SCOTTISH LEGAL AID BOARD

RESPONSE TO THE CONSULTATION ON THE COURTS REFORM (SCOTLAND) BILL

1. INTRODUCTION

The Scottish Legal Aid Board welcomes the opportunity to respond to the Consultation document published in February 2013. The Board’s Response principally concerns the potential impact on the provision of legal assistance.

2. RESPONSES TO CONSULTATION DOCUMENT

Chapter 1 - Moving civil business from the Court of Session to the sheriff court

Question 1: Do you agree that the provisions of the Bill raising the exclusive competence and providing powers of remit will achieve the aim of ensuring that cases are heard at the appropriate level?

The Board agrees with this proposal. The change will mean that a large number of cases currently coming before the Court of Session will be moved to the sheriff court. Many of these smaller value claims are not, however, funded by civil legal aid. The Board’s existing guidance on the use of the Court of Session as a forum for reparation claims in particular is that the value of the claim needs to be at least £50,000 unless the case raises issues of

- particular complexity;
- novel aspects of law; or
- other unusual features requiring the specialist knowledge of the Court of Session.

Increasing the exclusive competence of the sheriff court to £150,000 will mean fewer applications for civil legal aid lodged for Court of Session proceedings than is currently the case. The Board does not however have any concerns about changing its approach to the consideration of applications for civil legal aid recognising that simply because a case has a high value does not necessarily mean that it is a complex case or vice versa. If it is considered counsel is needed for any publicly funded case in the sheriff court, an application seeking the approval of the Board for such use is required. Sanction for the employment of counsel will be given where it is demonstrated that the case requires it. The ability to remit cases between the sheriff court and the Court of Session will mean that the courts themselves will have the ability to determine the appropriate forum for consideration of the issues involved in any one case.

Question 2: Do you think that the Court of Session should retain concurrent jurisdiction for all family cases regardless of the value of the claim?

There are a number of family cases that currently must go before the Court of Session including applications heard under the Hague Convention. In addition the Court of Session is generally used for high value divorces. Applications for civil legal aid to bring family proceedings before the Court of Session are not common. The Board’s Annual Report for 2011/12 shows that 91 applications for civil legal aid were received for family matters in the Court of Session, with an additional 21 applications being made for protective orders, while 10,899 applications were made for civil legal aid for family matters in the sheriff court, with an additional 1,180 applications made in relation to protective orders. In the same year, 61 applications were granted for family Court of Session proceedings with 13 granted in relation to protective orders while 7,565 applications were granted for family actions in the sheriff court with 654 applications granted in relation to protective orders. Notwithstanding that family matters brought before the Court of Session using public funding are modest in number it is unclear why the Court of Session should retain
concurrent jurisdiction regardless of the value of the claim. The exclusive competence aspect to be applied to other types of cases should also apply in family matters.

Question 3: Do you think that the Court of Session should retain concurrent jurisdiction in any other areas?

The Board has no specific proposals on the retention of concurrent jurisdiction in the Court of Session.

Question 4: What impact do you think these proposals will have on you or your organisation?

A reduction in the number of cases brought before the Court of Session will reduce costs that may be incurred to the Legal Aid Fund. In 2011/12 the average cost of a publicly funded reparation action in the Court of Session was £43,949 while in the sheriff court it was £2,909. For medical negligence actions in the Court of Session the average cost of a publicly funded case was £43,312 while in the sheriff court it was £6,690. Any reduction in the number of reparation and medical negligence actions brought before the Court of Session using public funding is likely therefore to bring a reduction in cost to the Fund.

It should be noted that the success rate for publicly funded reparation cases is high at around 85%. Where cases are successful judicial expenses are generally sought and accepted rather than payment being made from the Legal Aid Fund. As such the net cost of reparation actions to the public purse is significantly reduced.

Another area for reduced costs arises from the fact that cases heard in the sheriff court do not attract the automatic use of counsel unlike Court of Session actions. If it is considered counsel is needed for sheriff court publicly funded cases, an application seeking the approval of the Board for such use is required. We will grant sanction where the case requires it. We provide guidance on this issue which is available to the profession in our various legal assistance handbooks. Generally before granting sanction for the employment of counsel we need to be satisfied that

- the use of counsel is appropriate;
- that the matter involves issues of novel, complex or unusual aspects of law; and/or
- that there are specific identified features in the case that require the involvement of counsel.

As previously indicated simply because a case has a substantial value does not mean it involves any particular complexities while more modest value claims may involve a range of complex issues that would justify the employment of counsel.

Chapter 2 - Creating a new judicial tier within the sheriff court

Question 5: Do you think that the term “summary sheriff” adequately reflects the new tier and its jurisdiction?

We consider it is important to retain the title of “sheriff” to reflect the fact that there is no diminution in the status of the court in which the matter is being heard.

Question 6: Do you agree with the proposal that the qualifications for appointment as a summary sheriff should be the same as that for a sheriff?

We consider it is important that the qualifications for the appointment of a summary sheriff are as robust as for other judicial office. Anything else will lead to a view being taken that the summary sheriff is in some way a lesser appointment dealing with cases that are not significant.
Question 7: Do you agree with the proposed competence of summary sheriffs in family cases?

The introduction of specialist summary sheriffs dealing with family cases is welcomed. Not only could it facilitate greater flexibility in the management of court business given the introduction of a wide range of members of the justiciary but it could be used to facilitate new approaches to the judicial management of family cases.

The Board has seen a substantial increase in the number of grants of civil legal aid for family related matters over the past five years with applications increasing by 25% over this period. Of more significance however is the increasing cost of family cases over this period. In 2004/5 expenditure on family cases was £16.3 million while in 2011/12 expenditure was £25.1 million, an increase of 54%. Of those costs the highest single area of expenditure is in relation to contact cases where, in 2011/12, costs amounted to £7.2 million.

There is a wide variety of reasons for the increase in expenditure including local practices and the court processes followed in each case. In addition the increasing use of bar reports, psychologist reports and multiple child welfare hearings to monitor progress in contact cases leads to higher levels of expenditure. In 2011/12 the top 10% most expensive paid accounts in family cases accounted for 46% of the total civil legal aid expenditure on family cases. In contact cases £4.4 million was spent on 2,581 accounts submitted with costs below £6,000 while £2.8 million was spent on 271 accounts submitted where costs were over £6,000. In contact cases 39% of the total expenditure was utilised on just 10% of accounts.

As part of the Board’s overall examination of expenditure on publicly funded cases we have focused on long-running sheriff court family actions. We have concerns about the lengthy processes and procedures used to try to resolve some of the most expensive family cases particularly when the issues involved

- did not appear to be particularly contentious;
- should not have required substantial amounts of court time to be resolved; and
- seem unlikely to have taken so long to resolve had the individuals been paying privately.

We favour changes in the procedures for handling family cases which will introduce more robust case management and a very proactive “hands-on” approach to actions that could otherwise have the capacity to spiral both in terms of cost and duration in proportion to the issues involved in the dispute. A reduction in the cost to public funds from expensive family cases could see significant benefits for the Legal Aid Fund while also providing swifter resolution of disputes at a proportionate cost. This is likely to be to the long term benefit of the families involved in those disputes.

Question 8: Do you agree that summary sheriff should deal with referrals from Children’s Hearings?

The Board agrees with the proposal to allow summary sheriffs to deal with referrals from Children’s Hearings. It will allow summary sheriffs to develop a specialised knowledge of the proceedings and issues involved and increase the efficiency of the process as some referrals take a considerable period of time to be resolved. This is not desirable for the children involved at the centre of the dispute.
Question 9: Do you think that, in addition, to summary crime, summary sheriffs should have powers in other areas of criminal jurisdiction?

The Board supports greater specialisation in the work undertaken by sheriffs and summary sheriffs but it may be that if summary sheriffs have powers in other areas of criminal jurisdiction this would provide the benefit of greater flexibility in the management of court business which may also be beneficial to the Fund if it allows for a swifter resolution of court cases.

Question 10: Do you agree that the allocation of cases where there is concurrent competence between sheriffs and summary sheriffs should be an administrative matter for the relevant Sheriff Principal?

We agree that the decision on the allocation of cases should be a matter left to each Sheriff Principal to determine in accordance with the arrangements in their own area.

Question 11: What impact do you think these proposals will have on you or your organisation?

The changes could have cost implications for the Legal Aid Fund because of the differential rates in fees paid between the sheriff court, the stipendiary magistrates’ court and Justice of the Peace court. Of importance here are the decisions taken by the Crown in relation to the appropriate forum for hearing a case. This decision can impact significantly on costs to the public purse through the Legal Aid Fund given the differing fees payable.

In relation to family cases, the introduction of a more focused and hands-on approach to the resolution of disputes will mean the Fund is likely to see savings in overall family costs having regard to the total expenditure spent on the more expensive and long-running cases.

**Chapter 3 - Creating a New Sheriff Appeal Court**

Question 12: Do you agree that criminal appeals should be held in a centralised national appeal court?

The Board agrees with this proposal. A central criminal appeal court could, if bail appeals are to call before it, deal with large numbers of appeals with economies of scale being made.

Question 13: Do you think that civil appeals should be heard in the Sheriff Appeal Court sitting in the Sheriffdom in which they originated?

The Board considers that this proposal will promote flexibility and efficiencies as well as proportionate access to justice for individuals involved in the appeal process. However, in order to maximise the possible efficiencies that the creation of the court could achieve it should be possible for the court to hear appeals from outwith the Sheriffdom if this will assist in the smooth running of court business.

Question 14: Do you agree that the Sheriff Appeal Court should be composed of appeal sheriffs or Sheriffs Principal and Sheriffs of at least five years experience.

The Board considers that it would be beneficial to have experienced senior sheriffs involved in the appeal court.
Question 15: What impact do you think that these proposals will have to your organisation?

The Board anticipates savings to the Legal Aid Fund from having more local presentation and representations of cases rather than much appeal work being focussed in Edinburgh requiring the use of counsel. Increasing the proportion of representation undertaken by solicitors rather than counsel through use of a sheriff appeal court will create savings for the Fund although it should be noted that counsel may continue to be involved in some of these appeals where the case warrants it.

Chapter 4 - Creating a Specialist Personal Injury Court

Question 16: Do you agree with the establishment of a Specialist Personal Injury Court?

The Board has consistently supported the specialisation of court business which improves the efficiency of the court process and creates a consistency of approach to cases. We believe it helps to develop best practice and allow for a greater degree of certainty in potential outcomes in cases.

The introduction of a new specialist personal injury court may assist in answering some of the concerns raised by the increase in the exclusive competence of the sheriff court. One argument advanced in favour of the continued use of the Court of Session is that there is greater certainty in the potential outcome than arises using different sheriff courts across Scotland. This is particularly true so far as the operation of the commercial court in the Court of Session is concerned. The introduction of a specialist personal injury court will bring consistency of approach and use judges who have the necessary skills and expertise to deal with the issues before them. The introduction of the specialist court does not however remove the option of raising a personal injury action in a local sheriff court so for individuals who wish to raise an action locally there will be no obligation to use the specialist injury court. This will provide greater access to justice while at the same time allowing for a specialised consideration of personal injury actions.

For those who wish to use the specialist injury court but have concerns about the cost of travelling to that court greater use of video conferencing would minimise the necessity to travel to the court thus assisting in keeping costs at a manageable level. This would apply whether an individual was paying privately or was using public funding for their case. The Legal Aid Fund would benefit greatly from the increased use of video conferencing in keeping overall costs to the public purse from travel at the lowest possible level.

Question 17: Do you agree that civil jury trials should be available in the specialist personal injury court?

If it is intended to retain the availability of civil jury trials then there is no logical reason for not allowing this option to be available in the specialist personal injury court especially as it may take over a sizeable proportion of the work currently dealt with before the Court of Session where jury trials are an option.

Under the current arrangements in the Court of Session the majority of litigants elect to opt out of the jury trial procedure. Given this the current system where there is an assumption that a jury trial will take place should be amended so that, irrespective of whether a case is brought in the Court of Session or the specialist personal injury court those seeking a jury trial would need to opt in to that procedure rather than opt out.

As such continuing with the current default system where there is an assumption that a jury trial will take place should be amended so that, irrespective of whether a case is
brought in the Court of Session or the specialist personal injury court those seeking a jury trial would need to opt in to that procedure rather than opt out.

**Question 18: What impact do you think these proposals will have on you or your organisation?**

In 2011/12 expenditure on civil legal aid for reparation cases in the sheriff court was £3.5m while in the Court of Session it was £5.4m of which £2.5m was paid to counsel. If the Bill’s proposals mean more cases are presented by solicitors in the sheriff court then the total expenditure of the Fund may decrease. Counsel will not necessarily be instructed in each case before the specialist personal injury court. As detailed in the response to question 4, in the event that an individual is legally aided and they wish to use counsel for an action before the specialist personal injury court they will require to obtain the Board’s approval for this. We will consider whether the case warrants the use of counsel. Unlike Court of Session cases there will not be an automatic entitlement to use counsel and this is likely to reduce the overall expenditure on such cases.

Consideration may need to be given by the Scottish Government to the civil legal aid fees for solicitors and counsel to ensure that the existing fee structures fit with the operation of the new specialist personal injury court.

**Chapter 5 - Improving Judicial Review Proceedings in the Court of Session**

**Question 19: Do you agree with the three months time limit for judicial review claims to be brought?**

The Board supports the introduction of a time limit to bring a petition for judicial review. The introduction of a time limit brings clarity to the issue of delay and how much time should be allowed to elapse before an individual or organisation seeks a remedy. The Board’s existing guidance in relation to the statutory test of whether it is reasonable to make civil legal aid available does indicate that where an applicant fails to avail themselves of remedy at an appropriate time it may well be considered unreasonable to make legal aid available at a considerably later date. This would allow applications for civil legal aid to be refused when an individual waits for an inordinate period of time before proceeding with a petition. However, the introduction of a clear time limit means that any confusion in respect of this issue will be resolved.

Consideration may need to be given to when the three month time period starts. We consider it is important that individuals exhaust the internal procedures of the relevant body against whom the petition is going to be brought before commencing any court action. A number of pre-action protocols (“PAP”) are being brought into effect in relation to judicial review most notably in relation to those petitions involving immigration and asylum claims where the UKBA is expected to be given the opportunity to address the issues to be raised in any petition before the procedure goes ahead. This is designed to prevent a waste of court time and expenditure. This approach should be adopted in relation to all judicial review petitions.

**Question 20: do you agree that the introduction of the leave to proceed with an application for judicial review will filter out unmeritorious cases?**

The consultation paper noted that the Scottish Civil Courts Review saw benefit in the pre action protocol system in judicial review cases in England and Wales. Consequentially this led to the recommendation of the introduction of a requirement to obtain leave to proceed with a judicial review.

There are two distinct categories of cases which could usefully be removed from the petitions which currently proceed and these concern unmeritorious actions and actions in
situations where the apparent dispute is in fact susceptible to resolution or partial resolution without action. In the Bill as currently framed section 84 introduces time limits and the requirement for leave to appeal. Section 85 would amend the Court of Session Act 1988 to give regulatory powers including power to make provision for avoiding the need for action to be taken before proceedings are brought and power to make provision about the grounds upon which applications for judicial review may proceed or the procedure by which a respondent may be sisted.

In England and Wales the pre-action protocol procedure ("PAP") is optional and not mandatory. Failure to follow the PAP does not invalidate any application for leave to proceed with judicial review but can have consequences in the discretion of the court subsequently as to issues of expenses and case management.

In England and Wales the application for permission to proceed with a judicial review must be served on the respondent and anyone that the claimant considers to be an interested party. They have a right to make representations and where there is a hearing, the right to participate in that hearing.

In our view these mechanisms are important components in the process. The PAP may not itself directly remove unmeritorious applications but it has significant scope to remove applications in situations where the dispute is susceptible to resolution or partial resolution between the parties themselves. It may however indirectly assist in filtering out unmeritorious applications in situations where legal aid is sought in that an applicant who does not use the PAP without good justification may be refused legal aid.

In addition it is important that in the filtration of unmeritorious applications respondents have a right of response and to make representations in relation to the application for leave. The Bill does not contain any direct provision about the right of respondents and interested parties to make representations and in our view the Bill and relevant provisions in the Court of Session Act should include at statutory level, the fact that the court may only grant leave to proceed where the application has been intimated upon the respondent and any interested parties and the respondent and parties have had the opportunity of making representations. Alternatively, this could be specified in regulatory powers in a pre-grant of leave requirement.

As a public body making decisions which can potentially be subject to judicial review changes to filter out unmeritorious petitions and to allow the opportunity to comment could assist and reference is made to the response in question 22 in this connection.

Question 21: Do you agree that these proposals to amend the judicial review procedure will maintain access to justice?

This will maintain access to justice. Such access is needed for meritorious actions and cases that are not susceptible to any other form of resolution beyond petition for judicial review. Equally imposing a time limit on the ability to bring a petition for judicial review will assist in ensuring that there is no delay in seeking resolution to an intractable problem.

Question 22: What impact do you think these proposals will have on you or your organisation?

In terms of the Legal Aid Fund the proposals could lead to savings to the Fund as consideration would be given to and payment made only for meritorious actions. The introduction of the three month time period will not create any issues in relation to the administration of legal aid. A process by which petitions can be brought before the court where there is merit and where there is no other means of resolving the problem,
including the use of a PAP should avoid applications being made where a court action is not in fact needed to resolve matters.

In addition, as stated in question 20, the Board is a public body making decisions which can potentially be subject to judicial review so the increased scope for extra judicial resolution of challenges could have a significant saving in terms of both resources internally for the Board and cost. The legal aid arrangements do not have a statutory appeals mechanism and parties can take a range of approaches to challenging decisions made by the Board. Some of these can involve recourse to the court by parties in circumstances where issues might or would be susceptible to further consideration and discussion to avoid the need for court proceedings or to minimise areas of dispute.

Chapter 6 - Facilitating the Modernisation of Procedures in the Court of Session and Sheriff Courts.

Question 23: Do you agree that the new rule making provisions in sections 85 and 86 of the draft Bill will help improve the civil procedure in the Court of Session and Sheriff Courts?

Question 24: Are there any deficiencies in the rule making provisions that would restrict the ability of the Court of Session to improve civil procedure in the Court of Session and Sheriff Courts?

Question 25: What impact do you think these proposals will have on you or your organisation?

The Board believes that the new rule making provisions will assist civil procedure. So far as deficiencies in the rule making provisions are concerned reference is made to the Board’s response to question 20 where more specific provision could be made for notification to respondents and interested parties in judicial reviews.

Any procedures which create efficiencies and provide for the more effective operation of the court process itself are likely to result in savings to the Legal Aid Fund not least through the avoidance of postponed hearings due to lack of court time.

Question 26: Do you agree that a single judge of the Inner House should be able to consider the grounds of an appeal or motion?

Question 27: What impact do you think these proposals will have on you or your organisation?

We consider that a single judge of the Inner House should be able to consider the grounds of an appeal or motion and believe that this could result in savings to the Legal Aid Fund if it allows for unmeritorious appeals to be filtered out at an early stage.

Question 28: Do you agree that the distinction between ordinary and petition procedure should be abolished?

Question 29: Do you foresee any unattended consequences for this change?

Question 30: What impact do you think these proposals will have on you or your organisation?

The Board does not consider that the changes envisaged here will have an impact on its workings or the Fund. The Board does not have any specific comment to make in relation to this issue.
Question 31: Do you agree that the new procedures will ensure that courts are able to deal with appropriately vexatious litigants?

Question 32: What impact do you think these proposals will have on you or your organisation?

The Board supports proposals to deal appropriately with vexatious litigants. While such individuals may not be able to access public funding for their case as they may not meet the statutory tests for civil legal aid of financial eligibility, probable cause and reasonableness there is still a significant administrative burden imposed in the processing of an application even if it is ultimately refused.

Question 33: Do you think that an order for interdict should be capable of being enforced at any sheriff court in Scotland?

The Board believes there is a need for clarity about the difference between the geographical area over which an order for interdict is effective and the issue of the location of the court where an interdict may be enforced. Currently interdicts granted within a Sherifffdom are geographically effective within the Sherifffdom and separately may only be enforced in the courts of that Sherifffdom. There may be issues which make it desirable, in certain circumstances, for an interdict to be granted prohibiting wrongful acts across an area wider than the particular Sherifffdom including being applicable across all of Scotland. This does not necessarily mean that there is a similar need for any court in Scotland to be able to deal with making further court orders in relation to that interdict for example consideration of a breach of interdict.

The majority of protective orders appear to work broadly successfully despite being Sherifffdom restricted and there is no indication that anything other than a minority of interdicts could usefully be susceptible to escalation over a wider area. It could be suggested that giving all sheriffs the power, on cause shown, to grant an interdict over a geographical area wider than their own Sherifffdom could be of assistance in certain cases. There is no concomitant need to extend the number of courts that can then deal with court orders in that case. The power to deal with that interdict should remain with the originating court unless and until a change in circumstances make it more appropriate to transfer the matter to another court and this can be done adequately under existing arrangements.

In certain situations parties who believe that actions may be raised against them will seek to lodge a caveat in the relevant court. In order to avoid the need to lodge caveats in each court in Scotland any change to the arrangements for interdicts and their enforcement should also apply to caveats allowing the lodging of one caveat in a local court to be applicable throughout Scotland.

Question 34: Should interim orders and warrants have similar all Scotland affect and be capable of enforcement at any sheriff court?

The arguments advanced in response to question 33 apply equally here. There is no obvious reason for extending the courts which can make orders in a case and the issues that may arise can be adequately dealt with by extending the scope for geographical effectiveness. Separately it is not desirable to have scope for confusion arising with multiple proceedings in several courts taking place over the same cause of action.

Question 35: What impact do you think these proposals will have on you and your organisation?

There are not substantial numbers of applications for civil legal aid in relation to protective orders in the Court of Session which would have a Scotland wide impact. In the
year 2011/12 there were 21 applications for civil legal aid made in respect of protective orders. In the same year 13 such applications were granted. This contrasts with the 1,180 applications that were made for protective orders in the sheriff court and the 654 grants of civil legal aid that were made in that same year for protective orders.

These figures suggest there is not a significant concern about the restricted nature of the current sheriff court interdicts but if changed arrangements could result in any reduction of cases brought before the Court of Session then there will be a consequent reduction and cost to the Fund as Court of Session protective orders cost more than sheriff court orders with the relevant figures from 2011/12 being £4,046 for a Court of Session protective order as compared to £1,335 for a sheriff court protective order.

Chapter 7 - Alternative dispute resolution

Question 36: Do you think that ADR should be promoted by means of Court Rules?

The Board is currently project managing the enabling Access to Justice Project, part of the Scottish Government’s Making Justice Work Programme. The proposal to promote ADR by means of Court Rules is in line with the aims of that project. The provision gives regard to mitigating the length and complexity of proceedings and if used in appropriate cases, have the potential to facilitate the achievement of just outcomes and to reduce cost and time spent by those involved in the dispute. This would deliver further benefits in terms of speed and expenditure for the courts in administering such cases.

Question 37: What impact do you think these proposals will have on you or your organisation?

The proposal to promote ADR could introduce an extra step in proceedings if applied as a blanket policy across all cases within an area of law. This could increase costs to the Legal Aid Fund as the costs of both the mediation itself and any additional associated work that has to be carried out by the solicitor may be met from the Fund. On the other hand if the provision is used to promote ADR when appropriate, taking into account on a case by case basis, the prospect of successfully mitigating the length and complexity of proceedings then this should allow cases to be resolved more quickly potentially producing a saving to the Legal Aid Fund.