported through public funding, this will in the vast majority of cases be under legal aid. We describe legal aid, as a form of publicly funded legal assistance, in more detail in 12 to 98 below. A further description of the various other forms of publicly funded legal assistance on civil matters is given in 99 to 104 below.

### *Criminal*

- 10 In contrast to the wide range of providers who may assist with a range of civil justiciable problems, legal assistance with criminal matters is only available through a solicitor. Only a solicitor or, where appropriate, counsel, may represent a client in the criminal courts.
- 11 Criminal legal assistance supported from *public funds* is paid out of the Scottish Legal Aid Fund, and may only be provided by solicitors who are registered with the Scottish Legal Aid Board to provide criminal legal assistance. Those solicitors are mainly practitioners in private practice who are paid fees from the Fund for work done on the client’s behalf. However, the introduction of the Public Defence Solicitor’s Office (PDSO) has created the beginnings of an alternative method of delivery of criminal assistance. Solicitors employed by the PDSO are salaried employees of the Board.

## **LEGAL AID**

### **Introduction**

- 12 Legal aid is help towards the costs of legal advice and representation paid out of public funds so that individuals on low and modest incomes can gain access to the legal system. Legal aid is only available to individuals and sole-traders and there are no nationality tests.
- 13 The operation of the legal aid system in Scotland is governed by the Legal Aid (Scotland) Act 1986. There are currently five aid types (detailed in Annex 1A):
- Advice and Assistance (including in certain circumstances Assistance by Way of Representation or “ABWOR”)
  - civil legal aid

- criminal legal aid
- children's legal aid
- legal aid for proceedings for contempt of court.

- 14 Between them, the various types of legal aid cover the cost of assistance from, and representation by, solicitors and counsel<sup>3</sup> where this is required. It also covers any expenses incurred by solicitors in providing these services. The latter includes the cost of services provided by other professionals, such as expert witnesses. The cost of these other professionals can however be covered by legal aid but only via the solicitor concerned.
- 15 All these forms of legal aid are paid for from the Legal Aid Fund, which is incorporated in the budget of the Scottish Executive Justice Department. The fund is administered by the Scottish Legal Aid Board (SLAB) and is not capped. It is instead demand led and therefore increases and decreases according to the demands placed upon it. The overall spending by the taxpayer from the legal aid fund in 2003/04 was £147million.
- 16 The Board is, in accordance with the legislation, only allowed to pay Scottish solicitors and counsel delivering these various forms of legal aid. Legal aid, in all the forms listed above, is therefore by definition delivered by solicitors or counsel.

### **Legislative framework**

- 17 The Legal Aid (Scotland) Act 1986 provides the legal framework within which the legal aid system operates and also defines the Board's powers. However, the Act provides only a skeletal structure which needs to be filled by secondary legislation (e.g. Regulations).
- 18 The legal aid Regulations are made by Scottish Ministers under the powers conferred to them by the 1986 Act. Many legal aid Regulations are subject to the 'negative resolution procedure' which means that they come into force as they are made unless annulled by the Scottish Parliament within 21 days from their making. However, some Regulations, including those uprating on an annual basis the financial eligibility levels for Advice and Assistance and civil legal aid, are subject to the 'affirmative resolution procedure'. This means that the draft instruments are subject to committee scrutiny and come into force only if a motion is approved by the Scottish Parliament itself.

### **Advice and Assistance**

- 19 Advice and Assistance makes it possible to obtain initial legal advice from a solicitor, or where appropriate, from counsel, on any matter of Scots law. Advice and Assistance is therefore available on a wide range of civil matters to include marriage, debt, employment and injury, as well as for criminal matters. Advice and Assistance does not cover a solicitor representing his or her client in court or at a tribunal.
- 20 Advice and Assistance is provided directly by solicitors, who carry out a simple

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<sup>3</sup> This term refers to both advocates and solicitor-advocates

financial eligibility assessment of the person's weekly disposable income and disposable capital. The financial eligibility thresholds are prescribed and revised annually by Regulations.

#### *Financial Eligibility*

- 21 An applicant in receipt of Income Support, income-based Jobseekers Allowance, or with a disposable weekly income of no more than £83, and with disposable capital of less than £1,330 will be eligible for advice and assistance without payment of a contribution. Any applicant whose weekly disposable income is between £83 and £197, and whose disposable capital does not exceed £1,370 will be eligible for Advice and Assistance subject to the payment of a contribution on a sliding scale. Any applicant whose disposable income exceeds £197 and/or whose disposable capital exceeds £1,370 will be ineligible for Advice and Assistance.
- 22 The assessment on financial eligibility is carried out by the solicitor at the time of the application for Advice and Assistance being made, and is done on the basis of the income in the week immediately preceding the application. Any contribution is due to and will be collected by the solicitor directly. The maximum contribution that can be asked for Advice and Assistance is £114.
- 23 The basis of the assessment of the eligibility in Advice and Assistance and civil legal aid are very different. It should be noted therefore that somebody eligible for Advice and Assistance may not be eligible for civil legal aid and vice versa.

#### *Providers*

- 24 Since October 1998 only a solicitor who is registered with the Board may provide criminal legal assistance, which includes both criminal legal aid and Advice and Assistance on criminal matters. Therefore, only registered solicitors may provide Advice and Assistance on a criminal matter.
- 25 The Legal Aid Scotland Act 1986 allows any solicitor to provide Advice and Assistance on a civil matter. However, as a result of Practice Rules made by the Law Society, from October 2003 civil legal assistance, which includes Advice and Assistance on a civil matter, can only be provided by solicitors registered with the Board and subject to the Society's quality assurance requirements. The 1986 Act does not place any restrictions on counsel providing Advice and Assistance.

#### *Levels of authorised expenditure*

- 26 A solicitor providing Advice and Assistance must work within an initial limit of authorised expenditure, which is usually £85. A higher limit of £160 applies where it is likely that the matter will only be resolved by court proceedings for which civil legal aid is available, and the applicant is likely to qualify financially for civil legal aid.
- 27 If the solicitor considers that s/he will exceed the initial level of authorised expenditure, s/he must ask the Board to authorise an increased cost ceiling before doing the work. Thereafter, increases in the ceiling are sought on a stage-by-stage basis. Increases in authorised expenditure cannot be granted retrospectively.

28 To simplify the process of seeking an increase in authorised expenditure, the Board has introduced ‘templates’, which provide the solicitor with a known cost ceiling for pre-defined stages of work. This model fits the Board’s legal aid online solution, as well as bringing significant efficiency gains for the solicitor and the Board. Templates were successfully piloted in August 2003 for asylum cases. The Board has now published templates for divorce, employment and personal injuries cases. The introduction of templates did not require any legislative change.

### **ABWOR (Assistance By Way Of Representation)**

29 ABWOR is a form of Advice and Assistance, which allows a solicitor or counsel to represent a client in specified civil and criminal proceedings in certain courts and tribunals (representation is not normally covered by Advice and Assistance itself).

30 The basic legislative definition of ABWOR is wide enough to cover all types of proceedings in any court or tribunal at any level whether at first instance or on appeal. Thus, while Regulations limit the proceedings in which ABWOR is available, the scope of ABWOR is potentially wide, and indeed has been significantly extended over the years to cover a wide range of quasi-criminal and civil proceedings. ABWOR has thus performed a useful function in making legal representation available in situations not originally covered or foreseen by the 1986 Act.

#### *ABWOR for criminal proceedings*

31 The most significant use of ABWOR in criminal matters is in summary criminal proceedings. ABWOR allows for the representation of a person charged under the summary procedure and not in custody in a limited number of specified circumstances, but most commonly where a plea of guilty is to be tendered. However, ABWOR is also available for a wide range of criminal matters falling outwith the scope of criminal legal aid. These include:

- entering an early guilty plea in summary cases, and presenting a plea in mitigation on the client’s behalf
- representing a client who is accused of breaching a community service order
- representing a client before the Sheriff at the investigative stage of a terrorism case
- making representations to the court on behalf of someone other than the accused in a Proceeds of Crime matter.

#### *ABWOR for civil proceedings*

32 In civil proceedings, ABWOR allows for the representation of a person in a number of different proceedings. These include petitions by a debtor for his own sequestration; proceedings arising from a failure by a person to pay a fine or other sum or obey an order of the court; proceedings before the Immigration Appellate Authority; proceedings before an Employment Tribunal.

#### *Eligibility*

33 Financial eligibility for ABWOR is generally the same as for Advice and Assistance, and solicitors can directly provide ABWOR if they are satisfied that their client is financially eligible. Clients who are financially eligible for Advice and Assistance are generally also financially eligible for ABWOR. However, a solicitor may provide

ABWOR in some cases without assessing the client's means. These include cases under the Terrorism Act and the Mental Health Act. This means that some clients who would otherwise be ineligible for Advice and Assistance may receive free representation.

- 34 In many ABWOR categories, the solicitor can proceed to provide representation without any prior authority from the Board. However, some matters require the solicitor to obtain the Board's prior authority, or apply a merits test himself. Different tests apply to different cases. For example, the solicitor may only provide ABWOR for a guilty plea where s/he is satisfied that the court is likely to impose a custodial sentence or a sentence that would lead to the loss of the applicant's livelihood, or that the applicant is unable to understand the proceedings.
- 35 On the other hand, ABWOR may only be provided before an employment tribunal where the Board has been satisfied that representation is required by a range of factors, including the complexity of the case and the ability of the applicant to understand the proceedings.

#### *Levels of authorised expenditure*

- 36 In most cases, the solicitor must work within an initial cost ceiling of £85. However, the higher limit of £160 applies where:
- the court orders a second or subsequent hearing
  - the case is a petition for sequestration by the debtor
  - the case involves representation before the Parole Board
- 37 As with Advice and Assistance, the solicitor requires the Board's prior authority for a higher cost ceiling. Templates are available to simplify the process where ABWOR is being provided before an employment tribunal, or in an asylum case before an Adjudicator.

#### **Civil legal aid**

- 38 Civil legal aid is essentially a form of legal aid which provides for representation by a solicitor or counsel in civil proceedings before designated Scottish courts and tribunals including proceedings in the House of Lords on appeal from the Court of Session, and proceedings before any person to whom a case is referred by one of the designated courts and appeals to the Social Security Commissioners.
- 39 Civil legal aid is available for a wide range of proceedings subject to a small number of exclusions: it is not available for proceedings wholly or partly concerned with defamation, election petitions, simplified divorce applications in the Court of Session or Sheriff Court; small claims processes at first instance and petitions by a debtor for the sequestration of his estate.
- 40 Unlike Advice and Assistance, where the solicitor determines eligibility, civil legal aid is only available on application to the Board, which must assess each application against a number of tests (described below). To ensure that a solicitor can act to protect the client's interests in urgent situations, there is provision for a solicitor to act in certain circumstances before an application is determined by the Board. This allows the solicitor to act immediately for his/her client in situations such as threat of child

abduction or domestic violence, or where an action is taken against the client and a defence has to be raised.

- 41 A client does not need to have received advice and assistance in relation to the matter before being able to apply for civil legal aid. The two processes are separate, although in practice Advice and Assistance will often precede an application for civil legal aid.

#### *Eligibility*

- 42 All civil legal aid applications must be submitted to the Scottish Legal Aid Board (SLAB), to decide whether or not civil legal aid will be made available. Applicants must satisfy the following three tests:

- they must be financially eligible
- they must have probable cause
- it must be reasonable that they should receive legal aid

#### *Financial eligibility*

- 43 The financial eligibility criteria for civil legal aid are not the same as those for Advice and Assistance. In addition, the assessment of eligibility is not undertaken by the solicitor but by SLAB. This assessment is more complex than that done by the solicitor for Advice and Assistance, and may take several weeks, and sometimes longer if the client's financial affairs are particularly complicated or there is difficulty in obtaining all necessary information.

- 44 A grant of civil legal aid may be subject to the payment of a contribution towards the costs of the case, depending on the client's capital and annual disposable income (unlike Advice and Assistance, where eligibility is assessed on the basis of weekly disposable income for the week immediately prior to the application being made).

- 45 Civil legal aid is available without contribution to those who have an annual disposable income of less than £2,902 and disposable capital of less than £6,271. Civil legal aid is available subject to a contribution by those who have an annual disposable income between £2,902 and £9,475 and disposable capital between £6,271 and £10,455. Civil legal aid is not available to anyone whose annual disposable income exceeds £9,475. The legislation does, however, allow the grant of legal aid where disposable capital exceeds £10,455, but it appears that the client cannot afford to proceed without legal aid. The financial eligibility thresholds are fixed and revised annually by Regulations approved by the Scottish Parliament.

- 46 The contribution based on the client's capital must be paid in one instalment. The contribution based on the clients' income can be paid in instalments over 20 months. The contribution is due directly to and will be collected by the Board (and not the solicitor, as for Advice and Assistance). The maximum income-based contribution that can be set for civil legal aid is one third of the client's annual disposable income, at present £2,191. Any capital contribution is payable in addition and will equal the amount by which disposable capital exceeds the lower capital limit.

#### *Probable cause and reasonableness*

- 47 It is SLAB's responsibility to assess whether the applicant has probable cause and whether it is reasonable to make legal aid available. Each case is considered on its own merits taking into account all of the relevant factors involved. The Board will not

prejudge issues that are really matters for the court to decide. All applications must meet the tests for probable cause and reasonableness.

- 48 To establish *probable cause* the applicant must show that there is a plausible legal basis for the proposed action. In this respect, the Board will expect to be given information to establish jurisdiction and the right, title and interest to raise proceedings. This is a fairly low test.
- 49 The second part of the merits test is that it is *reasonable* in the particular circumstances of the case that the applicant should receive legal aid for their case – in other words, that they should receive public funds to raise or defend court proceedings. For example, it may not be reasonable to grant legal aid to pursue an action for payment if the opposing party has no resources to meet the order sought; or if the cost of the case substantially outweighs any benefit to be gained; or if it looks unlikely that the case will succeed; or if the case appears to be frivolous or vexatious; or if a privately paying client would not reasonably be advised to prosecute such an action. The Board has a wide discretion in determining whether it is reasonable or not to grant legal aid, although all decisions of the Board are subject to review.

#### *Applications for Review*

- 50 SLAB considers each application on its own merits and neither Scottish Ministers nor Scottish Executive officials can interfere with the decision-making process. If an application for civil legal aid has been refused, SLAB is obliged under the 1986 Act to allow applicants to apply for a review of its decision to refuse legal aid. Applications for review are considered by different in-house assessors from those who decided the application at first instance. More complex review applications - for example those relating to proceedings in the House of Lords - are normally referred to a panel of external assessors.
- 51 SLAB's decision on an application for review is final, although an applicant may seek to judicially review SLAB's decision. Legal aid is available, subject to the normal tests, for the judicial review proceedings. However, if legal aid is refused and the applicant has applied for the review of his/her application SLAB must, unless it decides to grant legal aid, refer the application to the Sheriff for Lothian and Borders in Edinburgh, whose decision is final.
- 52 If legal aid has been refused there is nothing to prevent the applicant from submitting a fresh application addressing the grounds upon which the application was originally refused.

#### *Liability of the assisted person at the end of the case*

- 53 If the assisted person is *unsuccessful*, the Board will pay for the costs of the solicitor and the other expenses related to the case. The client has to pay their contribution as previously determined by the Board.
- 54 The court may order an unsuccessful assisted person to pay his/her opponent's expenses (costs). This places an assisted person in the same position as a privately paying client. However, an assisted person has a significant benefit which is not available to the privately-paying client. The assisted person may ask the court to reduce the sum due, even to nil. This process is known as 'modification' of expenses.

The court may only reduce the amount due after consideration of the assisted person's current financial circumstances (which might have changed since the time legal aid was granted) and his/her conduct in the case. If the court refuses to reduce the sum due, the assisted person is personally responsible for payment of the opponent's expenses. S/he cannot ask the Board to pay those expenses for him/her. However, s/he may be unable, or unwilling, to pay the costs sought by the opponent. Thus, whether the court modifies expenses or not, the opponent may be out of pocket through his/her inability to recover his/her court costs.

- 55 If civil legal aid is granted and the assisted person *wins the case*, the Board will also pay the costs of the solicitor and other expenses related to the case such as court fees and expert opinions. However, and the implications of this are not always sufficiently understood, the Board has a responsibility to recover the monies paid out for legal aid. To cover the costs of the case, the Board will use:
- any costs paid by the opponent(s)
  - any contribution the assisted person has to pay
  - if these first two methods are not enough to cover the costs, all or part of any money or property the applicant has won or managed to keep as a result of the case (around a third of the annual gross expenditure on civil legal aid is recovered in this way).

#### *Providers*

- 56 On 1 October 2003 a new fee structure for solicitors doing civil legal aid work was introduced. The new scheme is based on the 'block fees' system according to which solicitors are paid for specific stages or items of work. The scheme improves solicitors' remuneration and is designed to reward the efficient conduct of cases and is also linked to registration and quality assurance schemes. Only solicitors registered with the Board may provide civil legal aid. However, registration is not required by the 1986 Act. It is linked to Practice Rules made by the Law Society. Although solicitors may specialise in certain areas of law, these specialisms do not attract a different level of remuneration.

### **Criminal legal aid**

- 57 Criminal legal aid pays for legal representation of the accused person by a solicitor or counsel in criminal proceedings in the High Court, Sheriff Court and District Courts and before the Judicial Committee of the Privy Council. Criminal proceedings are classed as summary or solemn. The summary proceedings are used for less serious crimes and are dealt with in the District Court or by the Sheriff sitting alone. Solemn proceedings are used for more serious crimes and are dealt with in the Sheriff Court or the High Court; they may involve a jury trial.

#### *Registration of solicitors and Code of Practice*

- 58 From October 1998, all solicitors providing criminal legal assistance (criminal legal aid and Advice and Assistance on criminal matters) have to be registered by the Board. To be registered, solicitors and firms must comply with a Code of Practice drawn up by the Board in consultation with the legal profession and approved by Scottish Ministers. The Scottish Legal Aid Board audits the compliance of the profession with the Code.

#### *Duty Solicitor Scheme*

- 59 The Board is required to put in place arrangements for the availability of ‘duty solicitors’ in each Sheriff Court district and District Court district, to assist accused persons at early stages of the criminal proceedings. The Board therefore prepares annual ‘duty plans’ providing a rota of available solicitors. The plans are made available to court offices, police stations and other locations where the need to put an accused person in touch with a solicitor may arise.

*Accused person charged under the summary procedure*

- 60 Under summary criminal procedure, if the accused person is *not in custody* and decides to plead *guilty* then legal representation to assist the accused with that plea may be available in the form of ABWOR. Alternatively, the accused could plead *guilty* by letter and Advice and Assistance may be available to enable his/her solicitor to write such a letter to the court.
- 61 If the accused is *in custody* and decides to plead *guilty*, then the duty solicitor will act on their behalf in tendering the plea and will continue to act until the case is finished (e.g. if sentence is deferred).
- 62 If the accused person who is *not in custody* decides to plead *not guilty* to one or more of the charges, Advice and Assistance may be available to allow his/her solicitor to write a letter to the court stating that the client is pleading not guilty. However, a solicitor cannot be paid under legal aid for tendering such a plea on the client’s behalf in court.
- 63 However, if the accused is *in custody* and decides to plead *not guilty*, the duty solicitor is available to tender this plea on his behalf. To obtain representation beyond the initial plea of not guilty, whether the accused is in custody or not, an application for summary criminal legal aid must be made to the Board to allow a solicitor to prepare a defence and represent the accused at trial, where necessary. It is the Board that decides on eligibility and grants summary criminal legal aid.

*Eligibility for criminal legal aid in summary proceedings*

- 64 In order to qualify for summary criminal legal aid, the Board must be satisfied that the accused or his/her family would suffer ‘undue hardship’ if the accused had to pay for his/her own defence, and that it is in the ‘interests of justice’ that the accused should receive criminal legal aid.
- 65 Although no financial limits for criminal legal aid are set down in the legislation, in practice the Board refers to the civil legal aid eligibility limits as an indicator of the ability of the accused to pay for their own defence. There are no contributions to be paid for criminal legal aid. Therefore, once criminal legal aid has been granted there is no cost to be paid by the accused. However, contributions are payable for Advice and Assistance on criminal matters (as the same regime applies to civil and criminal Advice and Assistance).
- 66 In determining whether it is in the ‘interests of justice’ that legal aid be made available, the Board must weigh a number of factors, as set out in Section 24 of the Legal Aid (Scotland) Act 1986. These factors are:

- a) The offence is such that if proved it is likely that the court would impose a sentence which would deprive the accused of his liberty or lead to loss of livelihood.
- b) The determination of the case may involve consideration of a substantial question of law, or of evidence of a complex or difficult nature.
- c) The accused may be unable to understand the proceedings or to state his own case because of his age, inadequate knowledge of English, mental illness, and other mental or physical disability or otherwise.
- d) It is in the interests of someone other than the accused that the accused be legally represented.
- e) The defence to be advanced by the accused does not appear to be frivolous.
- f) The accused has been remanded in custody pending trial.

67 These statutory factors do not exclude other factors being taken into account by the Board, nor is it suggested that these factors are listed in any particular order, whether of importance or priority. The Board needs to be satisfied that there are good and sufficient reasons for a person accused in summary proceedings to be provided with legal representation at public expense. The Board is required to look at the whole circumstances of a case, including the circumstances of the individual concerned, and must make a balanced decision.

*Accused person charged under the solemn procedure*

68 An accused person charged and brought before the Sheriff in a solemn case is automatically entitled to criminal legal aid until a) his/her application for legal aid is determined by the court or b) s/he is given bail or placed in custody. The accused person can choose his/her own solicitor or ask to see the duty solicitor.

69 Automatic legal aid however only covers the first stage of the case, so it is necessary for the accused person to apply for solemn criminal legal aid straight away. The application has to be made to the *court* (and not to the Board). The court must be satisfied, after consideration of the accused person's financial circumstances, that the expenses of the case cannot be met without 'undue hardship' to him/her or his/her dependants.

70 The fact that the accused is charged under the solemn procedure means that the seriousness of the charge and the impact of a possible conviction are assumed, and a separate interest of justice test is not applied by the court.

*Applications for Review*

71 If an application for summary criminal legal aid has been refused, under the 1986 Act the applicant can apply to the Scottish Legal Aid Board for the review of its decision not to grant legal aid. SLAB's decision on an application for review is final, although an applicant may seek to judicially review SLAB's decision (see paragraph 51 above)..

72 Like in civil legal aid, if an applicant has been refused summary criminal legal aid, there is nothing to prevent him/her from submitting a fresh application addressing the grounds upon which legal aid was originally refused by SLAB.

73 There are currently no provisions for a review in relation to applications for solemn

legal aid.

*Public Defence Solicitors' Office (PDSO)*

- 74 The PDSO in Edinburgh opened in October 1998 as a five-year pilot scheme to compare the provision of criminal legal assistance by private solicitors with solicitors employed by SLAB. Two further offices are now operational in Glasgow and Inverness.
- 75 The PDSO provides criminal legal assistance on the same basis as solicitors in private practice. The PDSO is also part of the duty solicitor scheme. If the person is financially eligible, the PDSO solicitor will be able to offer Advice and Assistance, and/or prepare an application for summary criminal legal aid and submit this to the Board. If the Board grants legal aid, the PDSO solicitor will act for the client under the normal rules of professional conduct. However, the Board will not pay the PDSO's solicitors on a case by case basis, as these solicitors already receive a salary from the Board.
- 76 The pilot scheme was independently evaluated and a report was made to the Scottish Parliament in October 2001 (3 years into the pilot). New research on the effectiveness scheme is planned for reporting in 2008.

**Other forms of legal aid**

- 77 Two further specific forms of legal aid exist, which are mentioned to complete the overview of the system. Neither of these accounts for a substantial number of applications nor for a great demand on the Legal Aid Fund. Both these forms of legal aid are granted by the *courts*.
- 78 *Legal aid for hearings arising from the children's hearing system*  
This particular type of legal aid is commonly referred to as 'children's legal aid' and is automatically available to the child or parent (without a means test) for an appeal to the Sheriff against a decision of a children's hearing to grant a warrant for the detention of the child.
- 79 Children's legal aid is also available to the child or parent for applications to the Sheriff for a finding as to whether the grounds for referral to the children's hearing are established and for applications to the Sheriff against the decision of a children's hearing other than a decision to grant a warrant for detention. These forms of legal aid are not automatic – a form of merits test as well as a means test apply.
- 80 *Legal aid for proceedings for contempt of court*  
Legal aid is available to a person liable to be dealt with for contempt of court during the course of, or in connection with, any proceedings. Legal aid is granted on application to the court if the applicant cannot meet the costs of the case without 'undue hardship' and it is in the interests of justice that legal aid should be made available

**Remuneration of solicitors and counsel**

- 81 The Board pays solicitors and counsel according to the rates set out in various tables

of fees contained in Regulations approved by the Scottish Parliament. Different rates of pay apply to different categories of work, such as representation or meetings with clients. In addition, different methods of payment apply to different types of work (for example 'time and line' vs. fixed payments) and checking and control is carried out by SLAB in different ways. The various tables of fees and the operation of the various payment systems make for a complex picture. The main features (only) are set out below.

#### *Advice and Assistance and ABWOR work*

- 82 Advice and Assistance (A&A) work attracts an hourly rate of £42.20. However, a minimum fee of £25 may apply. ABWOR attracts an hourly rate of £54.80 for representation and £42.40 for other work. For ABWOR in summary criminal cases (for a guilty plea, see above), a block fee of £70 covers all work up to and including the first diet at which representation is provided.
- 83 Although the solicitor grants A&A in the first instance, work requiring expenditure over and above the first £85 needs to be approved by SLAB. Further approval from the Board is also required should the solicitor require to carry out further work that would exceed any subsequent limit of authorised expenditure.
- 84 Solicitors must first look to their client's contribution for payment of their account. However, where their bill exceeds any contribution payable by their clients together with any expenses or property recovered or preserved, they must submit their account to SLAB.

#### *Civil legal aid work*

- 85 Solicitors providing civil legal aid in the Sheriff Court and Court of Session have historically been able to choose whether they charge their bill on a detailed 'time-and-line'<sup>4</sup> or on a 'block fee' basis. This structure was substantially reformed on 1 October 2003, with most Sheriff Court cases falling within a mandatory, modernised block fee structure. This system, which encourages the better and more efficient conduct of cases, has simplified and streamlined legal aid billing. By linking payment to defined stages of work, interim billing became possible, assisting the solicitor's 'cash-flow'. A choice of charging methods remains available in the Court of Session. The level of detailed fees was also increased on 1 October 2003.
- 86 A table of fees has been prescribed for work by counsel in the Court of Session, although the Auditor of the Court of Session has been given a wide discretion to allow a higher fee. In practice, this means that the fees paid to counsel may be significantly higher than those prescribed by Parliament. Where civil legal aid is provided in other courts (including the Sheriff Court and House of Lords), counsel are paid 90% of what is essentially a commercial fee.

#### *Summary criminal legal aid work*

- 87 Since 1 April 1999, criminal work for summary cases is paid under the 'fixed payments' scheme. Under this scheme solicitors receive a standard 'all inclusive'

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<sup>4</sup> 'Time and line': a system whereby solicitors are paid for individual pieces of work such as telephone calls, letters and meetings with clients, as well as court appearances. Payment is based on length of letter, call, meetings etc. The solicitor keeps a detailed record of every item of work done which is submitted to the Board for scrutiny and payment.

payment by the Board for conducting summary cases in the Sheriff and District Courts. The fixed payment is currently £500 for work in the Sheriff Court and £300 for work in the District Court; additional payments are available for trials that last longer than 30 minutes and certain other court appearances, such as bail appeals and deferred sentences.

- 88 Certain summary cases are exempted from fixed payments and are paid on an on a 'time and line' basis.

*Solemn criminal legal aid work*

- 89 Solemn criminal legal aid work is paid on a 'time and line' basis, and attracts an hourly payment of £54.80 for solicitors for representation and £42.20 for other work. In practice, counsel are paid a variable daily rate. Solicitors submit their accounts to SLAB at the end of the trial. There are no interim payments, and no mechanisms for SLAB to monitor expenditure in these cases on an ongoing basis.

- 90 A table of fees has been prescribed for work by counsel in the criminal courts, although the Auditor of Court has been given a wide discretion to allow a higher fee. In practice, this means that the fees paid to counsel may be significantly higher than those prescribed.

- 91 The following table illustrates the current remuneration system:

	Advice and Assistance		ABWOR		Civil		Summary criminal		Solemn criminal	
	Solicitors	Counsel	Solicitors	Counsel	Solicitors	Counsel	Solicitors	Counsel	Solicitors	Counsel
Minimum fee	£25.00		£25.00							
Block fees			<sup>5</sup>		<b>Sheriff Court:</b> 1 hour in court = £72 <b>Court of Session</b> 1 hour = £66					
Fixed payment							<sup>6</sup> <b>District Court</b> = £300 per case <b>Sheriff Court</b> = £500 per case			
Hourly payment	£42.20		1 hour in court = <b>£54.80</b>  Non-advocacy: 1 hour = <b>£42.20</b>		<b>Sheriff Court</b> 1 hour in court = £68 <b>Court of Session</b> 1 hour = £52.60 <b>House of Lords</b> 1 hour = £52.60				Conducting trial: 1 hour = £54.80  Non-advocacy: 1 hour = £42.20	
Variable daily rate		No fees prescribed – commercial rates chargeable		No fees prescribed – commercial rates chargeable		<b>Sheriff Court:</b> No fees prescribed (Proof fees of between £600 and £1500 have been allowed by Auditors) <b>Court of Session</b> <sup>7</sup> Junior - 1 day at proof = £240.50 Senior - 1 day at proof = £320.80 <b>House of Lords</b> No fees prescribed		<sup>9</sup> Junior: 1 day trial = £172 - £291  Senior: 1 day trial = £315 - £510.50		<sup>9</sup> Junior: 1 day trial = £172 - £291  Senior: 1 day trial = £315 - £510.50
Board approves unusual expenditure										
Board approves expenditure as case progresses										
Board reconfirms legal aid as preset stages in case										

<sup>5</sup> £70.00 for preliminary stages of guilty pleas, pleas to competency and referrals to ECJ and £27.40 or £45.00 for sequestration

<sup>6</sup> Normally, summary criminal legal aid attracts a fixed payment but certain cases are exempt from fixed payments and are paid on an hourly basis

<sup>7</sup> Although daily rates are prescribed in Regulations, often counsel are paid rates that are specific to individuals. The Auditor of Court has been given a wide discretion to allow a higher fee

## Legal aid figures

- 92 The tables in Annex 1B show patterns of expenditure between the main types of legal aid in recent years. Table 1 shows that total expenditure has increased significantly since 1987, reaching a peak in 1997/98. Although it fell in the three following years, total spend has increased again in the last couple of years. This recent increase has been driven entirely by increases in the cost of criminal legal assistance, while civil legal assistance has been falling since 1997/98.
- 93 It is clear from the table that the majority of expenditure is (and always has been) on criminal legal assistance. This is particularly so when one considers net spending on civil legal aid, which takes account of the sums the Board recovers by way of contributions from assisted persons, expenses from opponents and ‘clawback’ against property recovered or preserved in the course of a legally aided case. The overall balance between civil and criminal has not changed markedly over the years, although the recent increase in criminal legal assistance has shifted the balance further towards criminal in the last couple of years. This is despite recent growth in the cost of asylum cases (shown under civil ABWOR).
- 94 Tables 2 and 3 of Annex 1B again show the breakdown of expenditure across the aid types, but also show the relative spends on different elements of a case: fees for solicitors, advocates and solicitor advocates and outlays (costs incurred in the course of a case, such as travel costs, or the cost of expert witnesses and reports).
- 95 These tables illustrate two main things: the split between different heads of expenditure has shifted over time and the split also varies significantly between aid types. On the former, spending on advocates and solicitor advocates has increased faster than spending on solicitors or outlays, from a combined total of 5% in 1996/97 to 9% in 2002/03. There has also been a notable growth in spending on outlays in civil legal aid, *relative to the total cost of civil legal aid*. This appears likely to relate in particular to an increase in the use and cost of experts, either as witnesses, or to prepare reports during a case.
- 96 As for the split between aid types, a noticeably lower proportion of civil legal aid spending relates to solicitors’ fees, as both counsel and outlays are more significant here than in other major aid types (spending on counsel is not reported separately for Advice and Assistance, where it is treated as an outlay).
- 97 Table 4 of Annex 1B shows a basic comparison of expenditure between Scotland and England and Wales. Again, there are two main points to note. Firstly, the balance of spending between civil and criminal across the two jurisdictions is different. Criminal takes up a far greater share of spending in Scotland than in England and Wales, although recent increases in criminal spending south of the border are bringing the two slightly closer together.
- 98 The other main point is that spending overall in England and Wales is much higher per capita than in Scotland, particularly for civil legal assistance. However, it should be noted that asylum cases have in recent years taken up an increasing and substantial share of civil spending in England and Wales, far more so than in Scotland. In addition, it is important to note that the legal aid systems, and wider legal systems, in

the two jurisdictions are different in many significant respects. This impacts on legal aid expenditure, and as such, direct comparison of costs is of limited value.

## **1B OTHER FORMS OF PUBLICLY FUNDED LEGAL ASSISTANCE ON CIVIL MATTERS**

### **Providers**

99 As set out in paragraphs 4 to 9 above, publicly funded legal advice on civil matters is available from a wide range of providers, of which solicitors being paid through legal aid are part. We can distinguish between providers of advice on civil matters on the basis of the sector in which they operate. There are providers from all three main sectors – private, public and voluntary. These sectors do not always work in the same way. The table in Annex 1C illustrates (with some generalisations) how the different sectors work. The table also includes information on funding and the areas of work that may be covered by providers in each sector.

### **Services**

100 However, the picture of service provision is more complex than a simplistic three-way split by sector might suggest. In particular there is variation in service provision on a number of themes outlined below.

#### Catchment:

- Some services may cover a **very local** area, for example Granton Information Centre in Edinburgh provides a general advice service to people within a few postcode areas of the city.
- Some services cover a **city or local authority area**, for example Edinburgh City Council Welfare Rights team provides advice to anyone who lives within the council area.
- Some services are **regional** – for example the Edinburgh-based Shelter Housing Aid Centre covers the Edinburgh, Lothian and Borders area.
- Some services are **national** – for example the Scottish Association for Mental Health has a legal officer responsible for issues from across Scotland, as does, for example, the Disability Rights Commission.
- Some services have **no stated catchment area** – for example many private practice solicitor firms will not operate a restriction on geographic terms.

#### Type of service:

- Some services may **provide information** to people and may act as important points of contact to link people to other, more specialist services.
- Some services also would try to **help resolve a problem**, but would refer the person on to another provider if there is a need for more long-term advice and support.
- Some services operate on a **casework** basis, taking a more in-depth role in resolving more complex problems and acting on the person's behalf.
- Some services also provide **representation** at tribunals or in court.

In some cases, one or more of these kinds of intervention may all be carried out within the one service, but possibly by different people.

Specialist and generalist:

- Services may state that they provide advice and information on a wide range of topics – **generalists**. Many Citizens Advice Bureaux will work in this way, as do many solicitors practices.
- Services may state that they provide advice on a more limited range of topics, that is they are more **specialised**, such as Money Advice Teams, housing advice centres, or solicitors specialising in family law.
- Some services may be a combination of generalist information, with specific posts set aside for areas of law such as debt, or immigration law.
- Finally, services may be specialist in terms of their focus upon a particular client group, for example specialist services for children’s rights, disabled people or ethnic minority groups.

### **Funding bodies and funding levels**

- 101 Due to the great variety of providers of publicly funded legal assistance on civil matters, and the variety of means by which and sources from which they obtain funding for their work, it is extremely difficult to compose an accurate picture of the sources and levels of funding.
- 102 The Working Group which was established in October 2000 to ‘consider how a community legal service might be developed for Scotland’, and which reported in November 2001 under the title of ‘Review of Legal Information and Advice Provision in Scotland’ (the ROLIAPS report) looked into funding for advice provision. The Working Group concluded that it was not possible to obtain exact figures on current levels of funding for advice provision. However, the Group did attempt to identify the major sources of funding, and concluded that the major funding bodies are local authorities, central government, and the Scottish Legal Aid Board.
- 103 Of those, local authorities are the principal funders of the voluntary advice sector as well as being significant providers of advice services themselves. However, we cannot be certain about the scale of the investment made by local authorities as this information is not available. The Scottish Legal Aid Board almost exclusively funds provision through private practice solicitors.
- 104 Central government funding (of voluntary sector provision or for specific initiatives in local authorities) is less prominent, but does involve a number of UK Government Departments (such as DTI, who provide funding for Citizens Advice Scotland and support initiatives such as the Consumer Support Networks). The Scottish Executive also provides funding for advice provision, through several Departments. Details of this can be found at paragraphs 112 to 116.

### **ROLE AND FUNCTIONS OF THE SCOTTISH EXECUTIVE**

- 105 The Scottish Executive carries out a number of functions in relation to legal aid, and in respect of publicly funded legal information and advice. In essence these fall into three categories: sponsorship of the Board, policy development and funding of advice provision.

## **Sponsorship of the Scottish Legal Aid Board**

- 106 The Access to Justice Division of the Justice Department is the sponsoring Division of the Scottish Legal Aid Board. On a day-to-day basis this function is carried out by staff in the Legal Aid Policy Team.
- 107 Sponsorship of an Non-Departmental Public Body encompasses the following functions:
- appointment of Members
  - pay regimes of staff
  - acting as a conduit for the relationship between the body and Scottish Ministers
  - general oversight of the operation, planning and policies of the body.
- These functions are generic and would also apply to other NDPBs such as Scottish Natural Heritage, Crofters' Commission, or the Scottish Arts Council.

## **Legal aid policy**

- 108 The Access to Justice Division, and the Legal Aid Policy Team within it, is also responsible for overall legal aid policy. This includes:
- the fixing of fees and outlays for solicitors and counsel doing legal aid work
  - ensuring that provision is made for the availability of legal aid where changes in legislation (originating from the House of Commons, the Scottish Parliament or EU) make this necessary
  - updating and adjusting legal aid Regulations in the light of court judgements, Scottish Executive policy initiatives, and identified difficulties
  - undertake the strategic review of the delivery of legal aid, advice and information, followed by implementation of agreed action
  - continue to modernise legal aid to promote efficiency, quality and reward in the delivery of legal aid, in particular through reform of Advice and Assistance by December 2004 and implementation of graduated fees and quality assurance in the High Court. The Access to Justice Division is also responsible for policy regulation of the legal profession, but this is not the subject of this Review.
- 109 The Scottish Executive, either through civil servants or its Ministers, is by law not allowed to get involved in or comment on individual applications for legal aid or decisions made by the Scottish Legal Aid Board in these.

## **Policy on publicly funded legal advice and information**

- 110 In addition to policy on legal aid, the Access to Justice Division is also responsible for developing policy on publicly funded legal advice in general and in particular for developing a national framework for legal advice and information.
- 111 Earlier work included the establishment of the 'CLS Working Group' in October 2000 by the Deputy First Minister, Jim Wallace, to consider how a 'community legal service' might be developed for Scotland, which resulted November 2001 in the report 'Review Legal of Information and Advice Provision in Scotland' (ROLIAPS report). Following on from this work further research and development work was undertaken by the Division. More detail on that can be found in paragraphs 200 to 203 below.

## **Direct funding of provision**

- 112 The Executive also performs a role in funding of legal advice provision or funding of support structures for advice provision.
- 113 The Access to Justice Division in the Justice Department, funds six pilot In-Court advice projects (Edinburgh, Aberdeen, Dundee, Airdrie, Hamilton and Kilmarnock), to provide advice for unrepresented litigants in the Sheriff Court. These projects will be evaluated by March 2006.
- 114 The Social Inclusion Division, in the Development Department, provides funding for locally based money and debt advisers, and for the ongoing training and support of money advisers in Scotland. As a result of the recommendations of a Working Group for the replacement of Poindings and Warrant Sales the Executive, from 2002, made £3 million a year available to local authorities to deliver a substantial enhancement to the provision of money advice in Scotland. It is estimated that this £3m per annum increased the capacity of the money advice sector by approximately 25%. This funding is being increased by £1m in 2004, and by a further £2m in 2005. To provide support and training and to ensure consistent quality of money advice, the Executive is providing funding of £500,000 per annum (until 2005) to establish MATRICS<sup>8</sup>, a central support service for the money advice sector, which is run jointly by Citizens Advice Scotland and Money Advice Scotland.
- 115 Housing Division 3, also in Development Department funds organisations such as Shelter, the Shelter Housing Law Service and Legal Services Agency, through its housing sector voluntary grant scheme. Communities Scotland, through HomePoint, provides a total funding of £300,000 to a number of voluntary sector organisations for the provision of legal information and advice on areas of housing law. The largest grant is provided jointly with the Development Department to Shelter for the delivery (in partnership with Citizens Advice Scotland) of a second tier housing advice and training and support of housing advisers in the CAB network. This scheme is due to be reviewed in the light of the landscape review of housing information and advice which is currently being undertaken by the Executive with Communities Scotland.
- 116 Various other Divisions may provide smaller amounts of funding for projects that encompass an element of legal information and advice provision, for example in work with young people (Education Department) or older people (Health Department).

## **Other relevant activity**

- 117 The Enterprise and Industry Division of the Enterprise, Transport and Lifelong Learning Department plays a minor role in relation to the provision of (legal) advice services. The Business Interests and Improving Regulation Branch is the first contact point within the Executive for matters relating to Citizens Advice Bureaux (CABx) and Citizens Advice Scotland (the membership organisation for local CABx). This involvement stems from its liaison role with the Department for Trade and Industry (DTI), and its policy interest in consumer matters. The DTI fund Citizens Advice

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<sup>8</sup> Money Advice Training , Resources Information and Consultancy Services.

Scotland directly, and local CABx are important providers of advice on consumer issues.

- 118 There have been recent policy developments in the areas of housing advice and money advice which are very relevant to this review. These are described at paragraphs 226 to 230 below.

## **ROLE AND FUNCTIONS OF THE SCOTTISH LEGAL AID BOARD**

### **Status and functions**

#### *History*

- 119 SLAB assumed overall responsibility for the administration of legal aid with effect from 1 April 1987. The entire legal aid staff of the Law Society transferred to SLAB, including solicitors and accounts assessment staff. Only a few civil servants from the SHHD Legal Aid Assessment Office joined SLAB, bringing experience of means assessment in civil applications. The new organisation also inherited practices from the previous administration, including the use of committees and external "reporters" to assess the merits of applications.

#### *Present*

- 120 SLAB is an executive Non-Departmental Public Body (NDPB) and acts independently within the powers afforded to it by the Legal Aid (Scotland) Act 1986. An NDPB is a public body which has a role in the process of the national Government, but it is not a Government department or part of one. An NDPB carries out its day-to-day functions independently of Ministers, but Ministers are ultimately accountable.
- 121 Since SLAB is an executive NDPB, the Scottish Executive appoints its members and determines the Board's Management Statement and Financial Memorandum after consultation with the Board. SLAB must report each year to Scottish Ministers. Audit Scotland audits the accounts of the Board. In turn, Scottish Ministers must place SLAB's annual report (and Audit Scotland, the accounts) before the Scottish Parliament.
- 122 The functions of the SLAB under the 1986 Act are:
- advising Scottish Ministers on the current operation and development of legal aid provision
  - investigating different ways of delivering a legal aid service
  - developing operational plans and procedures, including e-business, to improve the delivery and administration of legal aid
  - considering applications for civil and where appropriate criminal legal aid and making decisions on whether to grant or refuse these.
  - examining accounts sent in by solicitors and advocates for all legal aid work, and paying them the appropriate amount for the work they have done
  - collecting expenses and contributions
  - registering firms and solicitors under the Code of Practice in relation to criminal legal assistance and monitoring their ongoing compliance
  - investigating and pursuing abuse of legal aid
  - advising Scottish Ministers on legal aid matters

- administering the Legal Aid Fund.
- carrying out research.

### *Independence*

- 123 SLAB is a corporate body, which means that it is an organisation with a distinct legal personality from that of its members or personnel. Under the 1986 Act, it is expressly stated that SLAB is not an emanation of the Scottish Executive or other government departments. Neither the Board members nor SLAB's staff are civil servants nor is any member of staff entitled to any particular status, immunity, privilege or exemption. SLAB's property is not owned by or held on behalf of the Executive or other government departments. SLAB is subject to any tax, charge or levy in the normal way.
- 124 SLAB's status ensures the proper level of detachment from the Executive so that its functions, and in particular the assessment of individual cases, can be carried out rigorously and independently, although within the overall context of Ministerial strategies and objectives. The independence enjoyed by SLAB is therefore greater than that afforded by Executive Agencies which are established by Ministers as part of Executive Departments, or as Departments on their own rights, to carry out certain functions. Agencies are staffed by civil servants.
- 125 However, since SLAB and its operation are funded by the Executive, SLAB is required to provide the Executive with the necessary information relating to its property and the proposed discharge of its functions. SLAB must also produce an annual report and have regard, in the exercise of its functions, to the guidance that the Executive may from time to time provide. However, such guidance cannot relate to the consideration and disposal of legal aid applications.

## **The Board**

### *Composition*

- 126 By statute, the Board has a minimum membership of 11 and a maximum of 15. At least two members must be members of the Faculty of Advocates; at least two members must be members of the Law Society of Scotland and at least one other member must have experience of the procedure and practice of the courts. The Board currently consists of a Chairman and 11 other members. Of the current 12 members six are not legally qualified, although one of these will cease to be a Board member in December 2004. An appointment round is currently being held to replace that member and, depending on the number of persons chosen, this will mean either an equal number of legally and non-legally qualified or a slight majority of non-legally qualified persons.

### *Tenure and Remuneration of Board's members*

- 127 Appointments of SLAB Board members are Ministerial public appointments made in accordance with the Code of Practice issued by the Office of the Commissioner for Public Appointments. Members are usually appointed for a four-year term, and a further four-year term may be agreed depending on satisfactory performance as a Board member. In exceptional circumstances a further term of office, not greater than two years, may be agreed by Ministers.

128 The Sponsor Team, in this case the Legal Aid Policy Team at the Scottish Executive, is responsible for recommending the level of remuneration to be paid to public body chairs and members, with guidance from within other Departments of the Executive. In certain circumstances Ministerial approval is also required. The Sponsor Team should take account of the views of the body in reaching their decision. The cost of remuneration for the chair and Board members is met from SLAB's existing administration costs.

#### *Functions and Operation of the Board*

129 The Board has the collective responsibility for ensuring that the statutory functions of SLAB and Ministerial policy and priorities are being fulfilled, and that SLAB's use of public funds is appropriate and effective. The Board should also provide leadership, support and guidance to SLAB as a whole, as well as ensure and promote commitment to its core values, policies and objectives. In addition, the Board has the following specific responsibilities:

- approving the annual report and accounts
- monitoring SLAB's financial position against the legal aid provision and the required financial targets and take corrective action as and when appropriate
- developing, reviewing and monitoring performance targets and take corrective action as and when appropriate
- developing, reviewing and approving key strategic and policy documents (e.g. Corporate Plan, Operational Plan, Corporate Strategy)
- approving high value, unusual or contentious expenditure proposals for submission to the Executive for approval
- ensuring that SLAB operates in an open and accountable manner taking into account the views of users and stakeholders

130 Under the 1986 Act the Board may regulate its own workings and make arrangements for the discharge of one or more of its functions. For example, committees may be set up and dissolved and may consist, almost entirely, of persons who are not Board members.

131 There are currently three Committees of the Board:

- The Audit Committee
- The Remuneration and Appointments Committee
- The Legal Services Committee

132 The *Audit Committee* is concerned with corporate governance and meets four times each year. It comprises six Board members including the Chairman, and the Chief Executive in his capacity as Accountable Officer. The *Remuneration and Appointments Committee* meets when necessary, usually three or four times per year. The *Legal Services Committee* deals with the application of legal aid legislation and the Board's policies for conducting its operational business. It meets 12 times per year. The *Legal Services Sub Committee* also meets 12 times per year to deal with sensitive, high profile or complex legal aid applications. Its membership includes (lay and legally qualified) members of the Board and external co-opted legally qualified members (solicitors or advocates). These external members have experience in legal aid work and provide a valuable input into the decisions on these difficult cases.

133 These Committees report to the Board on a regular basis. The Chairman, who is

appointed by Ministers amongst Board members, provides strategic leadership of the Board collectively, and individually. The Chairman's specific responsibilities are to:

- chair Board meetings
- oversee the implementation of the Board's decision by SLAB's staff
- advise the Sponsor Team and Sponsor Minister on the appointment of Board members and the performance of individual members
- represent SLAB in engagements with Minister and the Scottish Parliament

## **Staff**

- 134 SLAB employs its own staff, who are not civil servants (see above). SLAB currently employs around 300 people. The principal officer of SLAB is the Chief Executive who is appointed by the Board. The Chief Executive has responsibility for the overall organisation, management and staffing of SLAB and for its procedures in financial and other matters, including conduct and discipline.
- 135 The Chief Executive of the Board is also SLAB's Accountable Officer in accordance with sections 14 and 15 of the Public Finance and Accountability (Scotland) Act 2000. As Accountable Officer, the Chief Executive is personally responsible for the propriety and regularity of the public finances of SLAB and for ensuring that the resources of SLAB are used economically, efficiently and effectively. SLAB's Accountable Officer has also a duty to promote Best Value.
- 136 The other staff of the Board include staff processing legal aid applications, and the payment of accounts, staff working in the areas of Information Technology, Human Resources, Audit and Compliance, Policy and Finance, and Legal Services. The Board also employs solicitors and support staff in the Public Defence Solicitor's Office and Part V Projects.

## **Funding**

- 137 Much of the funding for legal aid and SLAB derives from transfers to SLAB made by the Scottish Executive. All of this funding is incorporated in the Budget Bill for the appropriate financial year. The Management Statement and Financial Memorandum sets out the operating framework for the proper use of funding. In addition to the terms and conditions set out in these documents, Ministers may also issue supplementary guidance or directions.

### *Grant in Aid Funding of the Board's operation*

- 138 The cost of running the administration of the Board is paid by a separate "grant-in-aid" from the Scottish Executive, which is cash-limited (unlike the Legal Aid Fund (see below)). From this grant, the Board also funds so-called Part V pilot projects set up under Part V of the Legal Aid (Scotland) Act 1986 to test out different methods of delivery of legal assistance.
- 139 The Grant-in-Aid spend for 2003-04 was £10.602m, which was allocated as follows:
- |                        |         |
|------------------------|---------|
| Staff costs            | £6.976m |
| Running costs          | £2.403m |
| Capital                | £0.782m |
| Civil legal aid reform | £0.441m |

### *The Legal Aid Fund*

- 140 The Board has the statutory duty of setting up and maintaining the Scottish Legal Aid Fund. The fees and outlays for legal aid work done by solicitors and counsel are paid out of the Fund. By statute only solicitors and counsel can be paid out of the Fund. The salaries and running costs of the PDSO are also paid from the Fund.
- 141 Expenditure is financed by contributions from assisted persons, recovery of expenses from opponents, recovery of legal aid costs from any property recovered or preserved by the assisted person and a grant from the Scottish Executive. This grant is not cash limited and covers the shortfall between the payments made out of the Fund and the income received from the payment of contributions, expenses and damages.

## **PERFORMANCE MEASUREMENT IN THE SCOTTISH LEGAL AID BOARD**

- 142 During the late 1990s SLAB experienced operational difficulties leading to a failure to meet the majority of its performance targets in 1999/2000 and a backlog in the processing of accounts. Since then a range of measures have been introduced to improve performance, including the development and introduction of new and challenging key performance indicators, the setting up of an Independent Checking and Quality Unit, the extension of measures to tackle potential fraud and the extension of its forecasting capabilities.

### **Key Performance Indicators**

- 143 In 1999/200 SLAB had only seven key performance indicators, the majority of which were concerned with timeliness. A new set of performance indicators was developed and introduced in October 2000. The new targets were designed to give a much more complete and balanced review of SLAB's performance. They include targets for all aspects of the applications process rather than concentrating solely on first instance decisions and the targets measure accuracy as well as timeliness. Headline indicators were also introduced which combine individual targets for accuracy and timeliness. They are designed to give an appropriate balance between the measures for speed of processing and the quality of decisions.
- 144 Since 2000 SLAB has continued to develop the performance indicators and increase the targets. Since then SLAB has consistently met or exceeded the vast majority of its targets. In 2002/2003 SLAB met or exceeded all the headline indicators and the vast majority of the individual targets. SLAB's performance indicators and performance against the targets during 2002/2003 are shown at Annex 1D.

### **Independent Checking and Quality Unit**

- 145 In addition to recognising the paramount importance of accuracy of decision making in the development of the new performance indicators, an Independent Checking and Quality Unit was set up during 2000/2001. This unit checks that decisions are taken in accordance with guidelines and are accurate and consistent. The remit of the unit has been gradually extended and now covers decisions taken on applications, accounts and debt recovery matters.

## **Fraud and verification**

146 Since 1999/2000 SLAB has increased its investigative capacity to check that only those who are eligible to receive legal aid receive it. SLAB has increased the volume of checks of information supplied by applicants and in 2002/2003 investigated 1,622 cases where it appeared that an applicant or assisted person had not made full disclosure at the time of application or, in civil cases, had not told SLAB about a change of circumstances. During the same period SLAB carried out 96 investigations into the conduct of solicitors. In 2002/2003 savings of £1 million resulted from the investigations into applicants, assisted persons and solicitors.

## **Communications and consultation**

147 SLAB surveys solicitors every three years to ascertain their views on the range of the Board's services, operations and policies. The most recent survey was undertaken in 2003 and showed respondents to be generally satisfied with SLAB's services. It also showed there had been significant improvements in respondents' views of SLAB's performance since the previous survey in 2000.<sup>9</sup>

148 To find out the views of the people who actually use legal aid, in 2003 SLAB conducted, for the first time, separate surveys of assisted persons and applicants for Advice and Assistance<sup>10</sup> and of people assisted through criminal legal aid, civil legal aid and opponents in civil legal aid cases. SLAB uses the information obtained from the surveys to help to identify further areas for development of legal aid and the services it provides.

149 SLAB has increased the level of communication and consultation with solicitors, advocates, assisted persons, the voluntary sector and others with an interest in legal aid. This includes consultation on developments in legal aid, meeting regularly with key partners in the justice system, holding public meetings and undertaking surveys.

## **Complaints**

150 To monitor and improve its performance, SLAB has developed and introduced a new complaints procedure. This is separate from grievance review procedures relating to the granting of legal aid.

151 If applicants are dissatisfied about the service provided by SLAB, they can avail themselves of SLAB's three-stage complaint procedure. SLAB received 192 formal complaints during 2002/2003, a fifth less than the previous year. Of these complaints, 50% were considered justified, compared with 68% the previous year.

152 In common with most other public bodies in Scotland, SLAB comes within the remit of the Scottish Public Services Ombudsman and if, after exhausting SLAB's complaints procedure (or in other limited circumstances) applicants are still dissatisfied, they may be able to complain to the Ombudsman. The Ombudsman investigates complaints made by members of the public who have suffered injustice or

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<sup>9</sup> As reported in the Recorder issue 37, Summer 2003.

<sup>10</sup> As reported in the Recorder issue 36, March 2003

hardship through maladministration or service failure from a wide range of public bodies.

- 153 During 2002/2003 the Ombudsman received 13 complaints relating to SLAB and a further three were carried forward from the previous year. The Ombudsman cleared 12 of these cases, none of which became statutory investigations or resulted in findings of maladministration by SLAB.

### **Staffing**

- 154 SLAB experienced very high staff turnover in the late 1990s. This situation has now been reversed by a dramatic reduction in staff turnover. The percentage of leavers during the year 2003/2004 was 9.8% and staff turnover has consistently improved since 1998/99, when it stood at 24.6%. The Board's current performance compares very favourably with The Chartered Institute of Personnel & Development (CIPD) ninth UK labour turnover survey<sup>11</sup> which was conducted in August 2003. This related to the calendar year 2002 and covers the responses from 577 organisations with 877,550 employees. The survey showed an overall turnover rate of 16.1%.
- 155 SLAB undertakes regular two yearly surveys of staff opinions and uses the information to increase staff satisfaction as well as considering potential improvements in operations identified by staff. SLAB's commitment to developing and motivating staff was recognised when it was successfully reassessed against the Investors in People standard in 2002.

### **Legal Aid Online**

- 156 SLAB has made significant progress with the development of its Legal Aid Online services. All SLAB services, including applications and accounts, will be available online by 2005. This will bring a range of benefits to the profession, applicants and opponents including significantly shorter timescales and increased accuracy. Legal Aid Online services will be introduced in the coming year, with Advice and Assistance expected to be available to solicitors from summer 2004.
- 157 As part of its commitment to continually improve its service and reflect this in its service standards and targets, SLAB has developed indicative service standards for cases that use the online service. They will be revised following the pilots and consultation. An example is registration of Advice and Assistance applications, which will be 3 days for online, compared to 10 days for paper based applications.

### **BEST VALUE**

- 158 Over recent years the need to achieve value for the money spent on public services and to secure high standards in service delivery has been increasingly recognised. This is reflected in the increasing pressure on public bodies to perform well in this area and a statutory obligation on them to ensure arrangements are in place to secure Best Value.

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<sup>11</sup> Labour Turnover 2003 – Survey Report December 2003 - CIPD

159 It is important to recognise the distinction between “Best Value” in the context of the duty imposed on public bodies and “best value” in the more general sense of the meaning of the phrase. This section of the report gives a brief description of the former as it applies to the relevant public bodies.

### **Non-Departmental Public Bodies**

160 As the public body charged with the administration of legal aid in Scotland, the Accountable Officer for the Scottish Legal Aid Board has a duty to ensure arrangements are in place to secure Best Value.

161 Since April 2002, there has been a duty on Accountable Officers to “ensure arrangements are in place to secure Best Value”, emanating from the Public Finance and Accountability (Scotland) Act 2000. The Scottish Executive has also been consulting on guidance that describes the characteristics of a Best Value organisation, and draft guidance has been issued.

162 For non-local authority public bodies the duty to secure Best Value can be described as a duty:

- to make arrangements to secure continuous improvements in performance (while maintaining an appropriate balance between quality and cost); and in making those arrangements and securing that balance,
- to have regard to economy, efficiency, effectiveness, the equal opportunities requirements and to contribute to the achievement of sustainable development.

### **Local authorities**

163 Section 1 Part 1 of the Local Government in Scotland Act 2003 places a duty on local authorities to make arrangements which secure Best Value; this duty is similar, but not identical, to the duty placed on non-local authority public bodies.

164 Local authorities are currently major funders and providers of legal information and advice and their Best Value duty has implications both in terms of local service delivery and funding of services. Local authority performance in respect of Best Value is audited by Audit Scotland on behalf of the Accounts Commission. In carrying out their various functions, local authorities will be expected to have regard to generally recognised guidance that may exist in respect of these functions.

### **Scottish Executive**

165 The duty to secure Best Value equally extends to the Scottish Executive. In addition to securing Best Value in the Scottish Executive itself, the Executive’s function in relation to the justice system places on its Accountable Officer a duty to make arrangements to secure Best Value for the whole justice system.

166 One recent development that may assist with this duty insofar as the criminal justice system is concerned is the creation of the National Criminal Justice Board. The Board is comprised of senior representatives from the key players in the criminal justice system and its role is to oversee the operation of the criminal justice system in Scotland and its performance in terms of the overarching aims, objectives and targets.

167 The Executive's role in making arrangements to secure Best Value for the justice system will be of critical importance in taking forward any agreed recommendations flowing from this Review and others, such as the McInnes review.



# Recent Developments And Ongoing Modernisation Work

## LEGAL AID

- 168 Scottish Ministers are committed to modernising the Scottish justice system, to deliver a better public service and inspire greater public confidence. An essential component of modernising justice is the modernisation of legal aid, to meet three key objectives:
- fair reward for work done
  - the introduction of quality assurance where is not in place already
  - value for money in the use of taxpayers money
- 169 These modernisation objectives are shaping a programme of reform activity which is currently underway. As well as through modernisation, legal aid has undergone considerable change over the last few years due to specific external forces ranging from the devolution settlement itself to policy developments stemming from other parts of the Scottish Executive, Westminster, the EU and beyond, resulting for example in:
- extension of the repayment period for contributions
  - new arrangements for urgent legal aid
  - legal aid for Social Security Commissioner and Childrens' Support Commissioner
  - legal aid for Employment Tribunal
  - legal aid for VAT Tribunal
  - annual uprating of the financial eligibility limits
  - increased capital thresholds for financial eligibility (now being uprated annually)
  - disregard of state benefits in Advice and Assistance
  - commitment to disregard state benefits in civil legal aid
  - legal aid for certain proceeding under the Adults with Incapacity (Scotland) Act 2000
  - legal aid for certain proceeding under the Protection from Abuse (Scotland) Act 2001
  - the Board's review of sanctions for experts and counsel, including the issuing of revised guidance
- 170 The Strategic Review takes account of this work. The main strands of recent and current reform and modernisation activity are briefly described below.

## Justice 1 Committee Inquiry into Legal Aid

- 171 The Justice and Home Affairs Committee (which became the Justice 1 Committee on 8 January 2001) agreed to conducted an inquiry into legal aid and access to justice, and published its report in November 2001. A number of recommendations were made, which ranged from minor technical issues to some major strategic questions about the general provision of legal services in Scotland..These can be viewed in annex 2A Many of the Committee's recommendations on matters such as increasing the amount of winnings exempted from "clawback" in matrimonial cases, making legal aid available for a wider range of proceedings, or specific changes to the

financial eligibility have been taken forward by the Scottish Executive (see Annex 2C).

- 172 It was originally envisaged that the Committee would issue a further report setting out the progress made. Due to the timescales involved in this process, the Committee decided to not issue another report, but instead to produce a legacy paper for its successor in the second Parliamentary session so that the incoming committee, in considering its work programme, could decide to pick-up on any outstanding issue concerning legal aid (see Annex 2B).
- 173 Although the Scottish Executive and the Scottish Legal Aid Board have progressed a number of recommendations, some are still outstanding (see Annex 2C). The Executive has continued to consider these recommendations, including issues such as ‘tapering’ of access to civil legal assistance, the rationalisation and harmonisation of the eligibility criteria, the simplification of legal aid regulations and a greater strategic role for SLAB, together with enhanced powers and a greater degree of flexibility of operation. The Strategic Review takes these, and other outstanding Justice 1 Committee recommendations into account.

### **Civil Legal Aid Reform**

- 174 Some far reaching reform activity has already been completed: a package of reforms to civil legal aid was introduced in October 2003. The changes are the result of successful partnership working between the Law Society of Scotland, the Scottish Executive and the Scottish Legal Aid Board and this continues as the reforms are implemented.
- 175 The reforms have three main strands. The first is a substantial (21%) increase in fees for solicitors, together with a simplified ‘block fee’ structure for most Sheriff Court cases. The new system is designed to reward the efficient conduct of work and is “front-loaded” to encourage early settlement of cases. The second is the introduction of a requirement that solicitors make regular reports to the Board on the progress of a case for which legal aid has been made available, so that the Board can be satisfied that the statutory tests continue to be met.
- 176 The third strand of the reform is the introduction of quality assurance. Any firm wishing to provide civil legal assistance must now be registered on the Board’s civil legal assistance register, to ensure that solicitors’ offices are operated to agreed standards. Alongside the registration requirement a system of ‘peer review’ will be operated by the Law Society. This involves the inspection of files by experienced civil practitioners to ensure that they meet agreed quality standards.
- 177 While the new feeing, application and reporting elements of the package have been operational since October 2003, implementation of the full registration and quality assurance regime will be completed by July 2004.

### *Children’s legal aid*

- 178 Following on from the reform of civil legal aid, equivalent changes relating to fees and quality assurance have also been brought forward for children’s legal aid.

## **Advice and Assistance**

- 179 Civil legal aid and Advice and Assistance on civil matters are inextricably linked and the quality assurance programme which has been introduced for civil legal aid will also cover the provision of civil Advice and Assistance (A&A).
- 180 A&A as a whole has been the subject of much discussion between the Law Society of Scotland, the Scottish Legal Aid Board and the Scottish Executive recently with a view to introducing a more fluent structure, improving the services provided, increasing fees payable and reducing unnecessary expenditure. The Board and the Society have produced proposals for reform and the Executive is looking at these as a matter of urgency. However, it is recognised that any restructuring of Advice and Assistance will need to take account of the conclusions of this Strategic Review. A discussion of the proposals for A&A takes place in the Strategic Review report which is available at <http://www.scotland.gov.uk/stratreviewlegalaid>.
- 181 In the meantime, and in order to reflect the changes introduced as a result of civil legal aid reform, a 5% interim increase in solicitors' fees for civil Advice and Assistance, will be implemented with effect from June 2004.

## **Criminal legal aid**

- 182 In criminal legal aid there is an equally substantial programme of current reform activity:
- following the Law Society's request for increased fees for solicitors in solemn cases the Scottish Executive has undertaken to do so as part of a larger package which will incorporate the introduction of a quality assurance mechanism. Pending the overall restructuring of the present criminal legal aid system, a 5% increase in fees for meeting with clients and for waiting time and a 15% increase for advocacy take effect from June 2004.
  - the Faculty of Advocates has entered into discussion on streamlining the fee arrangements for counsel in criminal cases allied with an effective quality assurance mechanism. It is intended that this package will be in place in time for the full implementation of the High Court reforms.
  - work to develop a peer review based quality assurance system for all criminal legal assistance has started.
  - the Tri-partite group (of the Scottish Executive, the Scottish Legal Aid Board and the Law Society of Scotland) is taking forward a programme of reform for solemn criminal legal aid, including a review of fee levels and structures
  - research has been commissioned by the Scottish Executive into the operation of the system of fixed payments for summary criminal legal aid (as introduced in 1999).
- 183 The reform work in criminal legal aid is closely linked to the ongoing and proposed modernisation in the criminal justice system, and the Strategic Review equally needs to take account of these. There are three key streams of work, all encouraging greater efficiency:
- High Court reform;
  - the McInnes Review of Summary Justice.
  - a review of summary criminal legal assistance by the Scottish Legal Aid Board

### *High Court Reform*

- 184 In December 2002, Lord Bonyon delivered his Report “Improving practice – 2002 review of the practices and procedure of the High Court of Justiciary”. This identified a number of areas in which the efficiency of the High Court could be improved, particularly in relation to the perceived difficulties of adjourned trials. The Scottish Executive subsequently published a White Paper, which was followed by the passing of the Criminal Procedures (Amendment) (Scotland) Act 2004 on 28 April 2004.
- 185 The resulting reform of the High Court has implications for legal aid, primarily relating to the payment of counsel. A series of linked proposals will need to be brought forward, covering advocates’ fees for criminal appeals, the payment of solicitor advocates, including in the Sheriff Court, and the feeing structure for solicitors in solemn cases.
- 186 SLAB was represented on Lord Bonyon’s review team by its Head of Legal Services (Technical) and therefore played a role in the development of the Report. Subsequent to the Report’s publication, SLAB has been working closely with its partner agencies towards implementation.

### *Sheriff Principal McInnes’ Summary Justice Review*

- 187 Sheriff Principal McInnes’ Report on the Review of Summary Justice was published on 16 March 2004. The key recommendations which impact upon the provision and structure of criminal legal assistance are analysed in Chapter 10 of this report. Although not represented on the review team, the Scottish Legal Aid Board did actively engage with the team through meetings and workshops.

### *SLAB’s Review of summary criminal legal assistance*

- 188 The Scottish Legal Aid Board has been undertaking a review of summary criminal legal assistance, which has now been published for consultation. In this review, consideration has been given to the efficiency and effectiveness of the current system of Advice and Assistance, ABWOR, the duty solicitor scheme and summary criminal legal aid, and the interaction between each of these elements and the summary justice process.
- 189 The Board’s review of criminal legal assistance cannot be considered in isolation from other major reviews of the criminal justice system being undertaken at the same time, most notably the McInnes Review of Summary Justice.

### **Draft EU framework decision on procedural safeguards in criminal proceedings**

- 190 Against a background of growing EU interest in judicial co-operation in criminal matters, the European Commission published a Green Paper on ‘Procedural Safeguards for Suspects and Defendants in Criminal Proceedings’ in February 2003.
- 191 Since then the Scottish Executive has been and continues to be involved in the development of proposals for a set of minimum standards for suspects and defendants subject to criminal proceedings which will apply across the European Union through influencing the UK’s formal response to the Commission and by ensuring representation by Justice Department and SLAB officials at a public hearing in

Brussels to discuss the Green Paper in June 2003.

- 192 On 28 April 2004, the Commission presented a draft Framework Decision, which proposes to establish common minimum standards throughout the European Union, which would enhance the rights of all suspects and defendants generally. It also intends to have the effect of ensuring a reasonable level of protection in cross-border criminal cases.
- 193 The provisions of the draft Framework Decision interact with the provision of legal aid throughout the UK, particularly in relation to:
- the right to legal advice
  - obligation of Member States to provide legal advice
  - obligation to ensure the effectiveness of legal advice
  - the right to free legal advice
  - the right to free interpretation for foreign suspects
- 194 The Commission proposes that the Framework Decision should come into force on 1 January 2006. Implementation will be subject to regular evaluation and monitoring. These proposals are currently being considered by the UK Government in consultation with the Scottish Executive.

## **DEVELOPMENT WORK ON OTHER FORMS OF PUBLICLY FUNDED LEGAL ADVICE**

### **Policy work to date**

- 195 The Scottish Office, in 1998, conducted the consultation ‘Access to Justice: Beyond the Year 2000’ - a consultation paper on civil legal aid. During the same period there was considerable development and change in civil legal aid administration in England and Wales, culminating in the Access to Justice Act 1999, which established the Legal Services Commission (LSC) as the successor to the Legal Aid Board, and launched the Community Legal Service (CLS) in England and Wales.
- 196 In October 2000 the Deputy First Minister, Jim Wallace, established a Working Group to consider how a ‘community legal service’ might be developed for Scotland, and to submit proposals by October 2001. The Working Group reported to the Minister in November 2001 under the title of ‘Review Legal of Information and Advice Provision in Scotland’ (the ROLIAPS report).
- 197 The Working Group did not propose a blueprint for a ‘community legal service’, but recommended further research and development work to better inform future policy development. A programme of work was subsequently embarked on by the Scottish Executive in close cooperation with the Scottish Legal Aid Board, consisting of:
- Development work*
- 4 pilot partnership for legal information and advice provision
  - developing tools for assessing the need for legal advice
  - developing tools for mapping the provision of legal information, advice and representation
- Research*

- into the impact of contracting legal services as operated under CLS in England and Wales
- into the use of outreach methods for service delivery, and use of IT
- audit of quality assurance mechanisms already in use in Scotland

*Pilot activity*

- Four ‘Part V’ projects in which SLAB directly employs solicitors to provide casework and capacity building services to other solicitors and advice agencies
- Five new pilot In Court Advice projects providing legal information and advice in Sheriff Courts to unassisted litigants

*Principles and objectives for a ‘community legal service’ initiative in Scotland*

198 The Working Group, made up of representatives from a wide range of stakeholders, discussed and agreed an overall objective for its own work, the purpose of and guiding principles for a ‘community legal service’. These statements of objectives and principles are relevant to and need to be taken account of in this Strategic Review.

199 The Working Group agreed that its overall aim was to improve access to civil justice for all in Scotland. This means that people need access to the information and help they need to make informed choices about how best to resolve problems they have which may involve the law. The Working Group agreed that the purpose of a ‘community legal service’ should therefore be:

- To ensure that there is a joined up network across Scotland of providers of quality-assured information, advice, assistance and representation on issues involving people's legal rights and obligations and legal procedures;
- To set out a general policy framework to allow local assessment of the adequacy of provision;
- And to encourage more effective partnership between service providers and funding bodies.

**Research**

200 Following the recommendations for further research made by the Working Group, a research review entitled “Legal Information and Advice Provision in Scotland: A Review of Evidence” was carried out by Blake Stevenson Ltd with the Office for Public Management.

201 The purpose of this research was to review the existing evidence on:

- the use of information technology, outreach and referrals by providers of legal information and advice
- quality assurance schemes in use by providers
- the use of contracting by the Legal Services Commission in England and Wales
- the role of lawyers and non-lawyers in the provision of legal advice and information.

202 The key findings of the research were:

- Need for a more strategic approach to planning and implementing advice resources, including IT, outreach services, referral practice and quality assurance
- Need to clarify the role of lawyers and non-lawyers and develop their respective skills

- Where contracts for legal services are in place in England and Wales, there is evidence of gaps in the supply of service providers.

203 The research also included an audit of quality systems in use by advice providers. A copy of the full research report is available at [www.scotland.gov.uk/socialresearch](http://www.scotland.gov.uk/socialresearch)

### **Part V pilot projects**

204 Part V of the Legal Aid (Scotland) Act 1986 contains provisions for the employment of solicitors by the Scottish Legal Aid Board to give Advice and Assistance, to act for persons receiving legal aid or to work with local organisations.

205 In 2001 four pilot projects were set up under Part V of the Act to allow the evaluation of different methods of improving access to justice through the direct employment of solicitors by the Board:

- *Citizen's Advice Scotland project*: a SLAB solicitor is based in Inverness and provides a remote second tier legal consultancy role to nine CABx over three council areas.
- *West Lothian Advice Partnership*: a SLAB solicitor works with a partnership of four public and voluntary sector advice providers in West Lothian. The solicitor provides first-tier advice to clients, makes active referrals to local solicitor practices and develops closer links between private sector solicitors and other advice providers within the partnership.
- *Streetwork (Edinburgh)*: a SLAB solicitor provides oral advice, Advice and Assistance and civil legal aid services to young people and rough sleepers in central Edinburgh. The project focuses on clients who are excluded from traditional services.
- *Glasgow Asylum Law Project*: aims to provide a direct legal aid service to asylum seekers in the Glasgow area, with a particular focus upon the Castlemilk, and Sighthill areas. The objectives for the project cover casework, education, community development, local networking and partnership building.

206 Although evaluations of the projects are still to be completed, some observations can be made about the functioning of this mechanism for improving access to justice. Part V is currently the only route available for SLAB to actively respond to identified unmet needs for advice. However there is some concern about how well Part V works in terms of the amount of flexibility it allows for meeting the identified needs in the most appropriate way, in particular:

- Part V only allows SLAB to employ qualified Scottish solicitors. This may not always be the most appropriate way of addressing an identified need
- The Board is required to respond to meet local needs, which limits the ability to respond to needs identified at a national or regional level.

207 There are many positives to be taken from the Part V experience so far. In particular there are identifiable benefits from working in partnership; where the host organisations have provided expertise in working with specific client groups, SLAB has been able to provide technical expertise and support to their solicitors, and the Part V solicitors have been able to gain experience in specialised areas of work.

## Needs assessment

- 208 The ROLIAPS report recommended that further work should include a comprehensive exercise to assess need for legal advice services.
- 209 In 2002 the Scottish Executive commissioned external researchers<sup>12</sup> to undertake needs assessment exercises in the four pilot partnership areas<sup>13</sup> using two methods: general population surveys and proxy modeling. In addition to supporting the partnership process, the aim was to identify which method of needs assessment may be the most appropriate and cost effective, and to make recommendations on future use of needs assessment methods.
- 210 The general population survey showed that the prevalence of justiciable problems was broadly similar across the four areas. However, the proportion of people seeking help for these problems varied considerably between areas. The survey also recorded what people did to resolve their problems and assessed whether they were satisfied with the advice received. There was also a considerable difference between the areas on these matters.
- 211 The research into proxy models evaluated the validity of existing models that have been used to estimate legal need, and the extent to which these can be applied to Scotland, and went on to develop a new proxy measure using the survey data on prevalence of different types of legal problem.
- 212 The existing CLS proxy models in England and Wales were judged to have some advantages over other proxy measures, but none were ideal. A new approach was recommended using the survey data. In terms of supporting future needs assessment work, the survey and proxy models were viewed as complimentary methods. The key strength of the survey was the ability to explore people's help seeking behaviour. While proxies cannot assess advice-seeking behaviour, they have the advantage of estimating relative need at ward or post-code level more cost-effectively than a survey.
- 213 The Report, entitled "Community Legal Service: Assessing Need for Legal Advice in Scotland" was published in May 2004. A copy of the full report together with the summary of the findings in each of the four areas can be found at [www.scotland.gov.uk/socialresearch](http://www.scotland.gov.uk/socialresearch).

## Pilot partnerships

- 214 Pilot legal advice and information partnerships were established in May 2003 as part of the implementation of the ROLIAPS Working Group recommendations. The pilot programme had a fixed lifespan to April 2004 and aimed to inform the understanding of how to develop better planned and co-ordinated legal advice services at a local level.

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<sup>12</sup> The project was undertaken by a team from MRUK, University of Salford and SeeIT

<sup>13</sup> The pilot partnership areas were the local authority areas of Fife, Edinburgh, and Argyll and Bute. The area of Glasgow West (based in social work boundaries used by Glasgow City Council) formed the fourth area.

- 215 Four pilot partnerships were established:
- a thematic partnership with a national remit to consider access to advice for disabled people
  - three geographic partnerships covering the local authority areas of Argyll and Bute, Fife and Edinburgh

Work was also done in association with Glasgow City Council in the Glasgow West area.

- 216 The key finding from the process has been that cross-sectoral partnerships<sup>14</sup> have much to offer in terms of improving working relationships and collaborative working. However without other changes (for example in how funding decisions are made) it would be unreasonable to expect that on their own such partnerships will lead to substantial improvements in the meeting of unmet need for advice services.

#### *The use of needs assessment – evidence based planning*

- 217 The geographic partnerships had access to the findings of a research project commissioned by the Executive to develop and test models for needs assessment in Scotland.

- 218 The pilot partnerships' experience is that the use of such information about needs for advice is a valuable addition to existing information about demand for services, and that it requires the adoption of a structured and transparent approach to reasoning about priorities. This was seen as a welcome improvement on the disjointed approach to setting of priorities that many providers have to operate within.

- 219 The conclusion is that needs assessment information can be used in two main ways:
- to inform planning decisions by funding bodies - by agreeing a common and transparent definition of unmet needs and priorities within these
  - to inform how current services could improve joined-up working on different subjects

- 220 The information for informing decisions on the basis of needs assessment would however need to be made more user friendly to enable ease of information and use by the partners. This was demonstrated through the development of basic tools and frameworks for assessment of evidence as part of the pilot process.

#### *Mapping of supply*

- 221 Accurate information about existing supply of services from all sectors is a prerequisite for planning of provision. The partnerships therefore undertook a supply mapping exercise in their areas.

- 222 The absence of a common quality system across all sectors and services, and therefore an absence of shared understanding of how to describe and assess advice means that the results of mapping of provision were of limited use in planning terms, as there was no consistent way of assessing what a service delivers. All partnerships believed this to be a major drawback. The conclusion is that the development of a common quality system would appear to be required before embarking on further detailed gap analysis of need and supply.

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<sup>14</sup> i.e. partnerships that involve the public, private and voluntary sectors.

### *Cross-sectoral partnership and planning*

- 223 Each of the pilot partnerships included representatives from across the three main sectors: public, private and voluntary. The inclusion of the private sector (solicitors) was a key difference from similar or previous initiatives in Scotland. Fostering better working relationships with the private sector, and seeking an input from the private sector in the understanding of need and the setting of priorities were seen as important.
- 224 Maintaining input from solicitors was difficult however, and success variable. Specific problems were:
- there is no real representative structure for private practice solicitors, making the idea of ‘representatives’ signing up for strategic direction for the sector as a whole unrealistic. Participation was on an individual rather than representative basis.
  - time spent involved in the partnership process was time not spent earning fee income. Although other partners clearly also gave up time that could have been spent doing other pressing things, the relation to income is less immediate.
- 225 For future partnership work consideration needs to be given to how to secure the engagement of private practice solicitor who undertake publicly funded work, and in particular to what the role of the Scottish Legal Aid Board in this could be.

### **Developments in homelessness and housing advice**

- 226 The Housing (Scotland) Act 2001 (in section 2(1)) placed a requirement on local authorities in Scotland to secure that advice and information about homelessness, the prevention of homelessness and any relevant services are available free of charge in their areas.
- 227 The Scottish Executive has issued Guidance which requires councils to take a corporate approach to this duty and to the planning of advice on homelessness and housing, setting out three roles for local authorities: provider of advice, funder of advice services, and strategic planner of advice provision. Local authorities evidence their compliance with this duty in their homelessness strategies and local housing strategies, and are monitored through the Communities Scotland single regulatory framework. HomePoint, the unit within Communities Scotland that supports providers of housing information and advice has commissioned further guidance for local authorities on strategic planning of housing information and advice provision.
- 228 The Scottish National Standards for Housing Information and Advice, published by HomePoint, are the standards that councils must apply in the discharge of their statutory duty.

### **Developments in money advice**

- 229 Following the introduction of the Debt Arrangement and Attachment (Scotland) Act 2002 a Debt Arrangement Scheme (DAS) has been introduced. A key feature of the Scheme is the role of ‘approved’ money advisers in guiding debtors through the process. In co-operation with the advice sector the Scottish Executive is setting up a process to recognise the appropriate skills and competencies of advisers that will be

required for ‘approval’.

- 230 A key issue of the increased money advice provision is that of maintaining the quality of services given to clients. With this in mind the Scottish Executive in 2003 commissioned a research project into the possible options for a quality system to cover money advice. The findings suggest that rather than develop a new system, there are already frameworks in existence for other advice provision that can be adopted and adapted to meet the requirements of different advice disciplines.<sup>15</sup> In particular, the report recommends that the Scottish National Standards for Housing Information and Advice could be adopted to provide the basis for unified quality standards frameworks for a range of (legal) advice services. This development is significant in the context of quality systems.

### **Work with local authorities**

- 231 It was recognised by the Working Group which produced the ROLIAPS report that local authorities in Scotland are the principal funders of the voluntary advice sector and also significant providers of advice services themselves. In the process of the pilot partnership work and other engagement with local government, the Executive and SLAB assessed there is a need for councils to review their role in advice provision systematically and strategically and to consider how they can provide better, joined-up, client centred advice and information to their communities and ensure best value from their investment and activities.
- 232 To initiate discussion on how this may be done a seminar for Local Authority Chief Executives and senior officials in the Executive was arranged November 2003 through SOLACE and with the assistance of CoSLA. This seminar was planned to enable those present to start examining local authorities’ role in advice provision, how better planning and coordination might be possible, and what the role of the Executive can be in supporting this. A second seminar on needs assessment was organised in March 2004. A further programme of seminars and events is planned for 2004/5.

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<sup>15</sup> Quality assurance framework for money advice in Scotland, Michael Bell Associates, 2004



## Annex 1A: Matrix Of Main Features Of Legal Aid Schemes ( as at 12 April 2004)

1.	Advice and Assistance	ABWOR <sup>1</sup>	Civil	Summary criminal	Solemn criminal
Who grants?	<b>Solicitor</b>	<b>Solicitor or SLAB</b>	<b>SLAB</b>	<b>SLAB</b>	<b>Court</b>
Must have net income of less than £ 197 pw	/	/			
Must have net income of less than £ 9,475 pa			/		
No specific income levels				/	/
Contribution from income?	<b>Yes</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b>	<b>No</b>
Maximum contribution from income	<b>£114</b>	<b>£114</b>	<b>£2,191<sup>2</sup></b>		
No contribution if net income is less than £83 pw	/	/			
No income contribution if net income is less than £2,902 pa			/		
Contribution from capital?	<b>No</b>	<b>No</b>	<b>Yes</b>	<b>No</b>	<b>No</b>
Must have capital of less than £1,370	/	/			
Must have capital of less than £10,455 <sup>3</sup>			/		
No specific capital levels				/	/
Must have probable cause			/		
Must be reasonable			/		
Must be in the interests of justice				/	<b>(Assumed)</b>
Costs of case must not create hardship to family				/	/

<sup>1</sup> Varying additional tests may also be prescribed for certain courts, tribunals, or procedures.

<sup>2</sup> Payable over 20 months

<sup>3</sup> In certain circumstances, SLAB may grant legal aid if capital above this figure



## Annex 1B

**Table 1: Scottish expenditure on criminal and civil legal assistance**

	<u>1987/88</u>	<u>1988/89</u>	<u>1989/90</u>	<u>1990/91</u>	<u>1991/92</u>	<u>1992/93</u>	<u>1993/94</u>	<u>1994/95</u>	<u>1995/96</u>	<u>1996/97</u>	<u>1997/98</u>	<u>1998/99</u>
	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000	£'000
<b>Criminal</b>												
<b>A&amp;A</b>	<b>911</b>	<b>2,910</b>	<b>2,630</b>	<b>3,391</b>	<b>4,415</b>	<b>6,242</b>	<b>6,528</b>	<b>6,959</b>	<b>7,309</b>	<b>7,502</b>	<b>7,583</b>	<b>7,504</b>
<b>ABWOR</b>	<b>539</b>	<b>484</b>	<b>1,048</b>	<b>1,001</b>	<b>1,287</b>	<b>1,770</b>	<b>1,506</b>	<b>1,774</b>	<b>2,061</b>	<b>2,163</b>	<b>2,258</b>	<b>2,408</b>
<b>Legal Aid</b>												
Summary	16,771	19,096	21,922	25,583	33,809	45,909	52,709	49,352	49,868	53,265	54,377	48,589
Solemn	8,281	11,696	11,108	12,636	12,272	15,350	19,054	25,897	23,670	25,695	26,773	25,888
Duty	715	820	824	912	890	989	987	918	847	877	877	943
<b>Total criminal legal aid</b>	<b>25,767</b>	<b>31,612</b>	<b>33,854</b>	<b>39,131</b>	<b>46,971</b>	<b>62,248</b>	<b>72,750</b>	<b>76,167</b>	<b>74,385</b>	<b>79,837</b>	<b>82,027</b>	<b>75,420</b>
Summary as % of criminal legal aid	65%	60%	65%	65%	72%	74%	72%	65%	67%	67%	66%	64%
Solemn as % of criminal legal aid	32%	37%	33%	32%	26%	25%	26%	34%	32%	32%	33%	34%
Duty as % of criminal legal aid	3%	3%	2%	2%	2%	2%	1%	1%	1%	1%	1%	1%
<b>Criminal Legal Assistance total</b>	<b>27,217</b>	<b>35,006</b>	<b>37,532</b>	<b>43,523</b>	<b>52,673</b>	<b>70,260</b>	<b>80,784</b>	<b>84,900</b>	<b>83,755</b>	<b>89,502</b>	<b>91,868</b>	<b>85,332</b>
<b>Civil</b>												
<b>A&amp;A</b>	<b>4,494</b>	<b>7,497</b>	<b>6,549</b>	<b>7,966</b>	<b>9,711</b>	<b>13,883</b>	<b>14,677</b>	<b>15,256</b>	<b>15,593</b>	<b>16,633</b>	<b>16,984</b>	<b>18,315</b>
<b>ABWOR</b>	<b>0</b>	<b>3</b>	<b>9</b>	<b>2</b>	<b>12</b>	<b>3</b>	<b>2</b>	<b>49</b>	<b>107</b>	<b>160</b>	<b>180</b>	<b>233</b>
<b>Civil Legal Aid (gross)</b>	<b>15,694</b>	<b>15,269</b>	<b>14,714</b>	<b>15,669</b>	<b>16,582</b>	<b>24,136</b>	<b>27,771</b>	<b>30,233</b>	<b>32,210</b>	<b>35,064</b>	<b>34,311</b>	<b>32,093</b>
<b>Recoveries against cost of civil legal aid</b>	<b>3733</b>	<b>3894</b>	<b>3960</b>	<b>3964</b>	<b>4238</b>	<b>4982</b>	<b>6422</b>	<b>7328</b>	<b>8001</b>	<b>9445</b>	<b>8992</b>	<b>9448</b>
<b>Civil Legal Aid (net)</b>	<b>11,961</b>	<b>11,375</b>	<b>10,754</b>	<b>11,705</b>	<b>12,344</b>	<b>19,154</b>	<b>21,349</b>	<b>22,905</b>	<b>24,209</b>	<b>25,619</b>	<b>25,319</b>	<b>22,645</b>
<b>Civil Legal Assistance total (net)</b>	<b>16,455</b>	<b>18,875</b>	<b>17,312</b>	<b>19,673</b>	<b>22,067</b>	<b>33,040</b>	<b>36,028</b>	<b>38,210</b>	<b>39,909</b>	<b>42,412</b>	<b>42,483</b>	<b>41,193</b>
<b>Legal Aid total (net)</b>	<b>43,672</b>	<b>53,881</b>	<b>54,844</b>	<b>63,196</b>	<b>74,740</b>	<b>103,300</b>	<b>116,812</b>	<b>123,110</b>	<b>123,664</b>	<b>131,914</b>	<b>134,351</b>	<b>126,525</b>
<b>Criminal as % of total (net)</b>	<b>62%</b>	<b>65%</b>	<b>68%</b>	<b>69%</b>	<b>70%</b>	<b>68%</b>	<b>69%</b>	<b>69%</b>	<b>68%</b>	<b>68%</b>	<b>68%</b>	<b>67%</b>
<b>Civil as % of total (net)</b>	<b>38%</b>	<b>35%</b>	<b>32%</b>	<b>31%</b>	<b>30%</b>	<b>32%</b>	<b>31%</b>	<b>31%</b>	<b>32%</b>	<b>32%</b>	<b>32%</b>	<b>33%</b>

Note: these figures do not contain expenditure on childrens legal aid or contempt of court. In that respect they differ from those on other pages showing the split between solicitors' fees, solicitor advocates, counsel and outlays.



**Table 2: breakdown of payments by head of expenditure and legal aid type**

	No. of Cases							
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Advice and assistance	271,480	272,000	271,663	276,165	277,340	288,029	276,122	283,736
Civil	22,605	22,146	20,365	18,194	15,772	14,339	12,903	11,994
Criminal	76,831	78,927	75,620	69,898	67,092	74,801	78,050	83,159
Duty								
Children	2,336	2,026	1,870	1,957	1,897	2,375	2,080	2,307
Contempt of court	0	105	132	98	161	153	131	195
<b>TOTAL</b>	<b>373,252</b>	<b>375,204</b>	<b>369,650</b>	<b>366,312</b>	<b>362,262</b>	<b>379,697</b>	<b>369,286</b>	<b>381,391</b>

	Solicitor (£ '000)							
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Advice and assistance	23,862	25,100	25,513	26,810	26,647	28,313	28,217	30,710
Civil	22,298	24,463	23,150	21,541	19,963	17,925	17,602	16,306
Criminal	64,615	67,855	68,737	62,521	59,284	57,170	60,889	65,771
Duty		862	890	924	856	817	792	856
Children	1,464	1,574	1,412	1,513	1,512	2,060	1,922	2,230
Contempt of court	19	25	30	27	30	40	33	43
<b>TOTAL</b>	<b>112,258</b>	<b>119,879</b>	<b>119,732</b>	<b>113,336</b>	<b>108,292</b>	<b>106,325</b>	<b>109,455</b>	<b>115,916</b>

	Counsel (£ '000)							
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Advice and assistance	38	39	37	47	27	48	70	0
Civil	2,641	2,399	2955	2940	2640	3482	3099	3,238
Criminal	4,312	5,029	5894	5850	4639	6150	7186	7,813
Duty		1	0	0	0	0	2	0
Children	112	85	121	83	98	255	644	883
Contempt of court	0	0	0	0	0	0	2	10
<b>TOTAL</b>	<b>7,103</b>	<b>7,553</b>	<b>9,007</b>	<b>8,920</b>	<b>7,404</b>	<b>9,935</b>	<b>11,003</b>	<b>11,944</b>

	Solicitor Advocate (£ '000)							
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Advice and assistance	2	0	0	0	0	0	2	0
Civil	1	3	2	1	0	5	8	1
Criminal	248	336	398	551	477	700	1,222	1,592
Duty	0	14	0	0	0	0	0	0
Children	0	0	1	1	1	3	0	0
Contempt of court	0	0	0	0	0	0	4	5
<b>TOTAL</b>	<b>251</b>	<b>353</b>	<b>401</b>	<b>553</b>	<b>478</b>	<b>708</b>	<b>1,236</b>	<b>1,598</b>

	Outlays (£ '000)							
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Advice and assistance	1,169	1,319	1,455	1,603	1,613	1838	1989	2,846
Civil	7,271	8,199	8204	7611	7643	7343	7637	7,526
Criminal	5,210	5,740	6121	5555	4168	3729	3916	4,341
Duty	0	0	14	19	14	18	19	22
Children	99	105	105	122	114	183	261	244
Contempt of court	1	1	1	1	1	1	1	1
<b>TOTAL</b>	<b>13,750</b>	<b>15,364</b>	<b>15,900</b>	<b>14,911</b>	<b>13,553</b>	<b>13,112</b>	<b>13,824</b>	<b>14,981</b>

	Total (£ '000)							
	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Advice and assistance	25,070	26,458	27,005	28,460	28,287	30,199	30,279	33,557
Civil	32,210	35,064	34,311	32,093	30,246	28,755	28,347	27,071
Criminal	74,385	78,960	81,150	74,477	68,568	67,749	73,213	79,517
Duty		877	904	943	870	835	813	878
Children	1,675	1,764	1,639	1,719	1,725	2,501	2,827	3,357
Contempt of court	20	26	31	28	31	41	40	59
<b>TOTAL</b>	<b>133,360</b>	<b>143,149</b>	<b>145,040</b>	<b>137,720</b>	<b>129,727</b>	<b>130,080</b>	<b>135,519</b>	<b>144,439</b>

**Table 3: % of total payments by head of expenditure and legal aid type**

<b>Total (£ '000)</b>								
	<b>1995/96</b>	<b>1996/97</b>	<b>1997/98</b>	<b>1998/99</b>	<b>1999/00</b>	<b>2000/01</b>	<b>2001/02</b>	<b>2002/03</b>
Advice and assistance	25070	26458	27005	28460	28287	30199	30279	33557
Civil	32210	35064	34311	32093	30246	28755	28347	27071
Criminal	74385	78960	81150	74477	68568	67749	73213	79517
Duty		877	904	943	870	835	813	878
Children	1675	1764	1639	1719	1725	2501	2827	3357
Contempt of court	20	26	31	28	31	41	40	59
<b>TOTAL</b>	<b>133,360</b>	<b>143,149</b>	<b>145,040</b>	<b>137,720</b>	<b>129,727</b>	<b>130,080</b>	<b>135,519</b>	<b>144,439</b>

<b>Solicitor</b>								
	<b>1995/96</b>	<b>1996/97</b>	<b>1997/98</b>	<b>1998/99</b>	<b>1999/00</b>	<b>2000/01</b>	<b>2001/02</b>	<b>2002/03</b>
Advice and assistance	95%	95%	94%	94%	94%	94%	93%	92%
Civil	69%	70%	67%	67%	66%	62%	62%	60%
Criminal	87%	86%	85%	84%	86%	84%	83%	83%
Duty		98%	98%	98%	98%	98%	97%	97%
Children	87%	89%	86%	88%	88%	82%	68%	66%
Contempt of court	96%	96%	97%	96%	97%	98%	83%	73%
<b>TOTAL</b>	<b>84%</b>	<b>84%</b>	<b>83%</b>	<b>82%</b>	<b>83%</b>	<b>82%</b>	<b>81%</b>	<b>80%</b>

<b>Counsel</b>								
	<b>1995/96</b>	<b>1996/97</b>	<b>1997/98</b>	<b>1998/99</b>	<b>1999/00</b>	<b>2000/01</b>	<b>2001/02</b>	<b>2002/03</b>
Advice and assistance	0%	0%	0%	0%	0%	0%	0%	0%
Civil	8%	7%	9%	9%	9%	12%	11%	12%
Criminal	6%	6%	7%	8%	7%	9%	10%	10%
Duty		0%	0%	0%	0%	0%	0%	0%
Children	7%	5%	7%	5%	6%	10%	23%	26%
Contempt of court	0%	0%	0%	0%	0%	0%	5%	17%
<b>TOTAL</b>	<b>5%</b>	<b>5%</b>	<b>6%</b>	<b>6%</b>	<b>6%</b>	<b>8%</b>	<b>8%</b>	<b>8%</b>

<b>Solicitor Advocate</b>								
	<b>1995/96</b>	<b>1996/97</b>	<b>1997/98</b>	<b>1998/99</b>	<b>1999/00</b>	<b>2000/01</b>	<b>2001/02</b>	<b>2002/03</b>
Advice and assistance	0%	0%	0%	0%	0%	0%	0%	0%
Civil	0%	0%	0%	0%	0%	0%	0%	0%
Criminal	0%	0%	0%	1%	1%	1%	2%	2%
Duty		2%	0%	0%	0%	0%	0%	0%
Children	0%	0%	0%	0%	0%	0%	0%	0%
Contempt of court	0%	0%	0%	0%	0%	0%	10%	8%
<b>TOTAL</b>	<b>0%</b>	<b>0%</b>	<b>0%</b>	<b>0%</b>	<b>0%</b>	<b>1%</b>	<b>1%</b>	<b>1%</b>

<b>Outlays</b>								
	<b>1995/96</b>	<b>1996/97</b>	<b>1997/98</b>	<b>1998/99</b>	<b>1999/00</b>	<b>2000/01</b>	<b>2001/02</b>	<b>2002/03</b>
Advice and assistance	5%	5%	5%	6%	6%	6%	7%	8%
Civil	23%	23%	24%	24%	25%	26%	27%	28%
Criminal	7%	7%	8%	7%	6%	6%	5%	5%
Duty		0%	2%	2%	2%	2%	2%	3%
Children	6%	6%	6%	7%	7%	7%	9%	7%
Contempt of court	3%	4%	3%	4%	3%	2%	3%	2%
<b>TOTAL</b>	<b>10%</b>	<b>11%</b>	<b>11%</b>	<b>11%</b>	<b>10%</b>	<b>10%</b>	<b>10%</b>	<b>10%</b>

**Table 4 : Comparison of expenditure in Scotland and England and Wales**

	2000/2001		2001/2002		2002/2003	
	£M	%	£M	%	£M	%
<i>Scotland</i>						
<b>Criminal Legal Assistance</b>	<b>78.8</b>	<b>67%</b>	<b>84.7</b>	<b>69%</b>	<b>91.8</b>	<b>71%</b>
<b>Civil Legal Assistance</b>	<b>38.6</b>	<b>33%</b>	<b>38.6</b>	<b>31%</b>	<b>38.1</b>	<b>29%</b>
	<b>117.4</b>		<b>123.3</b>		<b>129.9</b>	
<i>England and Wales</i>						
<b>Criminal Legal Assistance</b>	<b>872.4</b>	<b>52%</b>	<b>982.4</b>	<b>57%</b>	<b>1,095.7</b>	<b>57%</b>
<b>Civil Legal Assistance</b>	<b>791.9</b>	<b>48%</b>	<b>734.5</b>	<b>43%</b>	<b>812.8</b>	<b>43%</b>
	<b>1,664.3</b>		<b>1,716.9</b>		<b>1,908.5</b>	

Notes

All figures are net of recoveries

Figures for Scotland do not equal total expenditure for the given years as they do not include childrens legal aid or legal aid for contempt of court.

Scottish figures for 2000/01 and 2001/02 include the cost of advice and assistance for matters relating to the Children (Scotland) Act 1995

## Annex 1C: Table of The General Characteristics of Providers of Advice in Different Sectors

	<b>Voluntary sector</b> <b>4. For example CAB – other voluntary sector agencies may have slightly different working arrangements</b>	<b>2. Public sector</b> <b>5. For example Local Authority Welfare Rights Team</b>	<b>3. Private sector</b> <b>6. Private practice solicitors</b>
Type of advice activity: <ul style="list-style-type: none"> <li>◆ Information provision</li> <li>◆ Casework</li> <li>◆ Representation</li> <li>◆ Court work</li> <li>◆ Other?</li> </ul>	<ul style="list-style-type: none"> <li>◆ Voluntary organisations can be involved in provision of advice and information at all levels, from passive information provision to representation dependent upon the remit of the service</li> <li>◆ CABx may be providers of advice on a number of topics, but have a clear requirement to refer work on to an appropriate service if it is without their area of specialism</li> <li>◆ Areas of specialism should be clearly identifiable – for example if there is a specialist money adviser, employment adviser</li> <li>◆ May provide legal education in the community to improve knowledge of rights</li> </ul>	<ul style="list-style-type: none"> <li>◆ Teams of advisers in local authorities will undertake a range of activities including representation, and casework, as well as involvement in social and corporate policy development work, national campaigning, and training of other providers.</li> <li>◆ Provision is generally focussed on a few key specialist areas – welfare benefits, community care, employment – with other parts of an enquiry being dealt with by another relevant specialist provider (for example a Shelter Housing Aid Centre for a complex housing enquiry)</li> <li>◆ May do awareness campaigns in the community to improve knowledge of rights</li> </ul>	<ul style="list-style-type: none"> <li>◆ Generally advice and assistance work and court and representation/advocacy</li> <li>◆ Not always clear to the public or other providers which subject matters on which firms will offer a service</li> <li>◆ Some may specialise in specific areas but others provide a generalist service</li> </ul>
7. Planning of provision	<ul style="list-style-type: none"> <li>◆ Proactive targeting on issues that arise from analysis of caseload/enquiries</li> <li>◆ Reactive to changes in need in the</li> </ul>	<ul style="list-style-type: none"> <li>◆ Proactive targeting of areas of need (geographic, client groups, topics)</li> <li>◆ Reactive – to change in the local area</li> </ul>	<ul style="list-style-type: none"> <li>◆ Demand-led/market driven</li> </ul>

	<b>Voluntary sector</b>	<b>2. Public sector</b>	<b>3. Private sector</b>
	community ◆ Demand-led (partly)	◆ Demand-led (partly)	
8. Funding	<ul style="list-style-type: none"> <li>◆ Funding is normally a mixture of core funding plus additional sources of funding for specific projects, or additional posts</li> <li>◆ Majority of funding is from local authorities and public bodies</li> <li>◆ Funding allocated with conditions to meet objectives and targets</li> <li>◆ Funding often short-term and vulnerable</li> </ul>	<ul style="list-style-type: none"> <li>◆ Funding is normally for a team of workers with a specified remit</li> <li>◆ Welfare Rights Teams will normally be part of a council department such as Social Work, or Corporate Services</li> </ul>	<ul style="list-style-type: none"> <li>◆ Funding is case by case (except for Part V) from legal aid (and through payment by clients for private work)</li> </ul>
9. Cost to client	<ul style="list-style-type: none"> <li>◆ Free at point of entry</li> </ul>	<ul style="list-style-type: none"> <li>◆ Free at point of entry</li> </ul>	<ul style="list-style-type: none"> <li>◆ Means tested</li> <li>◆ Contributions</li> </ul>
10. Structure and staffing	<ul style="list-style-type: none"> <li>◆ Paid staff</li> <li>◆ Trained volunteers</li> <li>◆ Management committee</li> </ul>	<ul style="list-style-type: none"> <li>◆ Paid staff</li> <li>◆ Normally line managed through the sponsor department – for example Director of Social Work or Corporate Services</li> </ul>	<ul style="list-style-type: none"> <li>◆ Paid staff</li> <li>◆ Private business structure</li> </ul>
Quality assurance and monitoring	<ul style="list-style-type: none"> <li>◆ Funding normally requires monitoring and evaluation of the project</li> <li>◆ CAS has a membership Scheme with auditing against the membership conditions, including an audit of quality of advice</li> <li>◆ Insurance required</li> <li>◆ Complaints process required</li> </ul>	<ul style="list-style-type: none"> <li>◆ Quality of advice normally checked through peer review on regular basis</li> <li>◆ Monitoring of performance and outcomes is through reporting to directors, and also to elected members</li> <li>◆ Insurance required</li> <li>◆ Corporate complaints process</li> </ul>	<ul style="list-style-type: none"> <li>◆ Registration for legal aid work (civil and criminal)</li> <li>◆ Peer review (civil)</li> <li>◆ Regulated through Law Society including professional indemnity and complaints handling process</li> </ul>
11. Competence and training	<ul style="list-style-type: none"> <li>◆ There are defined levels of competencies for advisers – applied to volunteers and paid staff (this is a programme being rolled out across</li> </ul>	<ul style="list-style-type: none"> <li>◆ People come to this work from a variety of backgrounds – law graduates, from voluntary sector services</li> </ul>	<ul style="list-style-type: none"> <li>◆ Law degree, diploma and traineeship</li> <li>◆ CPD (although no requirements related to specific subject areas)</li> <li>◆ Stricter requirements for</li> </ul>

	<b>Voluntary sector</b>	<b>2. Public sector</b>	<b>3. Private sector</b>
	<p>CABx with support from CAS)</p> <ul style="list-style-type: none"> <li>◆ There are defined core competencies for core adviser skills – paid staff or volunteers can not move on to more in-depth advice provision before demonstrating achievement of these (this is a programme being rolled out across CABx with support from CAS)</li> <li>◆ There is ongoing training provided</li> </ul>	<ul style="list-style-type: none"> <li>◆ Normally with a commitment to specialise in this particular topic area and either a relevant degree or relevant experience</li> <li>◆ Training is normally provided through formal courses as well as shadowing and supervision</li> </ul>	<p>accreditation as specialists</p>
12. Methods of provision	<p>A variety of methods will be used including:</p> <ul style="list-style-type: none"> <li>◆ Drop-in</li> <li>◆ Phone advice,</li> <li>◆ Access to specialist support lines,</li> <li>◆ E-mail advice,</li> <li>◆ Information provided directly on the web,</li> <li>◆ Outreach surgeries.</li> </ul> <p>Services provided vary depending upon location</p>	<p>A variety of methods are used:</p> <ul style="list-style-type: none"> <li>◆ Drop-in</li> <li>◆ Phone advice,</li> <li>◆ Access to specialist support lines,</li> <li>◆ E-mail advice,</li> <li>◆ Information provided directly on the web,</li> <li>◆ Outreach surgeries.</li> </ul>	<ul style="list-style-type: none"> <li>◆ Appointment basis</li> <li>◆ Largely office based, but some outreach possible</li> <li>◆ Some telephone advice</li> <li>◆ May also provide clinics in advice agencies</li> </ul>

## Annex 1D: Scottish Legal Aid Board's Performance Indicators and Performance Against Targets During 2002-200

The headline indicators combine individual timeliness and accuracy targets for each aid type. This is so that the Board can achieve an appropriate balance between the measures for speed of processing and the quality of decision making. They are the key measures of the Board's operational performance. They are compiled from supporting targets for each aid type.

### CIVIL LEGAL AID APPLICATIONS

#### HEADLINE

	WEIGHTING	TARGET	ACTUAL
Timeliness	0.5	88%	86%
Accuracy	0.5	90%	94%
<b>Headline</b>		<b>89%</b>	<b>90%</b>

#### TIMELINESS

Percentage of applications actioned within service standard time	TARGET	ACTUAL	STANDARD
Initial applications	87%	83%	within 42 days
Sanction to employ counsel, expert witnesses or incur unusual costs	85%	86%	within 14 days
Requests to change solicitor	90%	90%	within 14 days
Reviews of refusal of initial application	82%	77%	within 35 days
Requests to extend the scope of the case	87%	89%	within 35 days
Reassessments of financial eligibility	95%	94%	within 28 days
Special urgency cases	97%	97%	within 5 days
<b>All application types</b>	<b>88%</b>	<b>86%</b>	<b>within standard</b>

#### ACCURACY

Percentage of decisions that are free of material errors	TARGET	ACTUAL	STANDARD
Initial applications	90%	92%	error free
Sanction to employ counsel, expert witnesses or incur unusual costs	90%	96%	error free
Requests to change solicitor	90%	99%	error free
Reviews of refusal of initial application	90%	92%	error free

Requests to extend the scope of the case	90%	96%	error free
Reassessments of financial eligibility	90%	97%	error free
<b>All application types</b>	<b>90%</b>	<b>94%</b>	<b>error free</b>

**CRIMINAL LEGAL AID APPLICATIONS****HEADLINE**

	<b>WEIGHTING</b>	<b>TARGET</b>	<b>ACTUAL</b>
Timeliness	0.5	97%	99%
Accuracy	0.5	92%	99%
<b>Headline</b>		<b>94%</b>	<b>99%</b>

**TIMELINESS**

<b>Percentage of applications actioned within service standard time</b>	<b>TARGET</b>	<b>ACTUAL</b>	<b>STANDARD</b>
Initial applications in summary cases	97%	99%	within 12 days
Sanction to employ counsel, expert witnesses or incur unusual costs	97%	99%	within 7 days
Requests to change solicitor	97%	99%	within 7 days
Reviews of refusal of initial application	97%	99%	within 14 days
Applications to make an appeal in court (including children's appeal)	97%	99%	within 7 days
Requests to reconsider a decision by the Board	97%	99%	within 14 days
Special urgency cases (summary first instance and appeals)	97%	99%	within 3 days
<b>All application types</b>	<b>97%</b>	<b>99%</b>	<b>within standard</b>

**ACCURACY**

<b>Percentage of decisions that are free of material errors</b>	<b>TARGET</b>	<b>ACTUAL</b>	<b>STANDARD</b>
Initial applications in summary cases	92%	99%	error free
Sanction to employ counsel, expert witnesses or incur unusual costs	92%	99%	error free
Requests to change solicitor	92%	99%	error free
Reviews of refusal of initial application	92%	99%	error free
Applications to make an appeal in court (including children's appeal)	92%	99%	error free
Requests to reconsider a decision by the Board	92%	98%	error free
<b>All application types</b>	<b>92%</b>	<b>99%</b>	<b>error free</b>

**ADVICE AND ASSISTANCE****HEADLINE**

	<b>WEIGHTING</b>	<b>TARGET</b>	<b>ACTUAL</b>
Timeliness	0.5	93%	95%
Accuracy	0.5	95%	99%
<b>Headline</b>		<b>94%</b>	<b>97%</b>

**TIMELINESS**

<b>Percentage of applications actioned within service standard time</b>	<b>TARGET</b>	<b>ACTUAL</b>	<b>STANDARD</b>
Intimations of a grant of advice and assistance by a solicitor	95%	95%	within 10 days
Requests for increase in authorised expenditure	90%	95%	within 7 days
Requests for change of nominated solicitor	95%	94%	within 14 days
Requests to reconsider a decision by the Board	85%	90%	within 7 days
<b>All application types</b>	<b>93%</b>	<b>95%</b>	<b>within standard</b>

**ACCURACY**

<b>Percentage of decisions that are free of material errors</b>	<b>TARGET</b>	<b>ACTUAL</b>	<b>STANDARD</b>
Intimations of a grant of advice and assistance	95%	99%	error free
Requests for increase in authorised expenditure	95%	99%	error free
Requests for change of nominated solicitor	95%	99%	error free
Requests to reconsider a decision by the Board	95%	95%	error free
<b>All application types</b>	<b>95%</b>	<b>99%</b>	<b>error free</b>

## ACCOUNTS ASSESSMENT

### CIVIL LEGAL AID

	WEIGHTING	TARGET	ACTUAL	STANDARD
Timeliness - percentage of accounts actioned within service standard time	0.5	86%	99%	within 30 days
Accuracy - percentage of accounts that are free of material errors	0.5	94%	97%	error free
<b>Headline</b>		<b>90%</b>	<b>98%</b>	

### CRIMINAL LEGAL AID

	WEIGHTING	TARGET	ACTUAL	STANDARD
Timeliness - percentage of accounts actioned within service standard time	0.5	97%	99%	within 30 days
Accuracy - percentage of accounts that are free of material errors	0.5	94%	97%	error free
<b>Headline</b>		<b>95%</b>	<b>98%</b>	

### ADVICE AND ASSISTANCE

	WEIGHTING	TARGET	ACTUAL	STANDARD
Timeliness - percentage of accounts actioned within service standard time	0.5	95%	99%	within 30 days
Accuracy - percentage of accounts that are free of material errors	0.5	94%	96%	error free
<b>Headline</b>		<b>94%</b>	<b>98%</b>	

## **Annex 2A: Recommendations of The Justice 1 Committee Report on the Legal Aid Inquiry<sup>1</sup>**

1. The Committee is of the view that there may be a case to extend the scope of legal aid to incorporate collective action, organisations and representative bodies. The Committee recommends that the Executive examine how access to legal aid could be made available to support collective action, organisations and representative bodies and examine what eligibility criteria might be applied in these cases.
2. The Committee recommends that that the Executive should examine how legal aid could be made available to support small claims actions.
3. The Committee is of the view that it would be beneficial to review the range of excepted proceedings to determine whether there is a need for extension. The Committee recommends that the Executive examine how access to legal aid could be made available to support a wider range of tribunals and panels. The Committee also recommends that the Executive examine the most effective form and method of delivery of legal aid for tribunals and panels.
4. The Committee recommends that the Executive should further review the qualifying criteria for and consider an extension of the scope of civil legal aid to employment tribunals.
5. The Committee notes that SLAB is commissioning a research project to estimate any changes in eligibility over the years and to identify any particular groups that do not take up legal aid despite being eligible. The Committee will examine the findings of this research before considering whether to make any recommendations in this regard.
6. The Committee is concerned about the current position with respect to eligibility and means testing and recommends that as a matter of urgency the lower capital limit should be uprated in line with inflation since 1983 and uprated on an annual basis thereafter. The Committee further recommends that the Executive gives serious consideration to the introduction of a tapering of financial eligibility and reports to the Committee on its findings.
7. The Committee welcomes this research [into contributions – see recommendation 5] and will examine the outcomes before deciding whether to make any recommendations in this regard.
8. The Committee recommends that the Executive should monitor whether the extension of the repayment period results in an increase in the uptake of offers of civil legal aid and report to the Committee on this matter following the end of the SLAB current financial year.
9. The Committee is concerned about inconsistencies in the treatment of benefits and recommends that as a matter of urgency the Executive should examine this matter with the aim of seeking to simplify the system and harmonise the treatment of benefits for eligibility to all elements of legal aid. The Committee looks forward to receiving proposals from the Executive on this matter at the earliest stage.
10. The Committee considers that there may be a lack of coherence and the existence of anomalies in the approach to merits testing [apparently related to civil/FAI/criminal]. The Committee recommends that the merits test should be reviewed as part of a wider review of the legal aid regulations.
11. The Committee recommends that SLAB and the Society work together to develop and implement proposals to help people ascertain who has expertise in specific areas.

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<sup>1</sup> Extract from Justice 1 Committee, Report on Legal Aid Inquiry, SP Paper 437, pp. 8-24.

12. The Committee recommends that SLAB monitor the effectiveness of this measure and report to the Committee in this regard [SLAB's new power to provide a solicitor to an unrepresented accused]. The Committee also recommends that the lack of expertise in certain areas of the law, in particular social welfare law, should be addressed by the Executive. The Committee will examine the report of the working group on the community legal service once it is published and expects to see some proposals in this regard contained within that report.
13. The Committee recommends that in the context of consideration of a strategic approach to the provision of legal aid services in Scotland the Executive gives careful consideration to the benefits and consequential cost to the legal aid fund of the introduction of a contracting scheme.
14. The Committee recommends that SLAB monitor the impact of fixed fees on the availability of solicitors willing to undertake criminal legal aid throughout Scotland and report to the Committee on this matter in due course.
15. The Committee recommends that the fee rates paid for criminal work by advocates and by solicitors for cases not covered by the fixed payment scheme should be increased – linked to the introduction of a quality assurance system.
16. The Committee recommends that the fee rates paid for solicitors and advocates who provide civil legal aid and advice and assistance should be increased – linked to the introduction of a quality assurance system.
17. The Committee recommends that the Executive consider the regulations relating to the sanction of experts and the fee rates and consults on proposals for change within the context of a complete regulatory review. The Committee further recommends that SLAB give urgent consideration to streamlining and speeding the process of sanction for experts.
18. The Committee recommends that a framework for evaluation of quality in the provision of legally aided services be developed and implemented as a matter of priority.
19. The Committee recommends that SLAB, in carrying out its review [of urgent provisions], considers what scope there may be for applying the rules differently to ensure that the scheme does not unduly disadvantage particular groups.
20. Whilst the Committee is of the opinion that the same rules should apply whether or not the pursuer is in receipt of legal aid, it is also mindful of the costs to the public purse of implementing such a change. The Committee recommends that the Executive should assess the impact of applying the same rules to the successful unaided party as to the party in receipt of legal aid and report its findings to the Committee. The Executive should also assess the likely impact of reducing the test of hardship as in England and Wales.
21. The Committee will examine the guidance to be issued by SLAB on property recovered or preserved in due course and decide whether to make any recommendations on this issue at that time.
22. The Committee recommends that the Executive/SLAB consider the introduction of hardship provisions relating to civil legal aid in the case of property recovered or preserved. The Committee also recommends that the Executive should assess current exemptions from clawback and assess whether they are in line with inflation and whether they should be uprated in line with inflation.
23. The Committee recommends that the Executive instigate a complete review and revision of the legal aid regulations to simplify them and bring them up to date. In reviewing the regulations, the

Executive should seek to ensure that they are coherent as they relate to the merits test for both civil and criminal legal aid.

24. Whilst the Committee is seriously concerned about the lack of a strategic overview, planning and delivery of the provision of legally aided services in Scotland, it is not yet convinced on the need to set up a legal services commission. The Committee recommends that the Executive bring forward proposals to give SLAB a greater strategic role than at present together with enhanced powers and a greater degree of flexibility of operation.
25. The Committee recommends that the Executive should examine the need for a review of the civil justice system, and the resources required for such a review, and report back to the Committee with its findings.
26. The Committee recommends that the Executive should examine the cost implications of the recommendations of the Committee, in particular of those recommendations contained in paragraphs 25, 40, 52, 56, 67, 80, 81, 93, 103 and 108 and report back to the Committee with its findings as a matter of urgency.
27. The Committee recommends that the Executive should report to the Committee on the recommendations and outcomes of the working group on the Community Legal Service as a matter of urgency.
28. The Committee recommends that SLAB should report to the Committee on the outcomes of its current research as a matter of urgency.
29. Once the Committee heard from both the Executive and SLAB on the matters outlined in paragraphs 121 to 123 the Committee intends to issue a further report on legal aid in Scotland.

## Annex 2B: Justice 1 Committee Inquiry Into Legal Aid: Summary of the Legacy Paper<sup>2</sup>

1. Automatic Uprating of the Financial Eligibility Thresholds for Civil Legal Assistance  
**1. It is suggested that the successor Committee may wish invited to address this issue by promoting a Committee Bill or alternatively a member may wish to sponsor a member's bill.**

2. Tapering and Benefits Disregard  
The Committee hopes that the future administration would make advancement on 'tapering' building on the preliminary technical work being undertaken by SLAB. The Committee also welcomes the Minister's announcement that all state benefits should be disregarded when assessing eligibility for advice and assistance and also the Executive's assurance to extend this policy to civil legal aid.

3. Specialist Expertise  
The Committee notes the progress made so far in this area by the Executive, SLAB and the Law Society. However, the Committee suggests that wider representative groups should be consulted, such as, the Social Welfare Law Practitioners.

4. Community Legal Service  
The Committee notes the progress made by the Executive and invites the incoming Committee to take evidence on the operation of the Community Legal Service.

**5. Civil Legal aid Fees and Other Substantial Changes to the Legal Aid System**  
The Committee welcomes the new remuneration scheme for solicitors doing civil legal aid work and the associated quality assurance measures, however is concerned that wider consultation, particularly with the end users representative bodies did not take place and recommends that substantial changes to the legal aid system should be consulted on more widely than has been the practice.

6. Civil Justice Review  
Notwithstanding the progress made by the Executive with regard to access to civil legal aid, the Committee reiterates that there is a need for a wide-ranging review of the entire civil justice system towards an approach based on the needs of those who use the system.

7. Criminal Legal Aid  
Although the Executive's priority is civil legal aid, the Committee made recommendations also in relation to criminal legal and this is therefore an area that the incoming Committee may wish to monitor.

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<sup>2</sup> Justice 1 Committee, Legacy Paper, J1/03/8/8

Barcode to follow



## Annex 2C: Breakdown And Progress Report Of The Recommendations Of The Justice 1 Committee Inquiry Into Legal Aid

	Para No	Recommendation	Current state of play
1	18A	2. The Committee is of the view that there may be a case to extend the scope of legal aid to incorporate <b>collective action</b> , organisations, and representative bodies. The Committee recommends that the Executive examine how access to legal aid could be made available to support collective action, organisations and representative bodies and examine what eligibility criteria might be applied in these cases.	On Group actions, this might be possible under existing legislation: SE and SLAB to consider further.
2	18B	3. The Committee is of the view that there may be a case to extend the scope of legal aid to incorporate collective action, <b>organisations</b> , and representative bodies. The Committee recommends that the Executive examine how access to legal aid could be made available to support collective action, organisations and representative bodies and examine what eligibility criteria might be applied in these cases.	On Organisations: primary legislation is needed
3	18C	4. The Committee is of the view that there may be a case to extend the scope of legal aid to incorporate collective action, organisations, and <b>representative bodies</b> . The Committee recommends that the Executive examine how access to legal aid could be made available to support collective action, organisations and representative bodies and examine what eligibility criteria might be applied in these cases.	On representative bodies primary legislation is needed
4	20	The Committee recommends that that the Executive should examine how legal aid could be made available to support small claims actions.	To be considered further in light of possible changes to the small claims procedure
5	25A	The Committee is of the view that it would be beneficial to review the range of <b>excepted proceedings</b> to determine whether there is a need for extension	Very few excluded proceedings; do not consider need to extend

	<b>Para No</b>	<b>Recommendation</b>	<b>Current state of play</b>
6	25B	<b>The Committee recommends that the Executive examine how access to legal aid could be made available to support a wider range of tribunals and panels.</b>	Scottish Ministers have already agreed to consider additional bodies on a case by case basis; Scottish Security Commissioners (SSC), Child Support Commissioners (CSC) and VAT Tribunal have been recently added
7	25C	<b>The Committee also recommends that the Executive examine the most effective form and method of delivery of legal aid for tribunals and panels.</b>	To be considered further
8	27	<b>The Committee recommends that the Executive should further review the qualifying criteria for and consider an extension of the scope of civil legal aid to employment tribunals.</b>	Legal aid for employment Tribunals only available since January 2001; not presently aware of any problems
9	31	<b>5. The Committee notes that SLAB is commissioning a research project to estimate any changes in eligibility over the years and to identify any particular groups that do not take up legal aid despite being eligible. The Committee will examine the findings of this research before considering whether to make any recommendations in this regard.</b>	ACHIEVED
10	40A	<b>The Committee is concerned about the current position with respect to eligibility and means testing and recommends that as a matter of urgency the lower capital limit should be uprated in line with inflation since 1983 and uprated on an annual basis thereafter. [ADVICE]</b>	<ul style="list-style-type: none"> <li>• Threshold increased to £1300: regulations came into effect on 1 July 2002.</li> <li>• Automatic uprating needs primary legislation; will need to consider manual uprating annually;</li> <li>• Ministers agreed in principle to annually uprate.</li> </ul>

	<b>Para No</b>	<b>Recommendation</b>	<b>Current state of play</b>
11	40B	The Committee is concerned about the current position with respect to eligibility and means testing and recommends that as a matter of urgency the lower capital limit should be uprated in line with inflation since 1983 and uprated on an annual basis thereafter. <b>[CIVIL]</b>	<ul style="list-style-type: none"> <li>• Lower capital thresholds increased to £6000 and upper limit to £10,000: regulations came into effect on 1 July 2002</li> <li>• Automatic uprating needs primary legislation; will need to consider manual uprating annually</li> <li>• Ministers agreed in principle to annually uprate.</li> </ul>
12	40C	6. The Committee further recommends that the Executive gives serious consideration to the introduction of a tapering of financial eligibility and reports to the Committee on its findings.	Under consideration
13	47	7. The Committee recommends that the Executive should monitor whether the extension of the repayment period results in an increase in the uptake of offers of civil legal aid and report to the Committee on this matter following the end of the SLAB current financial year.	<p style="text-align: center;">ACHIEVED</p> <p>SLAB reported to JC1 in August 2003</p>
14	52	8. The Committee is concerned about inconsistencies in the treatment of benefits and recommends that as a matter of urgency the Executive should examine this matter with the aim of seeking to simplify the system and harmonise the treatment of benefits for eligibility to all elements of legal aid. The Committee looks forward to receiving proposals from the Executive on this matter at the earliest stage.	<ul style="list-style-type: none"> <li>• Disregard of benefits in advice ACHIEVED;</li> <li>• Disregard of benefits in civil legal aid will follow later on</li> </ul>
15	56	The Committee considers that there may be a lack of coherence and the existence of anomalies in the approach to merits testing [apparently related to civil/FAI/criminal]. The Committee recommends that the merits test should be reviewed as part of a wider review of the legal aid regulations.	SE and SLAB to consider further

	Para No	Recommendation	Current state of play
16	61	9. 10. The Committee recommends that SLAB and the Society work together to develop and implement proposals to help people ascertain who has expertise in specific areas.	SE, SLAB and LSS to consider further
17	65A	11. The Committee recommends that SLAB monitor the effectiveness of this measure and report to the Committee in this regard [SLAB's new power to provide a solicitor to an unrepresented accused].	Power not yet used
18	65B	12. The Committee also recommends that the lack of expertise in certain areas of the law, in particular social welfare law, should be addressed by the Executive.	
19	65C	13. The Committee will examine the report of the working group on the community legal service once it is published and expects to see some proposals in this regard contained within that report.	
20	67	14. The Committee recommends that in the context of consideration of a strategic approach to the provision of legal aid services in Scotland the Executive gives careful consideration to the benefits and consequential cost to the legal aid fund of the introduction of a contracting scheme.	<ul style="list-style-type: none"> <li>• Contracting power available in criminal but not in civil; <ul style="list-style-type: none"> <li>• Need primary legislation</li> </ul> </li> </ul>
21	74	The Committee recommends that SLAB monitor the impact of fixed fees on the availability of solicitors willing to undertake criminal legal aid throughout Scotland and report to the Committee on this matter in due course.	<ul style="list-style-type: none"> <li>• Not for SLAB, but SE</li> <li>• Research commissioned</li> </ul>
22	80A	The Committee recommends that the fee rates paid for criminal work by advocates and by solicitors for cases not covered by the fixed payment scheme should be increased – linked to the introduction of a quality assurance system.	Ministers have agreed to an interim increase for solemn legal aid.

	Para No	Recommendation	Current state of play
23	80B	The Committee recommends that the fee rates paid for <b>criminal</b> work by <b>advocates</b> and by solicitors for cases not covered by the fixed payment scheme should be increased – linked to the introduction of a quality assurance system.	Currently under consideration in the context of graduated fees
24	81A	The Committee recommends that the fee rates paid for <b>solicitors</b> and <b>advocates</b> who provide <b>civil legal aid</b> and advice and assistance should be increased – linked to the introduction of a quality assurance system.	ACHIEVED
25	81B	The Committee recommends that the fee rates paid for <b>solicitors</b> and <b>advocates</b> who provide <b>civil legal aid</b> and <b>advice and assistance</b> should be increased – linked to the introduction of a quality assurance system.	Ministers have agreed to an interim increase
26	81C	The Committee recommends that the fee rates paid for <b>solicitors</b> and <b>advocates</b> who provide <b>civil legal aid</b> and advice and assistance should be increased – linked to the introduction of a quality assurance system.	Currently under consideration
27	84A	15. The Committee recommends that the Executive consider the regulations relating to the sanction of experts and the fee rates and consults on proposals for change within the context of a complete regulatory review.	ACHIEVED
28	84B	16. The Committee further recommends that SLAB give urgent consideration to streamlining and speeding the process of sanction for experts.	ACHIEVED
29	93	17. The Committee recommends that a framework for evaluation of quality in the provision of legally aided services be developed and implemented as a matter of priority.	

	Para No	Recommendation	Current state of play
30	97	<b>The Committee recommends that SLAB, in carrying out its review [of urgent provisions], considers what scope there may be for applying the rules differently to ensure that the scheme does not unduly disadvantage particular groups.</b>	ACHIEVED
31	103	<b>Whilst the Committee is of the opinion that the same rules should apply whether or not the pursuer is in receipt of legal aid, it is also mindful of the costs to the public purse of implementing such a change. [ expenses to successful unaided opponent] The Committee recommends that the Executive should assess the impact of applying the same rules to the successful unaided party as to the party in receipt of legal aid and report its findings to the Committee. The Executive should also assess the likely impact of reducing the test of hardship as in England and Wales.</b>	Need primary legislation
32	107	<i>The Committee will examine the guidance to be issued by SLAB on property recovered or preserved in due course and decide whether to make any recommendations on this issue at that time.</i>	ACHIEVED
33	108A	<b>18. The Committee recommends that the Executive/SLAB consider the introduction of hardship provisions relating to civil legal aid in the case of property recovered or preserved.</b>	
34	108B	<b>The Committee also recommends that the Executive should assess current exemptions from clawback and assess whether they are in line with inflation and whether they should be uprated in line with inflation.</b>	ACHIEVED
35	111	<b>The Committee recommends that the Executive instigate a complete review and revision of the legal aid regulations to simplify them and bring them up to date. In reviewing the regulations, the Executive should seek to ensure that they are coherent as they relate to the merits test for both civil and criminal legal aid.</b>	

	<b>Para No</b>	<b>Recommendation</b>	<b>Current state of play</b>
36	116	<b>19. Whilst the Committee is seriously concerned about the lack of a strategic overview, planning and delivery of the provision of legally aided services in Scotland, it is not yet convinced on the need to set up a legal services commission. The Committee recommends that the Executive bring forward proposals to give SLAB a greater strategic role than at present together with enhanced powers and a greater degree of flexibility of operation.</b>	Strategic review in train
37	119	<b>The Committee recommends that the Executive should examine the need for a review of the civil justice system, and the resources required for such a review, and report back to the Committee with its findings.</b>	Currently under consideration
38	120	<b>The Committee recommends that the Executive should examine the cost implications of the recommendations of the Committee, in particular of those recommendations contained in paragraphs 25, 40, 52, 56, 67, 80, 81, 93, 103 and 108 and report back to the Committee with its findings as a matter of urgency</b>	SE/SLAB currently considering
39	121	<b>20. The Committee recommends that the Executive should report to the Committee on the recommendations and outcomes of the working group on the Community Legal Service as a matter of urgency.</b>	ACHIEVED
40	122	<b>The Committee recommends that SLAB should report to the Committee on the outcomes of its current research as a matter of urgency.</b>	ACHIEVED

## **ANNEX 3: Models of Legal Aid Provision: Choice of Delivery Model and International Examples**

### **INTRODUCTION**

This paper provides a summary of the key issues in the developing debate over choice of legal aid delivery models, and describes some key features of a variety of international models of legal aid provision. It describes the move away from the traditional polarised debate of staff versus private lawyer provision to the current situation where complex mixed models of provision offering a variety of legal aid services from a variety of providers are increasingly seen as the desired approach in the civil field. Examples of systems of differing complexity are offered as evidence of the variety of models adopted by jurisdictions worldwide.

The information in this paper is drawn solely from an examination of evidence available electronically at the time of the review.

### **MAIN FINDINGS**

- Debate over models of provision of legal aid services has moved on from the traditional polarised debate over the advantages and disadvantages of salaried lawyers versus the private bar, which is now regarded as having stifled innovation in legal aid service delivery.
- Mixed models are now accepted to be the most desirable approach; increasingly Western jurisdictions are adopting more complex models of provision aimed at different client groups, types of law, and geographical areas. Assessment of needs is a dominant theme.
- No one delivery model exhibits characteristics that can be said to be superior to others – there is no ‘right answer’ to service delivery.
- Service delivery should be context specific, and ultimately the choice of services depends upon what are the desired objective of the system
- Provision, particularly in civil law matters, has moved beyond consideration simply of advice and representation services, and now includes a wider range of services to address legal needs within the community. These services can be delivered by a broad range of professionals. In contrast, criminal legal aid provision models are less complex.

### **1. DEBATE OVER THE CHOICE OF MODEL OF LEGAL AID PROVISION**

The choice of the model of delivery of legal aid services has generated a vast body of literature and debate. Historically, discussion of choice of models of delivery of legal aid has been dominated by debate over whether legal aid services should be delivered through private practice lawyers (the *judicare* model), or through salaried or staff lawyers (the *staff* model). Debate has tended to focus on the relative advantages and disadvantages of the *judicare* and *staff* models as alternative models of provision, an ‘either/or’ situation, with the two models seen as polarised options<sup>1</sup>. A number of studies (mostly from the USA/Canada) have attempted to compare *cost and quality* of the two models in the criminal field<sup>2</sup>, beginning with what is now seen as the classic study comparing *staff and judicare* delivery, the 1981 Burnaby study (Brantingham et al, 1981).

Concerns over the reliability of the evidence from these studies are evident in literature owing to a variety of methodological limitations, in particular the controlling of variables (Goriely 1997,

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<sup>1</sup> Even within these ‘pure’ models however there is scope for variation in service provision, as both are extremely flexible.

<sup>2</sup> Issues will transfer over to the civil field, although as will be noted later in this paper delivery choices will be different in relation to civil and criminal legal aid services. Conclusions from research in criminal fields will not necessarily be generalizable to other areas of law, and there is a dearth of empirical work comparing cost effectiveness of *staff/private* delivery in areas other than criminal.

McManus, Ontario Legal Aid Review, 1997). However, a review by Goriely (1997) of the various studies comparing staff and judicare models has shown, in summary, that<sup>3</sup>:

- Where costs data are available, they usually show that salaried services are cheaper on a cost-per-case basis. This is particularly so in criminal defence work.
- The reason salaried lawyers are cheaper is that they tend to spend less time per case. The reasons why are more problematic, but possible explanations include: staff offices may select easier cases, which probably accounts for at least some of the observed costs differences, though not all; staff lawyers may be more specialist – however the same may be true in some specialist private firms. Further, in complex and unusual cases there may be greater expertise in private practice; staff offices may enjoy economies of scale; salaried and judicare lawyers may have different incentives – staff lawyers are seen as wishing to get through their case load, while judicare lawyers whose fees depend on hours expended on each case may have incentives to carry out more work
- A key question then is whether staff lawyers are providing the same quality of service – according to Goriely the answer may vary according to the area of work, the Ontario Legal Aid Review (1997) found that generally, the findings of the different comparative studies demonstrate little difference in the quality of service delivered by the different models. For social welfare law, there is (very limited) evidence to suggest that salaried lawyers are able to secure similar outcomes although they spend less time per case

However, problems associated with staff offices include:

- Overload (staffing and resources may fail to keep pace with increased demand and service may deteriorate)
- Independence (e.g. public defenders' relationships with prosecutors)
- Choice (there is some evidence to suggest that some clients may prefer to choose a private lawyer)
- Access (in rural areas, physical access may be a problem)
- Bureaucracy (large schemes have potential for bureaucracy)

(Goriely, 1997)

### **The move towards provision through mixed models of delivery**

However, literature now shows that there is growing recognition amongst commentators that the conceptualisation of the debate in terms of 'staff versus private' models of provision has effectively stifled innovation in legal service delivery (Canadian Bar Association 2000). More recently, the debate has seen a growing consensus of the need for *mixed models* of service delivery in the context of legal aid provision. As Paterson comments,

*Even though experts are divided over the cost effectiveness of the judicare and salaried models of legal aid, there is a remarkable consensus that the ideal way forward for western countries is a model that involves a mixture of judicare and salaried elements' (Paterson in Goriely, 1997)*

A recent review of research evidence carried out by the Lord Chancellor's Department (2000) highlighted what was seen to be the clear benefits of a *mixed system* of delivery including a salaried defence service (in the context of criminal legal aid services), including:

- Good quality (salaried services can deliver the same outcomes for lower costs, or slightly better for the same costs)
- Better value for money: salaried services are cheaper on a cost-per-case basis

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<sup>3</sup> Goriely points out however that the conclusions drawn from empirical work should be treated with care

- Closer alignment of objectives: private practice solicitors seek to maximise profit, salaried solicitors would not have a profit motive
- Availability of information: Management information was not always forthcoming from private practice solicitors
- Positive pressures on private practice quality and cost: the presence of an alternative mechanism to private practice has the ability to test the quality and value for money of private practice services, and salaried services will also be subject to similar pressures from the private sector
- System flexibility of a mixed system: firstly, through the ability to establish salaried services that in geographic areas, or for different types of service, cover gaps in provision. Secondly, the ability to work closely with salaried defenders to develop new methods of delivery or higher standards more quickly than would be possible working at arms length with private practice lawyers

### **The growth of complex mixed models**

As recognition of the need for mixed models of delivery has grown, the concept of the simple mixed model involving both salaried and private solicitors has itself become somewhat outdated, with the notion of *complex mixed models* emerging as an approach to legal aid delivery. Based on the notion that no one delivery model is best for all purposes, complex mixed models – essentially a set of delivery mechanisms developed to deal with specific needs within a jurisdiction – are now increasingly evident amongst Western jurisdictions. Components of the mixed models vary from jurisdiction to jurisdiction (Currie, 1999). Indeed, the specific components employed under the models are seen as incidental – what is essential to the complex mixed model is ‘*the utilisation of a range of delivery modes which are matched to specific delivery problems*’ (Currie 1999, at 24).

Thus complex mixed models are not confined to provision of legal aid services through staff or private lawyers. Rather, increasingly models in Western jurisdictions will provide a mix of a variety of services and a mix of providers of these services. Such models incorporate the provision of services which go beyond the more traditional services of legal advice and representation, and include alternative services such as information provision, and mediation/dispute resolution services. The wider range of services provided necessitates a wider mix of providers in the model. Under the complex model, the various delivery systems work together towards the provision of an integrated system which consists of models targeted towards specific delivery problems.

#### *Choice of type model to be adopted*

In the context of what *type* of model should be adopted, literature is clear that no one model is better than another. As the 1997 McManus Review points out:

*...comparative studies in Canada and the United States have attempted a systematic evaluation of the relative performance of various legal aid delivery models....the most striking finding from most of the studies is that no one delivery model exhibits performance characteristics that are systematically superior to those of other delivery models in all contexts (McCamus, Ontario Legal Aid Review 1997)*

Rather, the approach can be seen as one of optimum provision for individual circumstances within a jurisdiction (Smith 2002). Literature shows that decision on the type of delivery model to be adopted will be heavily influenced by system objectives – as Goriely (1997) points out ‘*it is not possible to be prescriptive about which mixed model is best, it depends, as they say, on what you want*’. Evidence shows that choice will by necessity be jurisdiction specific – no one delivery model is the best for all purposes, without qualification (Currie, 1999). Key factors influencing the model adopted will include the cultural and historical traditions of a jurisdiction, the legal processes and wider justice system, specific needs within the jurisdiction, existing models of delivery, and local cultures (Goriely 1997, Smith 2002).

What is clear from literature is that models of provision for civil legal aid services will differ significantly from criminal services. Debate is now more concerned with a wider variety of options within the one system of provision, and this is particularly so in the case of civil legal aid. Literature highlights increasing advocacy of the need to consider a wider range of options for legal aid service delivery in civil matters as opposed to criminal matters (Smith, 2002) A key factor for consideration when planning provision in civil law matters is that, unlike criminal matters, citizens may find it difficult to realise that they have legal rights which need to be enforced. Thus in literature methods of delivery in civil law include a much wider range of possibilities beyond the traditional advice/representation services – including information and referral services, community legal education, counselling, and self help services. Particularly crucial in the context of civil legal aid services is a need for the supply of information and advice short of representation (Smith, 2002.)

Thus, the debate on legal aid delivery models can be seen to have moved from the traditional debate over staff against private lawyer provision, with increasingly complex models advocated as delivery mechanisms. As Currie (1999) points out, in the new legal aid provision field:

*‘Legal aid delivery is not a simple, one-dimensional issue. A delivery model must provide the best service possible, in the most effective manner, in ways that address a number of major aspects of service delivery. Legal aid service is provided in different areas of law, to diverse client groups, in different geographical areas, and involving cases that vary from simple to complex. These and other factors make legal aid delivery a complex and multi dimensional problem, not a simple and uni dimensional one’.*

## **2. INTERNATIONAL MODELS OF DELIVERY**

The review examined legal aid delivery models in England and Wales, Republic of Ireland, Finland, Sweden, the Netherlands, Germany, New Zealand, Canada (Ontario and British Columbia), and Australia (New South Wales and Victoria). The level of web based information on models of provision varied amongst the different jurisdictions examined, with more information generally available on non European, more complex models such as Australia and Canada<sup>4</sup>. The review sought information primarily on the type of model adopted in each jurisdiction (and in particular the mix between private bar and salaried lawyer provision, if any) but also examined where available the range of services and providers involved in the model. Models of provision of both civil and criminal legal aid services were examined.

Examination of the available evidence of key features of the models adopted in each of the jurisdictions showed 3 types of provision model: complex mixed models, mixed models, and non mixed models. Evidence shows that models of provision of criminal legal aid services tended to be less complex than those adopted for civil provision within the same jurisdiction. In the more complex jurisdictions, highly developed models of provision of civil legal aid services were evident with a range of services extending beyond the traditional advice and representation services, with the services available from a broad range of providers including non lawyers. In contrast, criminal services were more likely to be restricted to advice and representation provided through the services of lawyers.

### **Models of delivery of civil legal aid services**

A wide variety of models of provision of civil legal aid services was evident from examination of the available information on the jurisdictions under review. Models varied in their complexity from more simple models of provision of predominantly advice and representation services provided by private

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<sup>4</sup> Please note that this is based on the best available web-based data at the time of searching in each jurisdiction.

lawyers only, through to extremely complex integrated models of provision involving a wide range of services and provision through a mix of staff lawyers, private bar, and non lawyers.

### *Complex mixed models of provision*

Evidence of complex mixed models of provision was found in relation to delivery systems in Australia, England and Wales, New Zealand, and Canada. The complex mixed models in these jurisdictions shared a number of key features, including:

- a mix of service providers with both staff and private bar lawyers providing services, as well as non lawyers
- wide ranging service provision going beyond traditional services of advice and representation, and including provision of a range of services such as information and education, mediation, advocacy, and law reform work.
- a role for non lawyers within the systems, with providers including community law centres/law clinics, volunteers, and CABx. In most jurisdictions with this complex mixed model, the non lawyer, or not for profit sector, specialise in delivery of social welfare or clinic law services.
- tendency for the majority of services to be provided through the private bar, although this was not always the case. Practice varies as to whether services are provided on the basis of quality assured contracting with the private bar.
- often, merits tests include specific definition of the types of action which will be funded under legal aid schemes (through targeting of priorities), but will also include more subjective and less specific criteria. Matter of civil law covered tend to be wide ranging (with the exception of British Columbia, where recent funding cuts have reduced civil legal aid coverage, notably in social welfare law).

### *Mixed models of provision*

Less complex mixed models were seen to be operating in Finland, the Republic of Ireland<sup>5</sup>, and the Netherlands<sup>6</sup>. In these jurisdictions, while provision is still mixed amongst salaried and private lawyers<sup>7</sup>, the range of services does not extend so far beyond the traditional advice and representation services as is the case in the more complex models. Finland has recently increased the amount of work being given to the public sector, a move which goes against current comparative legal aid policy.

### *Non mixed models*

These can be seen in Germany<sup>8</sup>, and Sweden. In Sweden, the model was mixed until 2000, when the public law offices were closed down. In both Germany and Sweden, legal expenses insurance is the primary source of litigation funding for most citizens, consequently legal aid is seen as playing a more minor role in relation to provision of civil law services.

## **Models of delivery of criminal legal aid services**

Less information on criminal delivery systems was available in a web based format, however this is to some extent due to the fact that delivery models for criminal legal aid services tended to be less

<sup>5</sup> Provision is predominantly through salaried solicitors, but there are private practitioner schemes covering certain areas of law.

<sup>6</sup> The Netherlands was amongst the first to embrace the notion of mixed service provision using private and salaried lawyers

<sup>7</sup> There was evidence in some jurisdictions with mixed delivery systems of salaried lawyers providing the bulk of the advice work, with private practitioners the key providers of representation/litigation services

<sup>8</sup> Arrangements differ between districts, but are predominantly judicare

complex than those for civil legal aid services. Much of the debate in relation to provision of criminal legal aid services has centred on the polarised staff versus private bar position. However, as in the case of civil legal aid provision, debate has moved beyond this polarised approach and there is now evidence of a growing recognition of the desirability of delivery through mixed provision involving both the private bar and salaried lawyers, and recognition of the benefits that the salaried model can bring. Jurisdictions which have traditionally adopted a *judicare* model of provision of criminal legal aid services are recognising the benefits of supplementing private bar provision with at least some level of salaried lawyer provision, and introducing mixed provision models for delivery of criminal legal aid services. In Ontario, for example, provision has until very recently been 100% *judicare*. However, while still committed to provision through the private bar, Legal Aid Ontario has recently opened 3 staff criminal law offices in order to fill gaps in service provision. These offices are seen as supporting and supplementing the private bar, improving client choice and promoting innovation in delivery.

Review of the available evidence of models in relation to provision of criminal legal aid services suggests that delivery models for criminal legal aid schemes tended to be less wide ranging than civil legal aid, although some jurisdictions (England and Wales, New Zealand, Canada and Australia) appear to have more complex systems of provision<sup>9</sup> than the other European jurisdictions under review. As noted above, literature suggests that models for delivery of civil legal aid services will be more complex, given the more diverse nature of legal problems and issues. Criminal services feature in the main traditional advice and representation work and a minimal (if any) role for non lawyers

In terms of models adopted in the jurisdictions under examination, there was a fairly even split between *judicare* (5 of the 11 jurisdictions<sup>10</sup>) and mixed provision involving staff and private practice lawyers (6 of the 11). However, 2 of the 5 jurisdictions in which *judicare* is the traditional model have recently introduced pilots/projects whereby staff lawyers are supplementing provision.

In the mixed schemes, in most jurisdictions majority provision tends to be through the private bar. Practice varies as to whether contracting is the preferred model. In the European mixed models, however, advice services tend to be offered by salaried lawyers, with private practice lawyers conducting the ‘hard’ litigation end of service provision.

A feature of provision in some European jurisdictions is the existence of public defence counsel, normally in addition to legal aid. In some of these jurisdictions, defence in criminal matters is not seen as part of legal aid, but rather as part of the due administration of justice, with costs of public defence counsel being met by the state in mandatory representation cases. Evidence of this practice can also be found in Australia however – in Victoria courts will make orders for accused to be represented if they feel that they cannot guarantee a fair trial. Public defence counsel will be appointed in serious criminal matters, and are not subject to means testing.

The key criteria for appointment is the interests of justice, legal aid will be available in jurisdictions for serious crimes. However, jurisdictions vary in provision for non serious crimes, and the extent to which free advice systems are in place to help those accused of less serious offences. In the majority, practice is for choice of solicitor to lie with the legal aid applicant.

### Select Bibliography

Brantingham et al (1981) *The Burnaby British Columbia Experimental Public Defender Project*  
Department of Justice Ottawa

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<sup>9</sup> However, more information and detail on criminal models was available electronically in these jurisdictions

<sup>10</sup> Canada and Australia include consideration of 2 states

Canadian Bar Association (2000) *The Legal Aid Crisis: Time for Action* CBA  
[http://www.cba.org/CBA/Advocacy/legalAid/.](http://www.cba.org/CBA/Advocacy/legalAid/)

Currie, Abe (1999) *Legal Aid Delivery Models in Canada: Past experience and Future Directions*  
Ottawa Dept of Justice Canada

Goriely, T (1997) *Legal aid delivery systems: which offer the best value for money in mass casework? A summary of international experience* London LCD Research Reports

Lord Chancellor's Department (2000) *Criminal Defence Service: Establishing a Salaried Defence Service and Draft Code of Conduct for Salaried Defenders employed by the Legal Services Commission.* LCD Consultation Paper.

McCamus, J (1997) 'A Blue Print for Publicly Funded Legal Service: Report of the Ontario Legal Aid Review'

Smith, R (2002) *Legal Aid: Models of Organisation* Paper presented to conference of the European Forum on Access to Justice , 2002