

# **Strategic Review of Legal Aid by Colin Lancaster, Scottish Legal Aid Board**

## **INTRODUCTION**

A Strategic Review of the Delivery of Legal Aid, Advice and Information in Scotland was carried out between January and June 2004, with a report published in October 2004<sup>1</sup>. This paper provides some background to the Review and sets out the main recommendations contained in the Report.

The Report was submitted to Scottish Ministers and the Scottish Legal Aid Board in June 2004. Ministers are considering how and to what extent they intend to take forward its recommendations.

It should be noted, therefore, that this paper does not represent the views of Ministers or the Board on the recommendations, but simply sets out the findings of the Review team. However, some aspects of the recommendations have already been taken forward; Ministers have also publicly stated support for various elements of the Review. These are noted where relevant.

## **SCOPE, REMIT AND PROCESS OF THE REVIEW**

The Review was carried out by a Team from the Scottish Executive<sup>2</sup> and the Board, overseen by a reference group, whose role it was to provide advice and guidance to the review team and maintain a focus on the terms of reference. The Reference Group was

drawn from a range of bodies involved in legal aid and information, with representation from those most immediately involved in the Review (the Scottish Executive and the Board), as well as practitioner, independent and expert input.

The Review Team were asked 'to carry out a Strategic Review of the delivery of legal aid, advice and information in Scotland, including the role of the Scottish Legal Aid Board, in the context of Scottish Ministers' commitment to modernise legal aid, streamline criminal justice and pursue an active access to justice agenda for the benefit of the citizen, and taking into account the report of the inquiry on legal aid of the Justice 1 Committee<sup>3</sup>.'

In pursuing this remit, the Review Team was asked to focus on:

- the purposes and objectives of legal aid, advice and information in the context of the modernising justice agenda, and the roles, responsibilities of and relationships between the various stakeholders
- the steps that are necessary to implement the Minister for Justice's policy to modernise legal aid and deliver a national framework for legal advice and assistance, and the role of the Scottish Legal Aid Board within that

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<sup>1</sup> The text of the full report and an executive summary are available at: <http://www.scotland.gov.uk/library5/justice/srlam-00.asp> and <http://www.scotland.gov.uk/library5/justice/srlas-00.asp> respectively.

<sup>2</sup> The Scottish Executive is the devolved government of Scotland and is responsible for policy on legal aid and advice.

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<sup>3</sup> The Justice1 Committee of the Scottish Parliament carried out a review of legal aid and reported in 2001. The Committee's report is available at: <http://www.scottish.parliament.uk/business/committees/historic/justice1/reports-01/j1r01-08-01.htm>

- the respective responsibilities and working arrangements between the Scottish Executive Justice Department and the Scottish Legal Aid Board, focusing on strategic leadership and governance, and financial and other accountability, as well as links to other relevant parts of the Scottish Executive and the wider public sector
- the steps necessary for all parties to promote best value in the delivery of legal aid, with a particular focus on current pressures on criminal legal aid
- the scope for streamlining legal aid legislation
- the development of the Board's operations, and the resourcing and powers of the Board needed to deliver future priorities in the light of Best Value principles.

This remit is broad and meant that the Review was not simply focused on legal aid. Instead, it recognised that legal aid is one very significant element in a wider system of legal advice provision. Scotland already has a very rich tapestry of publicly funded advice provision, with services delivered by lawyers (predominantly under legal aid), generalist and specialist agencies in the not-for-profit sector and advisers employed directly by local government<sup>4</sup>. One of the Review's goals was to provide a strategic overview of this provision and suggest ways in which it might best be harnessed to deliver Ministers' objectives. This context also meant that the key stakeholders of the review were many and varied, including the legal profession, the not-for-profit sector, local government, users' groups, equalities bodies, the courts and the judiciary. The review also touched on a number of policy areas within the Scottish Executive, including criminal

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<sup>4</sup> A more detailed overview of the different kinds of service provision in Scotland by a range of advisers can be found in the background information published online to accompany the Report itself: <http://www.scotland.gov.uk/library5/justice/srlabi.pdf>

justice, regeneration, housing and homelessness, and social and financial inclusion.

As part of the Review process, a very wide range of these stakeholders were asked to give their views on the current situation, the key issues and problems, and to suggest what might be improved or changed. The Review Team then analysed this information, alongside a wealth of written information from internal (Scottish Executive and the Board) and external sources. No primary research was carried out for the Review, but reference was made to existing research findings where appropriate. In addition, a comparative analysis of models of service delivery in other jurisdictions was provided to the Team.

## **RECOMMENDATIONS**

### **Key Strategic Issues**

- There needs to be a more strategic and coordinated approach to planning and delivery of overall provision of publicly funded legal assistance<sup>5</sup>
- Many of the reforms already underway should lead to more effective delivery, but more needs to be done, in particular there is a need to take forward the better integration and co-ordination of legal advice services by solicitors (funded through legal aid) on the one hand and non-legally qualified advisers (funded from other public sources) on the other
- The development of publicly funded legal assistance needs to be taken forward in conjunction with the planned changes in the justice system, and not in isolation, given the influence and impact of each upon the other

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<sup>5</sup> Throughout the report the term 'publicly funded legal assistance' (PFLA) is used to cover not only the advice and services provided by solicitors and paid for by legal aid, but also to include advice provided by non-lawyers in the public and voluntary sectors on matters that raise a legal issue.

- The Scottish Legal Aid Board's strategic role and functions as presently formulated do not provide it with the powers and mechanisms to coordinate or manage the system proactively.

## **Publicly Funded Civil Legal Assistance**

### Purpose of publicly funded legal assistance

The *primary purpose* of publicly funded legal assistance on civil matters should be to *enable the resolution of justiciable problems*. Three secondary purposes are proposed: promoting early resolution of legal problems; promoting effective access to formal mechanisms of dispute resolution; and promoting social inclusion.

The Deputy Minister for Justice endorsed these purposes in a speech launching the publication of the Report at a joint Board/Law Society of Scotland legal aid conference in October 2004.

### Models of provision

A planned 'complex mixed model' for the provision of publicly funded legal assistance on civil matters is the only model capable of delivering against this complementary range of purposes.

Although in many respects Scotland already has a 'complex mixed model' there are weaknesses in its current functioning: it is not planned or co-ordinated and the potential for providers and services to complement each other is not maximised. To address these, the review proposed two strategies: development of a planning framework, and development of an overarching quality system.

### Planning and coordination

The Review recommends that the Executive should be responsible for setting strategic policy direction and for active coordination of various strands of activity and policy initiatives involving (legal) advice provision emanating from

across the Executive and other Government Departments.

The Board should have responsibility for promoting the resolution of justiciable problems in Scotland through supporting, developing and coordinating the delivery of publicly funded legal assistance on a national level.

To give effect to the envisaged new role and functions, the Board will need more flexible powers, in particular in relation to policy formulation, providing funds for legal advice services, and providing these itself. The current Scottish legal aid system extends only to the funding of lawyers, mostly on a case-by-case basis. The Board should be able to fund services in a range of ways and this funding role should also extend to legal advice services provided by non-lawyers.

Local authorities should plan and coordinate (legal) advice provision locally and give effect to such planning.

Partnerships of funders and providers of advice provision (including solicitors), operating with the support of the Board, should inform the formulation of a local plan, and contribute to its implementation.

### Quality systems

The development of an overarching quality system for all forms of publicly funded legal assistance on civil matters is a matter of urgency, as it can assist in addressing a number of strategic and operational issues.

The Review recommended that this should be started as soon as possible as a joint project between the Board and the Executive. Work has started on this, beginning with a detailed review of existing policy systems. It is intended that further work will seek agreement of the core elements of any quality system and seek to ensure that all publicly funded providers of legal assistance observe these.

### Specialists

The Board should take a central overview of the need for and development of specialist provision in civil PFLA. The Board's remit should extend to addressing shortcomings in specialist provision where considered necessary and where other routes are not available or need to be supported (e.g. through match funding).

### Use of technology

There should be closer cooperation and better, joint promotion of existing telephone advice lines. A central telephone service might also be of value, if a clear complementary role can be identified to the already existing advice lines.

The Board should also work with organisations that have developed electronic information sources to assess how these can be made more widely accessible and how these can be better integrated.

### Civil legal assistance - Scope and merits testing

A clear rationale for decisions on the scope of publicly funded representation should be established. The scope of civil legal aid/assistance by way of representation should be extended to proceedings in which representation may be required *in at least some cases*. A new test should also be developed to assess whether representation is required in such cases, based e.g. on the client's ability to understand the proceedings and the complexity of the case.

Consideration should be given to establishing a mechanism for setting priorities and their application to individual cases and classes of cases (for example a Code drawn up under statutory powers) and keeping this under review.

### Advice and Assistance reform

The Review supported the proposal for the reform of civil Advice and Assistance

(A&A) that were at the time being taken forward between the Board, the Executive and the Law Society. These proposals have since been consulted on separately<sup>6</sup>.

The Review also supported in principle the removal of the distinction in Advice and Assistance between legally qualified and non-legally qualified advisers but agreed that the scope of Advice and Assistance should not simply be extended to the full range of advice agencies.

The Board should have power to secure the supply of specialist services, whether by grant funding, contracting or direct provision. A specific fund should be established for this purpose. Non-solicitor agencies should also have access to a central demand-led 'outlays fund', controlled by the Board, to meet the cost of, for example, medical reports where a client would otherwise have to be referred to a lawyer for this purpose alone.

### Financial eligibility

As a general rule legal aid services should remain subject to financial eligibility restrictions; where essentially similar services are provided through the legal aid system financial eligibility arrangements should, as a general rule, be consistent.

*For most voluntary and public sector provision different methods of targeting may be more relevant, so financial eligibility need not be a factor. However, funding decisions for these kinds of services should be transparent and as objective as possible.*

### 'Tapering'

Eligibility for civil legal aid should be extended, on the basis of a scheme of 'tapered' eligibility and progressive contributions, whereby contributions are

reduced for those at the lower end of the current income scale, with progressively larger contributions applying as income increases.

## **PUBLICLY FUNDED CRIMINAL LEGAL ASSISTANCE**

### Purposes and models of publicly funded criminal legal assistance

The *two main purposes* for publicly funded criminal legal assistance should be the protection of the interests of justice, and the promotion of systemic efficiency.

These purposes are best delivered through a 'mixed model' of private practice and Public Defence Solicitors' Office style provision.

### Proposals for the reform of summary criminal legal assistance

The review team supported the Board's proposals for the reform of summary criminal legal assistance. The main thrust of the proposals is that the various existing schemes for assistance in summary cases should be streamlined to create a unified structure. Such a structure would encourage the early resolution of summary cases where appropriate by supporting early investigation, facilitating a realistic assessment of the prospects of any possible defence and removing the current incentive to plead not guilty to access summary criminal legal aid.

### Financial eligibility and contributions

'Ability to pay' should remain a factor for publicly funded criminal legal assistance: consistency of financial eligibility across criminal legal assistance should be achieved wherever possible.

Subject to issues of practicability and cost, some form of contributions should be introduced for criminal legal assistance.

### Encouraging systemic efficiency

The Board should be closely involved in the project to take forward the reform of Summary Justice, based on the review carried out by Sheriff Principal John McInnes, so that the further development and reform of criminal legal assistance fits closely with the planned changes to the criminal justice system.

### Quality assurance

A quality assurance regime should be introduced for all criminal legal assistance. Once this is in place, the Board should review the operation of the Code of Practice and consider the scope for simplifying or reducing the administrative burden of associated compliance audits. Good progress has already been made towards implementing this recommendation, both for solicitors and advocates.

## **EXPENDITURE ON LEGAL AID**

### Remuneration

The following general principles for remuneration structures and levels should be adopted:

- *Fair reward*: encouragement of efficiency in the conduct of cases and pay set at levels that will attract and maintain a sufficient supply of practitioners.
- *Regular review* of pay levels and structures.
- *Maximum certainty*: certainty of cost for the Board, certainty of fees for the practitioner. The introduction of a block fee system for solemn criminal legal aid should be considered. Existing tables of fees should be modernised (including the introduction of graduated fees for counsel) and tables of fees should be introduced where they do not exist. In addition, mechanisms should be established that provide for greater certainty of costs for outlays, particularly expert witnesses/reports.
- *Best possible value for public money*: inefficiencies should be continuously identified and tackled.

- *Quality assurance.*
- *Alignment with policy objectives:* payment structures and levels should, where possible, be used to encourage the behaviours and prioritisation that policy objectives, within legal aid or the wider justice system, require.

The principles have been endorsed by the Minister and are reflected in recent and ongoing work to increase fees and reform feeing structures in various parts of the system.

### **ISSUES IN SUPPLY OF PUBLICLY FUNDED LEGAL ASSISTANCE**

Research is urgently needed to establish whether, to what extent and why there is a shortage of new entrants (to legal aid work as well as small practices generally) and/or a withdrawal from legal aid work by existing practitioners.

Depending on the findings of this research, a range of measures may be needed to encourage/ensure supply. These may include:

- increase in rates of payment
- non-remuneration-based measures to improve the image of legal aid work
- use of contracts to meet specific shortfalls
- use of solicitors employed by the Board
- support for training of solicitors e.g. repayment of student loans, providing traineeships in Board solicitors' offices, sponsoring diplomas or traineeships