

# Strategic Review on the Delivery of Legal Aid, Advice and Information

Report to Ministers and the Scottish Legal Aid Board

## Summary



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Summary

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## KEY FINDINGS

The current system of publicly funded legal assistance in Scotland does provide valued services to a wide range of people. However, it is in urgent need of reform and development so that it can provide the people of Scotland who need it with good quality legal information, advice, assistance and representation in an efficient manner.

Key findings of the Strategic Review are:

- There needs to be a more strategic and coordinated approach to planning and delivery of overall provision of publicly funded legal assistance.
- 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 coordination 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, rather than in isolation, given the influence and impact of each upon the other.
- There needs to be an enhanced role for the Scottish Legal Aid Board to help deliver a better coordinated and more flexible and responsive system.



# INTRODUCTION

## Why a Strategic Review?

- 1 The Strategic Review of the Delivery of Legal Aid, Advice and Information was announced by the Minister for Justice at the joint Scottish Legal Aid Board (SLAB) and Law Society of Scotland conference on 24 October 2003. There were four main drivers for the Review:
  - The Executive's Partnership Agreement commitment to continue to modernise legal aid.
  - The recommendations of the Justice 1 Committee's Report on Legal Aid Inquiry<sup>1</sup>.
  - Wider policy developments on legal advice and information, including the report of the Review of Legal Advice and Information Provision in Scotland.
  - The quinquennial Policy and Financial Management Review (PFMR) of the Scottish Legal Aid Board was due.

## Terms of Reference

- 2 The terms of reference of the strategic review were as follows:

*'to carry out a strategic review of legal aid, advice and information in Scotland, including the role of the Scottish Legal Aid Board, in the context of the Scottish Minister's 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.'*

- 3 In addressing these terms of reference, the review aims to identify ways in which the current system of publicly funded legal assistance (PFLA) can be modernised to ensure that it is fair, accessible and relevant to modern Scottish society while achieving optimal levels of efficiency and quality. The review provides an opportunity for an overview to be taken of policy and provision with a view to establishing a strategic framework against which both can be assessed.

## The Review Process

- 4 The Review was conducted by a team from the Scottish Executive Justice Department and Scottish Legal Aid Board. The team consulted a wide range of stakeholders and also analysed a large volume of research material in the course of its investigations. The review process was overseen by a Reference Group consisting of individuals drawn from a range of bodies with an interest

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<sup>1</sup> Justice 1 Committee (2001) Report on legal Aid Inquiry, Scottish Parliament.

in the provision of publicly funded legal assistance. The group's role was to provide advice and guidance to the team and to ensure that the focus on the terms of reference was maintained. The Reference Group met five times between January and June 2004.

## Terminology

- 5 For the purposes of the Review, legal advice is defined as 'advice on justiciable problems'<sup>2</sup>. The term 'publicly funded legal assistance' (PFLA) is used throughout the report to describe not only the advice and services provided by lawyers and paid for through legal aid or other public funding, but also advice provided by non-lawyers in the public and voluntary sectors in relation to justiciable problems.

## Structure of this summary

- 6 This summary draws together the key points and recommendations contained in the Report of the Strategic Review of the Delivery of Legal Aid, Advice and Information. The full Report<sup>3</sup> sets out in detail the evidence and analysis that underpin the conclusions reflected in the summary.
- 7 Most of the issues that we considered in the course of the Review related to only one or other of civil legal assistance or criminal legal assistance. A small number of issues related to both. For this reason and for ease of reading, we consider issues relating to civil and criminal legal assistance in turn. These sections are then followed by a discussion of common issues.
- 8 For both civil and criminal legal assistance, our discussion starts with an analysis of several fundamental and interrelated questions: the purpose of PFLA, the most appropriate ways to deliver it and how to prioritise between competing demands and target scarce resources.
- 9 This analysis forms the basis of the strategic framework we seek to establish, which in turn informs the specific and substantive recommendations that follow.

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<sup>2</sup> '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.' This is a working definition based on the term 'justiciable event' used by Prof. Hazel Genn and Prof. Alan Paterson in *Paths to Justice Scotland 2001*, Hart Publishing, Oxford. 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>3</sup> Available at <http://www.scotland.gov.uk/stratreviewlegalaid>

# PUBLICLY FUNDED LEGAL ASSISTANCE ON CIVIL MATTERS

## Why have publicly funded legal assistance?

- 10 Having considered the wide range of purposes expressed by stakeholders and in the literature, we conclude that the primary purpose of publicly funded civil legal assistance should be *to enable the resolution of justiciable problems*. We also identify three secondary purposes that flow from this primary purpose:
- Promoting the early resolution of legal problems
  - Promoting effective access to formal mechanisms of dispute resolution
  - Promoting social inclusion

## Models for Delivery

- 11 Our next key question was whether any one form of service provision could deliver against this complementary range of purposes. Following a review of experience both in Scotland and in other jurisdictions around the world, we concluded that only a ‘planned complex mixed model’ of delivery had the potential to meet Scotland’s needs.
- 12 A delivery model of this type encompasses a wide range of services and service providers. These range from private practice solicitors who are remunerated from the public purse on case by case basis<sup>4</sup>, to salaried solicitors working in community law centres or employed directly in the public sector. It also encompasses paid or unpaid non-legally qualified advisers operating within the public sector or in voluntary sector advice centres. They may provide a generalist, front-line advice service, specialise in a specific area or provide ‘second tier’ support to front-line advisers.
- 13 In many respects, Scotland already has a complex mixed model of provision. This variety of provision, and its flexibility, is a great strength of publicly funded civil legal assistance in Scotland: it reaches a very wide range of advice seekers and addresses a great variety of needs. We recognise however that there are several weaknesses in the operation of the model in Scotland at present. These are explored below under ‘Options for Strategic Change’.

## Prioritisation of Resources

- 14 The range of purposes of civil PFLA and the variety of delivery mechanisms that form the complex mixed model raise questions about prioritisation between competing demands. Such questions are inevitable in a world of limited resources. We reviewed the many different forms of prioritisation already in use in Scotland and elsewhere and considered how these relate to varying purposes and delivery methods. This led us to conclude that, while all

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<sup>4</sup> This is known as the ‘judicare model’ and is reflected in the existing legal aid system in Scotland.

decision-making on priorities should be as objective, transparent and robust as possible, a range of different methods of prioritisation is appropriate.

- 15 There are strong grounds for applying particular forms of prioritisation where services are funded on a case-by-case, demand-led basis i.e. through the legal aid system. This is to avoid expenditure being completely open-ended, while ensuring that resources are used to meet established priorities.
- 16 Prioritisation based on the ability of the individual to pay for the services required is particularly relevant in demand-led PFLA. We conclude that as a general rule legal aid services should remain subject to financial eligibility restrictions. We recommend that financial eligibility arrangements should as far as possible be consistent across different forms of legal aid where essentially similar services are provided.
- 17 Looking further at legal aid services, we do not believe that the scope of Advice and Assistance should be restricted to certain types of problem, but we do conclude that restrictions should remain on the proceedings for which publicly funded representation is available (civil legal aid and ABWOR).
- 18 We do not make recommendations on which proceedings should or should not be included in the scope of civil legal aid or ABWOR, as there is currently a lack of clear evidence for such decisions. Instead, we recommend that a clear, evidence-based rationale for any restrictions or inclusions should be established. Consideration should also be given to establishing a mechanism for the setting of priorities and their application to individual cases and classes of cases and keeping this under review. This could take the form of a Code, drawn up under statutory powers, which sets out the rationale for prioritisation and how it will be applied.
- 19 Different criteria apply to prioritisation of services provided on the basis of *fixed resources*, such as those provided by local authorities and not-for-profit organisations. An assessment of financial eligibility may not be so relevant in these circumstances. Instead, we recommend that funding and provision should be based on as transparent and objective an assessment of need as possible. This approach would encourage a more rational distribution of resources between competing demands, leading to a focus on, for example, priority areas, subject matters or client groups.

## **Options for strategic change**

- 20 As noted above, Scotland already has a form of ‘complex mixed model’ of provision. We identified three primary weaknesses in its current functioning at a strategic level:
  - It is not consistently planned to match service provision to need
  - There is little coordination of funding with planning (where it happens), either nationally or locally
  - The potential for different services and providers to complement each other (the great strength of a ‘planned complex mixed model’) is not maximised.

- 21 We identified two main strategies for tackling these weaknesses:
- Development and implementation of a framework for planning and coordination
  - Development and implementation of overarching quality systems.

### **Planning and coordination**

- 22 We have identified four sets of players that could and should contribute to the development and operation of a national and local framework for the planning of civil PFLA: the Scottish Executive; a national co-ordinating body (identified as the Scottish Legal Aid Board); local authorities; and partnerships of advice providers and funding bodies.

#### *Role of the Scottish Executive*

- 23 We see the Scottish Executive as having two overall roles to play in the planning and coordination of civil PFLA:
- Setting and articulating strategic policy direction on principles and priorities for the delivery of PFLA
  - Active coordination of the various strands of activity and policy initiatives involving (legal) advice provision but originating both from different policy portfolios within the Executive and from different UK Government departments.

#### *Role of (new) Scottish Legal Aid Board*

- 24 We believe that there is a clear need for a national body with responsibility to plan, coordinate, support and develop civil PFLA in Scotland. We do not believe that a new organisation needs to be created. Instead, we recommend that the role and powers of the Scottish Legal Aid Board should be changed to encompass these new responsibilities.
- 25 What we envisage is a ‘new’ Scottish Legal Aid Board (hereafter referred to as (N)SLAB) which will be the primary body through which the Scottish Executive’s policy on the provision of publicly funded legal assistance is implemented.
- 26 (N)SLAB should be a proactive and creative body with responsibility for promoting the resolution of justiciable problems in Scotland through supporting, developing and coordinating the delivery of publicly funded legal assistance in Scotland on a national level. This role should be reflected in several additional functions:
- Provision: (N)SLAB should continue to be responsible for the administration of the Legal Aid Fund and associated forms of legal assistance. In addition we believe that (N)SLAB should be able to actively ensure provision of legal advice (particularly in relation to specialist services) where this is considered necessary and where other routes of ensuring this are not available or need to be supported
  - National planning and coordination: (N)SLAB should develop an overview of the adequacy or otherwise of legal advice provision across Scotland and of what action may be necessary to ensure appropriate

provision. This overview should be based on an (ongoing) assessment of need for and availability of legal advice services.

- National development and research: (N)SLAB should support local planning, including by providing support to local partnerships and developing planning tools, quality systems and best practice guidance.

27 To perform these functions, (N)SLAB will need to be given more flexible powers, in particular in relation to policy formulation, providing funds for legal advice services, and providing these itself.

#### *Role of local authorities*

28 As existing providers and funders of advice services (provided primarily by non-solicitors), we believe that local authorities are better placed than any other organisation or body to take on the function of planning and ensuring appropriate advice provision in their local area.

29 We therefore recommend that local authorities (and not a national body) should plan and coordinate (legal) advice provision locally (taking account wherever possible of publicly funded legal assistance provided by solicitors), and give effect to such planning.

30 We do not believe that a statutory duty should be placed on local authorities to ensure appropriate advice provision. Instead, we propose a consensual approach to improving and developing publicly funded legal assistance based on close co-operation between local government, the Scottish Executive and the (N)SLAB in order that the shared purpose of promoting the resolution of justiciable problems can be achieved.

31 The Scottish Executive should explore how the planning, coordination and provision of advice by local authorities may be supported through the development of robust planning and performance management systems and how this can be consolidated in existing or emerging processes in local government.

32 (N)SLAB should also provide practical guidance and assistance to local authorities as they develop their approach to the planning and co-ordination of advice provision.

#### *Role of partnerships*

33 We recommend that local authorities establish partnerships of local advice providers, including both solicitors and non-solicitors, and relevant funding bodies. (N)SLAB would also have a role in supporting the development and work of these partnerships.

34 The role of the partnerships would be to inform the formulation of a local plan, to contribute to its implementation and to improve local delivery of advice services through for example closer joint working, referral, and the sharing of information and training.

### *Planning framework*

- 35 An element of coordination of funding needs to be introduced to give strength to the planning infrastructure proposed. In accordance with the nature of the framework for planning we propose, greater coordination would best be achieved by introducing an element of strategic (match) funding capacity in the centre, with (N)SLAB.
- 36 The planning framework through which we propose to promote greater consistency in planning of provision at both national and local levels can be summarised as follows:
- strategic vision and statement of national priorities to be developed by the Scottish Executive, informed by national assessment of need and supply by (N)SLAB
  - co-ordination of provision in pursuance of these national priorities to be the responsibility of (N)SLAB
  - local plans to be drawn up by local authorities (or clusters of local authorities) with input from partnerships of providers and funding bodies and with support from (N)SLAB, including in relation to solicitor provision as appropriate
  - no duty on local authorities to produce plans, but the investment of any centrally held funds (either from the Executive or from (N)SLAB under its new power to proactively fund provision where necessary) to be dependent on evidence of an agreed planning process having been followed
  - such match funding only to be available (in due course) to providers following the overarching quality system developed for publicly funded legal assistance
  - finally, in demonstrating achievement of Best Value, local authorities will be expected to have regard to guidance, developed by (N)SLAB in consultation with Audit Scotland, the Executive and CoSLA

### **Quality Systems**

- 37 Along with the lack of planning and coordination of funding, we believe that the absence of a comprehensive overarching quality system is one of the most significant barriers to the fully effective functioning of the existing complex mixed model. Without a system which can encompass all forms of publicly funded civil legal assistance, we have identified several issues relating to:
- the variable quality of advice
  - the fact that quality is difficult for advice seekers to assess
  - the potential lack of protection for advice seekers
  - difficulties with referrals and joint working.
- 38 As well as helping to address these operational problems, the development of an overarching quality system is also necessary to support our proposed framework for planning and coordination. It is therefore a matter of urgency that such a system be developed and introduced. Accordingly, we recommend that initial development work should be commenced as soon as possible as a joint project between the Scottish Legal Aid Board, the Scottish Executive and Communities Scotland.

- 39 We believe that any overarching system of quality should have the following elements:
- Standards by which to measure agency competence;
  - Standards by which to measure individual competence
  - An independent audit to assess agency competence and the process and outcomes of the advice provision itself.
- 40 We recognise that several quality systems are already in place for some areas of civil PFLA and that many of these incorporate at least some of the features noted above. It will be an early task for the Scottish Executive and SLAB to review these existing systems and to consider how best to take account of and build on them in developing recommendations for an overarching system.

### **Use of Specialists**

- 41 In the course of the Review, we were told of difficulties in identifying and accessing specialists in specific subject areas. It is important that these difficulties are addressed in order to improve and maintain the quality of advice and ensure the effective functioning of a complex mixed model of provision.
- 42 In part, these difficulties can be addressed through the development and implementation of an overarching quality system, requiring providers to identify the type of service they provide, including their level and area of expertise.
- 43 It is also necessary to develop and maintain a central overview of the need for and development of specialist provision in civil PFLA. This should be a key element of the envisaged new responsibility for (N)SLAB. We also recommend that (N)SLAB's remit should extend to addressing identified shortcomings in specialist provision where alternative sources of funding are not available or need to be supported (e.g. through match funding). (N)SLAB will need flexible powers to enable it to respond in the most appropriate way.
- 44 We also recommend that two existing strands of Scottish Executive funded second-tier advice provision (for housing and money advice) should be better coordinated. The coordination of such centrally funded second tier advice provision could appropriately be one of (N)SLAB's functions in future.

### **Use of technology in delivery**

- 45 It appears to us that the use of technology in the provision of PFLA, including telephone advice lines and web-based services, is not maximised.
- 46 We believe there is a central role for either the Scottish Executive or (N)SLAB in facilitating closer cooperation between existing telephone advice lines as well as better, joint promotion. Further thought could also be given to a central telephone service being provided by (N)SLAB, if a clear complementary role can be identified to existing advice lines.

- 47 Good quality, accessible and up to date information underpins good quality advice, and making such information available to advisers needs to be part of any strategy to improve the quality of advice provided. We believe there is a role for (N)SLAB to work with organisations that have developed (part) publicly funded electronic information sources to assess how these can be better integrated and made more widely accessible.
- 48 In the context of the development of an overarching quality system, consideration should be given not only to standardising the basic statistical information that will have to be collected, but also to standardising the systems that will facilitate this.

### **Other methods of promoting access**

- 49 Our discussion so far has focused on publicly funded legal assistance, but we also note that legal assistance will not always be the best way to achieve the purposes we have set out. It may be possible for some simplification of court processes to promote the resolution of justiciable problems, but this will not remove the need for advice.
- 50 Alternative methods of dispute resolution such as mediation may also help achieve the early resolution of some legal problems. We do not see these as an alternative to advice, but as an alternative to court-based dispute resolution. We do however recognise that advice has an important role to play in making people aware of such options. We recommend that the Scottish Executive and SLAB explore ways in which PFLA can encourage greater use of alternative dispute resolution, as part of the promotion of the effective and early resolution of justiciable problems. We also recognise however that the wider development and funding of Alternative Dispute Resolution is an issue that goes beyond the scope of this Review.
- 51 Where legal assistance does appear to be the best way to achieve our stated purposes, we do not assume that such assistance always need be publicly funded. However, given our remit and the time available for the Strategic Review, we have not been able to gather sufficient evidence on the availability or operation of alternatives to public funding such as conditional fee agreements or legal expenses insurance.
- 52 Our initial view is that, largely because of the commercial considerations that govern such arrangements, the extent to which either can be relied upon by the state to deliver public policy priorities appears limited. Further investigation and research would however enable a fuller assessment of these options.

### **Issues in Civil Legal Assistance**

- 53 As well as the broad strategic issues explored above, our consultations with stakeholders highlighted a range of more specific issues related to the operation of the current system of civil legal assistance (civil legal aid and Advice and Assistance on civil matters). These are considered below.

## **Proposals for the reform of civil advice and assistance**

- 54 Proposals for the reform of civil Advice and Assistance (A&A) are currently being taken forward by the Tri-Partite group of the Scottish Legal Aid Board, the Scottish Executive and the Law Society of Scotland. The proposals aim to:
- separate civil A&A from criminal
  - introduce a separate ‘diagnostic’ stage with a separate eligibility test, remove the minimum fee arrangement and reduce the solicitor’s ability to make multiple grants
  - extend the use of ‘templating’ to reduce bureaucracy
  - reduce inconsistency between A&A and civil legal aid in respect of means and merits testing
  - increase the rates paid for advice and assistance to bring them more closely into line with those for civil legal aid
  - reflect the skills of specialists in the remuneration structure.
- 55 We support these proposals and believe that they are broadly consistent with the principles for civil PFLA set out above, striking an appropriate balance between value for money and access to solicitors’ services.
- 56 We also support in principle the proposed removal of the distinction in Advice and Assistance between legally qualified and non-legally qualified advisers, but agree that the scope of Advice and Assistance should not simply be extended to the full range of advice agencies. Instead, we recommend that (N)SLAB should be given the powers to secure the supply of specialist advice services where other funding routes are not available, either through grant funding, based on contracts or by employing specialist advisers directly. A specific fund should be established for this purpose. As far as practicable, (N)SLAB funding for non-lawyer specialist provision should be based on the principles of match or joint funding.
- 57 We also recommend that non-solicitor agencies should have access to a central demand-led ‘outlays fund’, controlled by (N)SLAB, to meet the cost of outlays such as medical reports or housing surveys. Any such fund should be restricted to specific and substantial case related costs.

## **Ability to pay and financial eligibility**

- 58 As set out above, we see financial eligibility as a key method of prioritisation of demand-led civil PFLA. We have however identified a number of issues relating to the practical application of the principle of ability to pay and the various tests of financial eligibility for civil legal assistance.

### *‘Tapering’*

- 59 Concerns have been expressed among stakeholders that access to justice is only available to those either poor enough to qualify for legal aid or affluent enough to fund their own actions. In response to these concerns, the Scottish Executive asked SLAB to explore the possibility of extending eligibility up the income scale.

- 60 On the basis of the work carried out by SLAB, we recommend that a system of tapered eligibility and progressive contributions should be introduced. Those beyond the current income threshold would be brought within the scope of civil legal aid on the basis that they would pay a substantial income-based contribution. At the same time, the size of the contribution payable by those at the lower end of the current income scale would be reduced.
- 61 In this way, the legal aid system would *facilitate* wider access, rather than financing access in a narrow range of cases. The Legal Aid Fund would effectively *underwrite* the majority of new cases that would enter the legal aid system under a ‘tapered’ eligibility structure by bearing the risk that would otherwise be borne by individual litigants.

#### *Repayment of contributions*

- 62 We support a recommendation already made by SLAB that consideration should be given to the further extension of the repayment periods for contributions, perhaps by allowing greater flexibility in individual cases. We further recommend that, subject to safeguards against bad debt, consideration be given to the introduction of an instalment system for contributions assessed against an applicant’s disposable capital in appropriate cases.

#### *Inconsistency in financial eligibility*

- 63 There are considerable differences between the financial tests applied for civil legal aid on the one hand and civil Advice and Assistance on the other. On the face of it, there seems to be little reason for access to essentially similar services under different forms of legal aid to be determined according to different levels of income and capital, different treatment of income from benefits and different approaches to the applicant’s outgoings.
- 64 This leads us to recommend that consistency should be sought wherever possible, although we also recognise that this may not always be compatible with the achievement of our strategic purposes. For example, to encourage broad access to advice and promote the early resolution of disputes, the proposals on civil Advice and Assistance being taken forward by the Tripartite Group suggest a broader and less formal test to be applied for initial diagnostic advice. We support this proposal.
- 65 By the same token, where work done under Advice and Assistance is broadly equivalent to that which could be done under civil legal aid were court proceedings necessary (for example, ongoing casework involving extended negotiation on the client’s behalf), we recommend that the two eligibility regimes should be far more closely aligned. As a first step, the system of disregards for benefit income introduced for Advice and Assistance in April 2003 should be extended to civil legal aid<sup>5</sup>.
- 66 A similar approach should be applied to the contribution structures of civil legal aid and Advice and Assistance: a realignment of eligibility criteria

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<sup>5</sup> The Scottish Executive has indicated that it intends to consider such a move.

should be accompanied by a reassessment of levels of contribution, with less stringent requirements for initial advice.

- 67 We recommend that the period of time to which the assessment of eligibility relates should be aligned for all casework services (those provided on a continuing basis, beyond the diagnostic stage) at a period somewhere between the two current extremes of civil legal aid and Advice and Assistance.
- 68 We also recommend that those assisted under either scheme should be required to inform their solicitor or the Board of material changes in circumstance (as is already the case under civil legal aid) and that confirmation of continuing financial eligibility should be required at various stages of a case. Finally, we recommend that further consideration be given to extending the period during which reassessment of means may be undertaken to the end of the case, or beyond.

*Recovery of costs at the end of the case*

- 69 The rules of civil legal assistance mean that an assisted individual may be required to meet all or part of the cost of their case from any property recovered or preserved by them at the conclusion of the case. This system is often referred to as ‘clawback’ and mirrors charging arrangements for privately paying clients.
- 70 We do not believe that the current provisions and their exemptions reflect our general principle of consistency in relation to similar work. As such we recommend a review of the application of the clawback principle, the range of exemptions available, including the test of grave hardship which applies only in Advice and Assistance. This review should seek to establish a clear rationale for any differences both within and between Advice and Assistance and civil legal aid.
- 71 We also note that, as part of the proposals for A&A reform outlined above, the Tripartite Group is considering whether solicitors should be able to claim an enhanced fee from clients who recover substantial sums under Advice and Assistance. We agree that the current system appears inequitable as between the legally assisted party and the unassisted party who must pay their solicitor at a market rate, which may be higher than the legal aid rate, but we are unable at this stage to say whether such a change would encourage more solicitors to provide an advice and assistance service (the other main driver for the proposal). We suggest that, were the proposal to be adopted for Advice and Assistance, it would appear inconsistent not to apply it also to civil legal aid. Any such system should be controlled and monitored by SLAB.

*Modification of expenses and the position of the opponent*

- 72 Section 19 of the Legal Aid (Scotland) Act 1986 allows the successful opponent of a legally aided party to recover their costs from the Fund. The terms of section 19 are quite restrictive and contain a strong presumption against recovery. We recommend a review of these terms to determine whether this is appropriate.

- 73 This is particularly important given our proposals on tapering eligibility. In that context we would also recommend that the current modification provisions<sup>6</sup> be reassessed with a view to ensuring their consistent application, perhaps with the introduction of some form of a sliding scale for payment of costs based on the legally aided party's ability to pay.

### **Scope and merits testing**

- 74 It is one of our strategic recommendations that the scope of publicly funded representation should be extended to proceedings in which representation may be required in at least some cases, on the basis of a robust assessment of need. We do not assume that representation will be required in all cases in relation to any such 'new' proceedings.
- 75 Thus a new test will have to be developed to assess whether representation is required in any particular case and whether the proposed representative is the most appropriate in the circumstances of the case. This dual test should consider the client's ability to understand the proceedings, the complexity of the case and the particular skills and expertise of the proposed representative (whether legally qualified or not).

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<sup>6</sup> The system whereby an unsuccessful legally aided party asks the court to reduce their liability for their opponent's expenses.

# **PUBLICLY FUNDED LEGAL ASSISTANCE ON CRIMINAL MATTERS**

## **Why have publicly funded legal assistance?**

- 76 Generally speaking we found a broader level of consensus among stakeholders as to the purposes of publicly funded criminal legal assistance than we found in relation to civil legal assistance. This could be due in part to the long tradition of representation within Scots criminal law and Scotland's international obligation to provide representation enshrined in Article 6(3)(c) of the European Convention on Human Rights (ECHR).
- 77 We conclude that criminal PFLA has a dual purpose:
- the protection of the interests of justice, and
  - the promotion of systemic efficiency.
- 78 The first of these should be seen as protecting both the interests and rights of the individual directly through effective representation as well as protecting the interests of the justice system by reducing the potential for miscarriages of justice and maintaining public confidence in the system.
- 79 This aim is further supported by the second stated purpose of criminal PFLA. The promotion of systemic efficiency within the criminal justice system as a whole is vital in ensuring that it achieves its desired aims. The structure and administration of criminal PFLA has a clear impact on the functioning of the wider criminal justice system and so has a clear role to play in ensuring systemic efficiency and effectiveness.

## **Delivery models**

- 80 As with civil PFLA, we conclude that the dual purposes of criminal PFLA are best delivered through a mixed model of provision. The mix of providers is more limited in criminal matters, although a degree of strategic planning is still required to ensure the availability of the services required for the effective protection of the interests of justice and the promotion of the efficient operation of the system as a whole. We believe in this regard that these services must be provided by both legal professionals in private practice and those operating within a system of salaried provision (such as those working in the pilot Public Defence Solicitors' Offices (PDSOs)). A mixed model also:
- provides choice to the consumer of legal services
  - allows legal professionals the option of working in different employment environments
  - provides an insight into the workings of criminal practice, the legal aid system and the criminal justice system
  - enables the ongoing benchmarking of the cost and quality of publicly funded defence work.

## Prioritisation

- 81 In terms of prioritisation, it is our position of principle that ability to pay should remain a factor in criminal PFLA as it is in civil PFLA. We recommend that consistency in the application of the financial eligibility test across different forms of criminal legal assistance should be achieved wherever possible.
- 82 In respect of the nature of the interests of justice test and how it is applied, we do not recommend that an identical test need be applied for all criminal legal assistance. We do however recommend that any differences in application should be based on a clearly identified rationale. Further, we recommend that the factors to be weighed should be clearly specified wherever an interests of justice **test falls** to be applied and that these factors should be consistent where this is possible and appropriate.

## Options For Change And Improvement

### Proposals for the reform of criminal legal assistance

- 83 We have considered proposals developed by the Scottish Legal Aid Board 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 in order to access summary criminal legal aid.
- 84 These principles are consistent with the recommendations made by Sheriff Principal McInnes in the report of his review of the summary justice system<sup>7</sup>. Indeed, the changes recommended by SLAB will be necessary to ensure that legal aid fits with, and contributes to the efficient operation of, a system reformed in the way recommended by McInnes.
- 85 We therefore recommend that summary criminal legal assistance is reformed along the lines proposed by SLAB, as informed by its consultation process.

### Ability to pay and financial eligibility

- 86 As with civil PFLA, we have identified a number of issues relating to the operation in practice of the principle of ability to pay and the various tests of financial eligibility for criminal legal assistance.

#### *The role of the courts*

- 87 We are concerned that the lack of guidance on the application of the financial test of undue hardship by the courts in solemn cases creates a risk of inconsistency in decision-making. We therefore recommend the transfer to

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<sup>7</sup> McInnes J. 2004 Summary Justice Review Committee – Report to Ministers, Scottish Executive.

SLAB of the courts' current functions in the assessment of financial eligibility in solemn cases. This should lead to greater transparency and consistency. We do not believe that it will lead to any delay in considering applications.

- 88 We also recommend that SLAB should be given powers in solemn cases to recover costs from applicants who have made false disclosure of their means and to withdraw legal assistance where this is appropriate.
- 89 The court is also currently responsible for financial assessment in cases where it is considering a grant of legal aid to a person who has not previously been sentenced to imprisonment or detention and the court is considering such a sentence. For practical reasons, we do not recommend that this responsibility is transferred to SLAB. However, further work should be carried out to promote consistency in the operation of the financial test in this matter.

#### *Inconsistency in financial eligibility*

- 90 We have considered the scope for harmonisation of the various financial tests for different forms of criminal legal assistance and how this might be achieved. We recommend that further consideration be given to the fixing of specific financial eligibility criteria, to be applied with regard to the likely cost of a case. Consideration should also be given to a 'lighter touch' test for earlier stages of assistance to encourage the early resolution of cases. Overall, the aim should be to simplify and harmonise the tests as far as possible.

#### *Contributions*

- 91 We have given careful consideration to whether or not a system of contributions towards the cost of criminal legal assistance should be introduced beyond the advice and assistance stage. We see strong arguments in principle for doing so in the context of a legal aid system in which the financial eligibility regime means that some applicants will be found able to pay for their own defence. The idea of contributions is entirely in keeping with the principle of ability to pay, which is a widely accepted feature of the existing criminal legal assistance system, and is consistent with international obligations under ECHR.
- 92 We are also aware of some potential difficulties that may arise in relation to the practicalities and financial feasibility of a contributory system. Accordingly, we conclude that further detailed work should be undertaken to identify workable options. This should include a detailed analysis of the costs and benefits of existing regimes for contributions in other jurisdictions.

#### *Changes in Circumstances*

- 93 Eligibility for criminal legal assistance is currently assessed at the outset of the case and no review of this assessment can be undertaken if the applicant's circumstances were to change. In line with our recommendations on civil legal assistance, we recommend that applicants for criminal legal assistance should be required to report material changes in their circumstances to their solicitor or SLAB during the course of a case so that a reassessment of means can be undertaken.

## **The Interests of Justice Test**

- 94 We note the proposals on the application of the interests of justice test made by SLAB in their proposals for the reform of summary criminal legal assistance. Where assistance is sought to prepare for and provide representation at trial, SLAB suggests that the over-riding factor should relate to the existence of a meaningful defence to the charges and that the current factor of the ‘non-frivolous defence’ is inadequate in this regard.
- 95 We are satisfied that this approach is entirely consistent with the protection of the interests of justice: those with a meaningful defence will still have full access to representation at trial, while those without any such defence will also have access to representation for the tendering of an appropriate plea. In the context of a reformed system more firmly geared towards early investigation, the solicitor would have access to information to establish this defence at the time of making the application. We therefore support SLAB’s proposals.

### *European Commission Draft Framework Decision*<sup>8</sup>

- 96 We note that the European Commission has proposed a list of factors by way of guidance as to the application in practice of the interests of justice test contained within Article 6(3) of the European Convention on Human Rights. The draft decision seeks to establish a common minimum standard throughout the European Union.
- 97 We are content that the current application of the interests of justice test in the Scottish legal aid system is consistent with ECHR. Nonetheless this position will have to be kept under review if the Commission’s Draft Framework Decision is adopted.

## **Promoting systemic efficiency**

- 98 The ongoing programme of reform of the High Court and Sheriff Principal McInnes’ recommendations on the summary criminal justice system have various implications for legal aid. SLAB has been involved in both of these processes and is working with partners to deliver a range of changes to criminal legal assistance that are in line with, and designed to facilitate, these wider reforms.
- 99 We would emphasise the continuing importance of SLAB being closely involved in the project to take forward the recommendations of the McInnes Review so that the further development and reform of criminal legal assistance fits closely with the planned changes to the criminal justice system.

## **Quality**

- 100 In line with our proposals on civil legal assistance, we propose that a system of quality assurance should be introduced for all criminal legal assistance. We

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<sup>8</sup> Commission of the European Communities (2004) *Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union*.

note that good progress has already been made by SLAB working with both the Law Society of Scotland and the Faculty of Advocates in developing peer review based systems. We recommend that consideration be given to whether all such schemes should be put on a statutory footing in due course, as is currently the case for solicitors.

- 101 We recommend that SLAB reviews the operation of the Code of Practice in Relation to Criminal Legal Assistance once the quality assurance regime for solicitors is up and running and considers in that light whether there is scope for simplifying or reducing the administrative burden of associated compliance audits.

## **EXPENDITURE IN LEGAL AID**

### **Forecasting of Legal Aid Expenditure**

- 102 The Legal Aid Fund is demand led, which means that anticipating expenditure as accurately as possible is important not only for legal aid, but in the context of the Justice Department budget.
- 103 Legal aid expenditure is a result of the volume of cases on the one hand, and the cost per case on the other. Drivers of expenditure on both volume and cost come from within the legal aid system, and so may be partly within the control of SLAB or the Executive's Legal Aid Policy Team, whereas others come from outwith the legal aid system, and are therefore beyond its control.
- 104 To improve forecasting of expenditure in civil legal assistance, the awareness of potential impacts of policy and legislative changes on legal aid expenditure should be improved throughout the Scottish Executive. Additionally the Scottish Executive, working with the Scottish Legal Aid Board, should build on the on the current work done by the Board to forecast expenditure trends by factoring in more accurate assessments of the impacts of policy changes (whether Scottish Executive or UK Government led) on civil legal aid. This information should be used to shape policies at an early stage, to ensure that the legal aid implications are consistent with legal aid policy and are affordable.
- 105 Forecasting of expenditure on criminal legal assistance can be improved through the greater sharing of information between the various criminal justice agencies.
- 106 We recommend that the agencies working in the criminal justice system make use of the current work by SLAB on forecasting and share information on business volume and type, to allow for better forecasting and to ensure a better awareness of the impact on legal aid expenditure of policy change in the criminal justice system.

### **Remuneration**

- 107 Although some fees have recently been reviewed and the structure improved, taking the fee structure as a whole there are issues in relation to the failure to uprate some fees for several years, uncertainty over fee levels, and a lack of consistent rationale underpinning the approach to payment structures and fee setting.
- 108 Remuneration structure and levels are powerful policy tools. Consideration should therefore be given to the extent to which payment structures and levels appropriately reflect current and future policy for the delivery of legal aid and other forms of publicly funded legal assistance.

- 109 In this context we recommend that the following general principles for remuneration structures and levels be adopted:
- *Fair reward*: efficiency in the conduct of cases should be encouraged and rewarded. Pay levels should be set at levels that will attract and maintain a sufficient supply of practitioners.
  - *Regular review* of pay levels and structures: a fair reward system needs to be regularly reviewed to ensure it maintains payment at the level intended, and continues to reward the work it intended to reward.
  - *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. Tables of fees should apply to all work by both solicitors and counsel. 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 which provide for greater certainty of costs for outlays, particularly expert witnesses/reports.
  - Best possible *value for public money* invested: inefficiencies in payment systems and structures as well as in administration should be continuously identified and tackled.
  - *Quality assurance*: it is recognised that cost and efficiency alone do not determine value for money. Quality needs to be maintained and assured through the introduction of quality assurance throughout the delivery of legal aid.
  - *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. For example, providing the same level of reward for work conducted out of court as that conducted within the court system would assist in the pursuit of a policy of promoting early resolution of disputes where possible.

## Control of expenditure

- 110 The Scottish Legal Aid Board has a range of mechanisms at its disposal to exercise control over legal aid expenditure. However, the ability of the Board to control legal aid expenditure is limited by the role of the Court and the role of the Auditor of Court.
- 111 On the role of the court, we have already proposed that, for the purposes of consistency and appropriate cost control, the assessment and granting function in relation to solemn legal aid should be transferred to the Scottish Legal Aid Board.
- 112 The current system of taxation by the Auditors of Court, with local differences, inconsistencies and resulting uncertainty, also creates significant difficulties for legal aid and compromises the ability of the Board to control and forecast cost. We see four possible means of addressing the difficulties in the current system:
- Maintain the current roles of Sheriff Court Auditors and the Auditor of the Court of Session in relation to legal aid disputes. Develop significantly

clearer and tighter guidance as well as the requirement for Auditors to adhere to such guidance.

- Retain the role of Auditors for work done in the courts they are attached to (and whose work they will be familiar with) and issue guidance as above. Transfer the taxation for other courts to a new central service.
- Transfer all responsibility for resolving payment disputes in relation to legal aid into one central taxation service.
- Reduce the scope for disputes over fees as far as possible by extending the use of block fees and ensuring that tables of fees apply to all work by both solicitors and counsel thus promoting adherence to the maximum certainty principle.

113 We thus recommend that the Scottish Executive explore these options, with a view to arriving at a taxation system for legal aid disputes which is swift, transparent, fair and consistent.

## ISSUES IN THE SUPPLY OF PFLA

- 114 As set out above, we believe that a complex mixed model of provision is best placed to deliver the policy objectives for publicly funded civil legal assistance while a mixed model provides the best mechanism for delivery of publicly funded criminal legal assistance. As part of each model, we believe that judicare provision should continue to be a primary mechanism for service delivery. However, there is consistent anecdotal, if little empirical, evidence that difficulties may arise in the medium to long term in judicare provision, due to a lack of solicitors in private practice being willing and available to take on publicly funded work.
- 115 On the basis of the strong anecdotal evidence and the limited, and at times contradictory, research evidence available to us we conclude that the concerns over (future) supply in judicare provision are both significant and genuine. In view of the current reliance on the private sector to undertake legal aid work and the long-term nature of any strategies to tackle potential problems, we believe that a ‘wait and see’ approach is not a viable option. However, any strategy to tackle such problems needs to be based on fuller knowledge of the extent of and reasons for the problem.
- 116 We believe it is a priority to undertake the necessary research 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. We recommend that this be taken forward between the Scottish Executive, the Scottish Legal Aid Board and the Law Society of Scotland as a matter of urgency.
- 117 Pending the results of this research, we have identified a range of possible responses that may assist in alleviating any potential problems.
- Increase in rate of payment: increases in fees send a positive message to practitioners and help to maintain engagement with legal aid practice and policy development. We do not believe however that an increase in fee rates would by itself solve (future) supply problems, nor indeed do we think it realistic or reasonable for the public purse to attempt to compete on fee rates with private client work.
  - Non-remuneration based measures to encourage supply and measures to encourage new entrants: active consideration should be given to any practical measure which can be taken by SLAB to encourage supply of legal aid services by private practitioners and to practical assistance and incentives to encourage new entrants into the system. This may involve for example measures to improve the cash flow of legal aid firms, assistance in the repayment of student loans for trainees embarking on a ‘legal aid traineeship’ or assistance for firms providing such traineeships.
  - Legal education and the image of legal aid work: legal education may have a role to play in ensuring an awareness of legal aid work and also in improving its image. SLAB should work with universities, the Law Society of Scotland and others to take this forward.

- 118 Because the judicare method of provision cannot by its very nature guarantee supply, other methods of delivery within a (complex) mixed model need to be used to ensure that publicly funded solicitors' services are available.
- 119 We recommend that the Scottish Legal Aid Board should be given more flexible powers in relation to the funding and provision of solicitors' services, so that it can ensure provision in a (complex) mixed model, by range of methods (e.g. employed or salaried solicitors, spot contracting, general contracting), as appropriate.
- 120 The vulnerability of publicly funded legal assistance provided by non-solicitors, particularly, but not exclusively, in the voluntary sector has also been identified as a strategic issue.
- 121 We recommend that, to encourage greater stability and security for providers in the not-for-profit sector, the Scottish Executive and (N)SLAB should, in supporting local authorities in their planning, coordination and development of advice provision, develop best practice guidance for use by planners and funding bodies based on the principle of a three year, rolling cycle.

## THE ADMINISTRATION OF LEGAL AID

- 122 In the course of our review it has been necessary for us to consider whether the current mechanism by which Scottish Executive policy on legal aid is delivered, is the most appropriate for that purpose. The first question relates to whether or not delivery should be the responsibility of an executive Non-Departmental Public Body (NDPB).
- 123 We have assessed the need to achieve an appropriate balance between accountability for public funds on the one hand and independence in the administration of legal aid on the other. The latter is protected explicitly in the legal aid legislation: while the Scottish Legal Aid Board must have regard to guidance issued by Ministers, this guidance cannot extend to the determination of applications for legal aid<sup>9</sup>.
- 124 We conclude on the basis of this assessment that it is appropriate for SLAB's current functions to continue to be carried out by an executive NDPB. We further conclude that SLAB's continued effective performance justifies the retention of responsibility for the administration of legal aid in Scotland within SLAB and can also justify serious consideration of the further development of its role and functions.
- 125 We also recommend that, although internally its administrative functions may increasingly be split between civil and criminal legal assistance, a single Scottish Legal Aid Board should continue to be responsible for both. We would also exercise caution with regard to suggestions that responsibility for legal aid within the Scottish Executive Justice Department (SEJD) should be altered in order to cater for the civil/criminal split. It is our recommendation that the administration of both should remain the responsibility of the Civil and International Group within SEJD.
- 126 It has been suggested that separate budgets should be created for civil and criminal legal aid, with a view to 'protecting' funding for civil legal aid in the face of the increasing costs of criminal legal aid. We do not believe in this regard that there would be any advantage in having separate legal aid funds. We recommend therefore that legal aid should remain a single vote within the Justice Department budget.
- 127 In terms of administrative resources, as the recommendations of this Review are taken forward there will be a need to consider the additional grant-in-aid resources required by SLAB to properly deliver agreed outcomes. This will be the case particularly where SLAB is given new or expanded duties and responsibilities. At the same time it will be essential when taking forward the agenda set out in this Review to restructure, reskill and re-resource the Legal Aid Policy Team in the Executive so that it can carry out all necessary functions effectively.

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<sup>9</sup> Section 3(5) of the Legal Aid (Scotland) Act 1986.

## **SLAB AND THE SCOTTISH EXECUTIVE WORKING TOGETHER**

- 128 While ensuring the continued operational independence of the Scottish Legal Aid Board, implementation of the ambitious proposals outlined in this report will require changes in the operation of SLAB and the Scottish Executive (in respect of legal aid), as well as a high level of co-operation and effective communication between the two bodies.
- 129 There are three main areas that need to be reviewed to ensure more effective working between the Board and the Executive:
- Regulatory issues: the legislative structure of the legal aid system requires the regular updating of regulations, for example to uprate financial eligibility. Although this work is fairly routine, it can be time consuming. We therefore recommend that consideration be given to making such basic regulation an administrative rather than legislative task, allowing the Legal Aid Policy Team to focus on more substantive issues.
  - Managing the Legal Aid Fund: building further on SLAB's work on trends analysis, effective joint working between the Legal Aid Policy Team and SLAB is essential to ensure effective forecasting and management of expenditure on the demand-led Legal Aid Fund.
  - Communication: improvements in communication are required on a number of levels.

### **The Legal Aid Policy Team**

- 130 A key point to address is the need for a more strategic approach to the way in which the Legal Aid Policy Team acts as the interface between the Scottish Legal Aid Board, Access to Justice Division and the rest of the Scottish Executive. It will also be necessary to address the way in which the Team deals with central finance and with public body policy areas in respect of the way in which overall policy in these areas impacts upon SLAB.

### **The Board**

- 131 The Board will review its operation and committee structure once the agreed outcomes of this Review are decided. This will be needed to ensure that these are fit for purpose, given any proposed wider powers and responsibilities that may result from this Review, and to ensure that the Board operates sufficiently strategically.
- 132 Depending on the outcomes of this Review, there is also scope for revisiting the size and composition of the Board. Similarly, it is recommended that the recruitment and remuneration of members be reviewed, with particular account to be taken of the outcomes of the Review and any new role and responsibility that may be given to the Board.

## **STREAMLINING THE LEGISLATIVE FRAMEWORK**

- 133 Our Terms of Reference specifically require us to assess the scope for streamlining of the legal aid legislation. This is because of concerns over the complexity and inflexibility of the current framework, which becomes even more of an issue as one considers making significant structural reforms of the type we recommend throughout our report.
- 134 Some of these reforms may be implemented within the existing legislative framework. Other proposals, such as those to provide more flexible powers to the Scottish Legal Aid Board, would have to be taken forward through a combination of regulations and primary legislation, either by way of amendment to existing statutory provisions or the creation of entirely new legislation.

### **The Current Legislative Framework**

- 135 The legislative framework for legal aid has become increasingly complex since the commencement of the Legal Aid (Scotland) Act 1986. The existing framework has been flexible enough to adapt to a certain amount of change but has relied heavily upon piecemeal amendment, often in reaction to other developments. As such, the legislation has not changed at a fundamental structural level, although significant operational changes have been made.
- 136 Legislative complexity has four main negative impacts:
- It can create operational uncertainty
  - Applicants and their opponents find it difficult to understand
  - It can lead to legislative inconsistency
  - It can create difficulties in effecting change
- 137 It is thus apparent that the modernisation and streamlining of the legal aid legislation would deliver many significant benefits by removing the complexity in the current system. These include the creation of operational certainty, the removal of inconsistency within and between aid types, improvements in interpretation and implementation, and an enhanced ability to plan and manage change.

### **Options for Change**

- 138 Any modernised legislative framework should be designed to deliver the objectives for publicly funded legal assistance set out in the report. It must also balance the need for parliamentary scrutiny and accountability for public funds with the principle of operational independence enshrined in the current legislation.
- 139 A number of approaches to modernisation of the existing legislation are possible. These could be implemented individually or in parallel with each other:

- Continuing to amend existing legislation, but on a more planned basis than at present.
- Providing mechanisms to automatically uprate figures for financial eligibility and/or fees on an annual basis, without the need for annual regulatory change.
- Involving the Board in the drafting of regulations, achieving a greater synergy between policy and operational objectives.
- Creating a new legislative framework, taking on the essence of each of the approaches above.

140 In the short term, a combination of the first three options provides a feasible route to achieving modernisation. Any such programme of change should be taken forward on the basis of a planned approach agreed between the Executive and SLAB and should capitalise on the expertise in legal aid administration and legislation which currently exists within SLAB. In the medium term, a full audit of the current legislation should be undertaken in order to identify any inconsistencies and to determine the means by which these can be rectified.

### **A New Legislative Framework**

141 The most radical approach would be to create an entirely new legislative framework for legal aid. Although one of the clearest benefits of a simplified system would be greater certainty and stability, flexibility will still be needed to allow it to respond to external change.

142 Any new system should have the following key features:

- **Unity:** all provision should be within the scope of any new primary and secondary legislation and thus subject to parliamentary scrutiny. There should be two main systems, one for criminal assistance and the other for civil assistance.
- **Flexibility:** this is essential if the legal aid system is to respond effectively to the many drivers which impact upon it. This could be achieved by removing predominantly operational matters from the instrument of Regulation as these areas require the most frequent change.
- **Regular Review:** the ability to plan change effectively may remain limited by the unpredictable influences of external drivers of change. Whilst a new legislative framework should reduce the need for consolidation, regular review may still be required.
- **Limited mechanisms for automatic change:** the existence of such mechanisms would reduce the necessity for routine change (e.g. financial eligibility uplifts, fee changes) through secondary legislation where appropriate.

143 A legislative structure similar to that in England and Wales, based upon primary legislation, a Code and Regulations, has its attractions. It will however be necessary to give careful consideration to ensuring the achievement and maintenance of the most appropriate balance between flexibility and accountability in such a structure and how this is expressed through the scope of each of its constituent parts.

144 On balance we believe that developing a legislative structure consisting of primary legislation, a Code (under statutory powers) and Regulations, offers the only real long term alternative to Scotland's present framework.

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