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A Sustainable Future for Legal Aid

Comments by the Scottish Legal Action Group on the Scottish Government discussion paper¹

On 5 October 2011 the Scottish Government published a Discussion Document *A Sustainable Future For Legal Aid*. SCOLAG considers that there are a number of serious concerns raised by the Discussion Paper. The following comments look at some recent European initiatives concerning legal aid, we make some general observations in relation to the Discussion Paper and also in relation to aspects of the stated themes of the Discussion Paper which cause us the most concern. Our overall conclusion is that the Discussion Paper is full of jargon and civil service speak which covers an attack on one of the most fundamental of legal services for the protection of the citizen. It is apparent that no additional value is placed by the current Scottish Government on the wider role of legal aid in a modern civilised society over and above its financial cost.

European Initiatives

The Discussion Paper contrasts sharply with European wide initiatives on legal aid. The European Commission has identified a number of important procedural minimum safeguards for justice, fundamental rights and citizenship. These minimum safeguards are:

- access to legal advice, both before the trial and at trial;
- access to free interpretation and translation;
- ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention;
- the right to communicate, inter alia, with consular authorities in the case of foreign suspects,
- notifying suspected persons of their rights (by giving them a written 'Letter of Rights').

A year before the Scottish Government's Discussion Paper the Council of Bars and Law Societies of Europe (CCBE) published on 22 October 2010 a position paper on *Recommendations On Legal Aid*. This position paper noted that access to justice is a fundamental right and that legal aid is an essential tool in ensuring access to justice. The CCBE called on Member States of the European Union to undertake a number of actions, including:

- Deal with legal aid as a fundamental right that guarantees access to justice and allows real and effective defence – and not only formal defence – which should be granted to all, irrespective of residence or nationality. Consider legal aid as the priority procedural safeguard;
- Give specific attention to assistance to suspects and particularly vulnerable groups;
- Ensure legal-aid coverage for all legal areas, jurisdictions and alternative dispute resolutions, including the assistance of a lawyer at all stages of the proceedings, the assistance of experts, translation and interpretation, and other trial costs;
- Circulate and make easy broad access for citizens to the necessary information on how to receive

legal aid;

- Promote e-management for legal aid by applicants and interoperability by public services;
- Recognise the essential role of lawyers in legal proceedings, in particular by highlighting deontological supervision and quality of service initiatives developed by Bars and Law Societies;
- Support specific training for lawyers who provide services in the framework of legal aid.

The CCBE *Recommendations On Legal Aid* are made in the context of dealing with a wide variety of circumstances in different countries. A number of the recommendations are also aimed more at recent Accession States, and with a view to setting minimum standards in countries which are much poorer than the United Kingdom and which do not have a history of widespread respect for civil rights for individuals in civic society or within state institutions.

SCOLAG believes that most people in Scotland would have expected that these procedural minimum safeguards were already in place, and that the CCBE Recommendations on actions would already reflect existing current practice in Scotland. By and large that is correct. However it is also clear that in Scotland, some aspects of meeting those minimum standards have only been recently met. The most striking example is in respect of the access to 'competent and willing professional assistance from the earliest moment of legal concern right through to the conclusion of the process'. The first (and most critical part in terms of effectiveness) has only been achieved in Scotland through a highly publicised *Cadder v HMA* case, and was achieved in the face of the strongest possible opposition from the Scottish Government. Not only that, but the outcome was also subject to some of the most intemperate criticism by members of the Government of the judicial decision and the judges personally since the days of the Thatcher Government.

General Observations

One point that is highlighted repeatedly in the course of the CCBE paper is the emphasis on the need to provide a quality of service to the highest possible standards. Although the Discussion Paper uses the word 'quality' four times, SCOLAG's concern is that the proposals advanced will inevitably lead to a reduction of quality of provision of legal aid services. The primary goal is about saving money, with the requirement to meet minimum procedural standards being seen as the imposition of a higher cost burden rather than an open willingness to meet minimum European procedural standards.

Scottish Government Budget proposals do not give legal aid expenditure the fundamental priority which SCOLAG believes is required. The entire premise of the Discussion Paper is based on there being an 8.3% cut in the legal aid budget between 2012 and 2015. As the Discussion Paper indicates, the actual level of expenditure is likely to be above Budget levels, and in reality the cuts being talked about will more realistically be in the order of 10% over 3

years in order to meet the 2015 budget. This is on top of earlier cuts, which have been targeted at legal aid service providers through reduced payments for work and cuts in funding for specific projects. One impact of this has been the closure of law centres. Other funding cuts elsewhere have led to the closure of advice centres. The result of those policies is that many disadvantaged people who need help the most have been the first to have been affected by cuts in legal aid.

In paragraph 13 of the Discussion Paper it is said that in 2009 only 5% of civil legal aid applicants had difficulty finding a solicitor. That is supposed to be a sign that the system works well and is meeting the needs of those it is aimed at. The figure is meaningless. First of all, a figure of 5% of applicants for legal aid having difficulty finding a solicitor is not good. It means 1 in 20 of those who actually applied for legal aid had difficulty in finding a solicitor. In Scotland, where the bulk of the population lives in the central belt or in urban or very close to urban conurbations and there are one or more solicitors offices or advice service in every high street the statistic is a sign that there is a serious problem getting access to civil legal aid. Secondly, it takes no account of those who had not applied for civil legal aid, even though they may have a need for such help. Since the statistic takes no account of people who have not applied for legal aid it is bound to be understate the problems that people will have in accessing civil legal aid. Thirdly, because it is a figure taken in isolation and does not take account of more recent changes made in 2010 and 2011 it does not assist in knowing in its own limited way whether the position is changing, and if so whether the change is for the better or for worse.

Recent changes to criminal legal aid have also meant that it has been far harder for accused people to obtain legal aid, and there has been a marked increase in the number of cases adjourned due to lack of legal aid being in place. Changes to fees for solemn legal aid where the accused is in custody from the outset have resulted in some accused being granted bail. Solicitors have successfully argued that a cap on legal aid for visits to the accused in prison could prevent the accused enjoying the right to a fair trial under Article 6 of the European Convention on Human Rights.

Similar problems arise in the civil legal aid system, which is hampered by the bureaucratic manner in which the system is designed and operated. This has significant implications for every person who is presently eligible for legal aid. No step can be taken without this being sanctioned first by the Scottish Legal Aid Board. SLAB's willingness (or unwillingness) to finance certain steps (such as a report from an appropriately qualified and experienced expert witness) can be crucial. In very complex cases where particular types of expertise are rare, SLAB will not fund the provision of expert reports at commercial rates. Those willing to accept such payment rates may not actually be suitable to act. The result can be that either no expert advice is obtained, or the advice which is obtained is not provided to an appropriate standard. This in itself can seriously undermine a case and also the funds invested by SLAB in that case. There is also a detrimental impact on an opponent who is not legally aided as the delays involved in obtaining sanction and in obtaining reports can lead to more time being taken up and more procedural appearances required. This also has an impact on the amount of court resources used.

Although the majority of lawyers will not distinguish between clients who are legally aided and those who are not, there is a widely held perception that the lower levels of remuneration together with the bureaucratic nature of legal aid administration leads to lower levels of service for legally aided clients compared to non-legally aided clients in both the civil and criminal spheres. We would hope that this perception does not reflect reality, but it is difficult to be certain that in all cases parties actually have equality of arms.

We are also concerned to note a number of comments in the Discussion Paper which are inherently critical of the services provided by lawyers. There is repeated assertion or implied criticism of unsubstantiated assumptions that the system is being milked by lawyers for their financial benefit to the detriment of the client or the taxpayer – see paragraphs 25, 26 and 29. Whilst in every system there are always some people who can be identified as acting outwith the rules or the spirit of those rules for their own advantage, the Group believes that the Discussion Paper's pandering to this view is an unfair reflection of the integrity, commitment and hard work of the legal profession in general.

Theme 1: Focussing Legal Aid On Those Who Need It Most

SCOLAG is very concerned that the express intention is to make legal aid 'a funder of last resort'. This has its most striking effect in the sphere of criminal legal aid. Our concerns are also related to proposed piecemeal changes in the law concerning evidence and procedure. We are particularly concerned that changing the rules of evidence in criminal cases so as to remove the requirement for corroboration without making other changes will be unduly prejudicial to the accused. When this is done whilst at the same time as restricting access to criminal legal funds through a requirement that the accused pay contributions, then we believe that the effect will strike a proper balance between the accused and the Crown. The requirement that the accused pay contributions towards criminal legal aid will make it harder for accused persons to have the means to defend themselves. We believe that the overall effects of both legal aid funding changes and procedural changes would be incompatible with the presumption of innocence and the right to a fair trial. Where the Crown does not succeed in a prosecution we also wonder whether the Crown should not have an obligation to pay the actual defence costs.

Civil legally aided clients are presently at a significant disadvantage in many cases when compared to those who can afford to pay for their own legal services. Many legal aid cases are taken against public authorities who in reality will spend whatever is required in order to pursue or defend their position, including whatever is needed by way of getting expert reports, or instructing counsel. The rate of legal aid funding for civil cases is set at a level which is far below what public bodies spend on the same case.

The proposal to "make changes to ensure that the amount expended on the provision of advice and assistance in any given case is proportionate to the benefit the client is likely to obtain" is also of considerable concern. There is no evidence presented to suggest that "disproportionate" amounts of money are spent on the Advice and Assistance scheme. This is merely an excuse for further

imposition of restrictions on the provision of Advice and Assistance funding. Clients often have an erroneous understanding of their rights, and also fail to recognise what is relevant and material information. It is only with the benefit of properly qualified and experienced advice that the full problem(s), or a correct understanding of the problem(s) appear. Who is to determine the value to the individual in advance? In reality the proposal means that a bean counter with a crystal ball will decide how a person's case should be considered and advised. This is a serious threat to the independence of the provision of legal services as the bean counter will second-guess the lawyer's experience and advice about what is in the client's best interests, and it is a threat to access to justice.

In the Children's Hearing system we anticipate there will be considerable problems in making parents pay for fees and to contribute to legal actions of their off-spring of 25 and under. We believe that this change, which has already been made, is grossly unfair.

We do not believe that the use of legal insurance policies are widely enough developed to be a reasonable alternative. Nor do we consider the use of "no win no fee" arrangements as being suitable in many types of cases beyond their existing use. The practicality is that these alternatives are not yet readily available, and where they are available, they are not good enough. The proposed cost savings in paragraph 32 of the Discussion Paper appear to us to be speculative. The potential for harm by such changes would in our view

Theme 2: Ensuring Wider Access To Justice- The Right Help At The Right Time

Whilst we consider that there is a role for pro bono work and initiatives such as Law Works and the Faculty of Advocates Free Representation Unit, such programmes cannot be considered to be a sustainable long-term basis for meeting widespread legal need. In particular the reference to "In House University Law Clinics" raises alarm as such facilities cannot and should not act as a replacement for the adequate provision of a properly funded system of legal aid. SCOLAG believes that such initiatives should not be used as an excuse for the state to avoid responsibility as to the issue of access to justice. Similarly organisations such as Consumer Focus Scotland can be a valuable source of self-help and advice through their websites etc, they are not able to provide representation. All studies show that it is knowledgeable representation which can make the biggest impact. The legal system can still be incomprehensible to a person without at least some legal training. Everyday issues often relate to very complex legislation, which is itself interpreted in the light of extensive case law.

In a number of situations alternative dispute resolution simply is not appropriate. Few large-scale organisations and many individuals, such as banks or other financial services providers, local authorities, private landlords have any interest in ADR outside their own complaints systems. For many people who are potential defenders, these service complaints procedures will be irrelevant. The Discussion

Paper refers to "better streamlined access to justice" but contains no detailed, practical suggestions put forward to explain how this will be carried out. It sounds unarguable with in theory, but as a basis for justifying real cuts in legal aid provision it is simply meaningless.

Theme 3: Maximising the value of legal aid expenditure

In our view SLAB is proposing to set about reform on the basis of figures that appear to be without basis. It appears to be purposefully vague.

We also have very great concern about the introduction of contracting. In our view this will lead to a diminution in the supply of legal service providers, and that new entrants to the professions will be particularly disadvantaged. We see this as being harmful to the overall vibrancy and health of the legal services market. We are also concerned at the degree of financial control it places in the hands of the Government over what is supposed to be an independent legal profession. We believe that in the longer run contracting will undermine that independence. The principal problem which arises in relation of an absence of legal aid services in certain geographical areas or for certain types of work is the deliberate decision of the Scottish Government to reduce payments for that type of work to a level below that which is adequate. It is only the current recession which makes this problem less severe than it already is. Using contracting to deliver services has already led to the loss of service providers in Scotland. The lesson from England shows that full blown contracting would have a disastrous impact on services for the most disadvantaged. The proposed expansion of the PDSO is also a threat to the independent legal profession.

Theme 4: Making The Justice System More Efficient

Whilst there is always room for development and change, it is not realistic to suggest that video conferencing is a satisfactory replacement for face to face advice. Video conferencing can itself be intimidating. It is also a barrier to communication and is less effective than direct personal contact. For some people, it will always be necessary to meet face to face in order to properly assess an individual and thereby understand exactly what questions to ask, what tone to adopt both as a means of drawing them out and fully understanding their position and to obtain all the necessary factual background, and also as means of testing the strengths and weaknesses of the person's position. Some particular service users, such as those with learning difficulties, are likely to have the most problems in presenting their position. We do not consider that this has worked well in some legal situations where it has been used, such as in immigration and asylum appeals. If the government do go down this route they will have to carefully consider in which situations it is appropriate.

1. Available at www.scotland.gov.uk/Publications/2011/10/04161029/0