

Criminal Justice Committee

**6th Meeting, 2021 (Session 6), Wednesday
29 September 2021**

Legal aid

Written submissions

1. The Criminal Justice Committee is holding a roundtable meeting about legal aid.
2. Written submissions have been provided by the following organisations who will be attending the roundtable meeting—
 - Citizens Advice Scotland;
 - Scottish Legal Aid Board;
 - Scottish Solicitors Bar Association;
 - Scottish Women's Aid.
3. These submissions are attached.

**Clerks to the Committee
September 2021**

Written submission from Citizens Advice Scotland

Scotland's Citizens Advice Network empowers people in every corner of Scotland through our local bureaux and national services by providing free, confidential, and independent advice. We use people's real-life experiences to influence policy and drive positive change. We are on the side of people in Scotland who need help, and we change lives for the better.

Summary

Citizen's Advice Scotland (CAS) work on Access to Justice issues aims to ensure that consumers can access legal services and make effective and informed choices about legal issues.

The Citizens Advice network in Scotland issues more than 3000 pieces of advice each month on legal proceedings. Between August 2020 - August 2021 Citizens Advice Bureaux (CABs) provided 44,439 pieces of advice on legal issues to 16,287 individual clients. The most common legal issues on which advice was provided include:

- Legal Aid
- Finding a solicitor or advocate
- Simple Procedure

A recent report on the economic value of advice provided by the Citizens Advice network in Scotland showed that the value of the advice provided by CAB on legal proceedings (including areas such as benefits, employment, housing, and debt) was estimated to be £11.58m¹.

CAS believes that no-one should be excluded from accessing justice on the grounds of cost or geography. The legal aid system should help ensure that everyone who has a legal issue is able to find help to resolve it. We believe that significant reform of the Legal Aid system, to place the user at the heart of it, is required.

We also highlight here a number of concerns regarding Access to Justice during the pandemic. We support the development of new and simplified ways of accessing Court services. However, we maintain that this must not come at the expense of channel choice.

Accessing help with legal issues

- Between August 2020 – August 2021, CAB provided 6,278 pieces of advice to 4,326 clients on finding Solicitors / advocates. Demand for this type advice has increased by 22% between August 2020 and August 2021, despite the impact of the pandemic on legal services.

¹ https://www.cas.org.uk/system/files/publications/economic_value_of_advice_report.pdf

- Demand for advice on Legal Aid was also up 32% in this time period.
- Simple Procedure remains consistently the legal area which CABs provide the most advice on to clients. Legal Aid is not currently available for many Simple Procedure cases at first instance.
- Feedback from CABs indicates that access to practitioners can be problematic for those in remote and rural areas and/or those looking for support in more specialist areas of law like immigration.
- Cost can be a significant barrier to people seeking advice on legal matters and people are often uncertain about where to start and how to navigate processes. Polling conducted in 2020 for CAS showed that only 30% of participants had used a lawyer for their last legal problem, with unaffordability being an issue for 44% of respondents².
- CAS believes that no-one should be excluded from accessing justice on the grounds of cost or geography. The legal aid system should help ensure that everyone who has a legal issue is able to find help to resolve it.
- The Scottish Government and other agencies such as SLAB, need to help ensure this issue is resolved. More grant funding may provide additional flexibility within the system to address gaps in the market either in terms of geography or specialism.

Reform of the Legal Aid system

- CAS believes that these issues demonstrate the continuing need for reform of the Legal Aid system, and we welcome the Scottish Government's commitment to a Legal Aid bill during this parliamentary session.
- Users must be placed at the heart of the legal aid system and this should be key to any reforms made. This was a central plank of the [independent review](#) of legal aid.
- CAS would welcome extension of the legal aid regime to:
 - Provide better triage before referral to solicitors
 - Provide coverage for areas not currently covered such as tribunal and simple procedure work (pre appeal)
- Early intervention and prevention are key, and we believe there should be a significant shift in resources towards this and towards the use of Alternative Dispute Resolution (ADR) in civil areas.
- The Citizens Advice network in Scotland has seen increases in demand for access to advice on ADR across a range of sectors including housing, employment, consumer, relationships, utilities, and healthcare during the pandemic period.
- People should be able to access advice and support in order to resolve disputes at the earliest stage as this can help to reduce the impact, cost, and distress caused by disputes. However, we recognise that some will always choose to pursue court action and all should be adequately supported however they chose to proceed with their dispute.

² Via the YouGov Scotland Omnibus, 1,028 Scottish adults were surveyed. Fieldwork for this survey was undertaken between 5th to 9th March 2020

Impact of the COVID-19 Pandemic on Access to Justice

- CAS has concerns around the move to digital services such as the mandatory use of Civil Online and the rise in remote appearances from custody.
- Many vulnerable individuals have issues with using digital services. We believe that channel choice is important, especially for older or disabled people.
- We question whether digital justice services allow for individuals to fully participate and understand proceedings affecting them and note the difficulties that can exist for professionals and advice agencies providing adequate and timely advice in digital proceedings.
- Finally, we note the extension to time limits for bringing criminal cases and the resulting rise in number of remand prisoners. Many remand prisoners will be found not guilty or receive community sentences. Remand is immensely disruptive for their lives and that of their families and better support is required for these prisoners.

Written submission from the Scottish Legal Aid Board

How legal aid works Legally aided services enable people to enforce or protect their rights, resolve disputes, and defend themselves when the state and others act against them. It also allows people to use the remedies, processes and facilities the law provides to manage their personal affairs and relationships. People can use it to challenge the power wielded by the state or others in a position of authority.

The Scottish Legal Aid Board (SLAB) is the national funding body for most solicitor and advocate delivered publicly funded legal services. We manage access to legal aid funding by applying the rules set by the Parliament for assessing eligibility for legal aid and checking and paying accounts submitted for payment by solicitors and advocates. The Scottish Government is responsible for the overall direction of legal aid policy, which finds expression in an extensive and complex body of legal aid legislation.

Funding for legal aid cases is demand led. The Scottish Government makes available the funding for legal aid cases that pass the statutory eligibility tests, regardless of the legal aid budget set at the start of the year.

Further background to how legal aid works can be found in the SPICE briefings.

Legal aid in practice

The current system is a subsidy system with few levers to ensure availability of services, design services to meet specific client needs or direct resources towards delivery of particular outcomes. It is not designed as a public service. The whole system is designed around what can be paid from the Legal Aid Fund and the rules for access to that Fund. The rules apply to applicants – who is eligible, and for what kinds of case - and separate rules apply to what can be paid to solicitors and advocates for services they have provided. SLAB's primary role is to implement these rules.

Aside from in limited defined situations, there is no obligation on a solicitor to accept instructions from a client, even where that person and their case would in theory meet the eligibility tests and where the firm is registered to provide legal aid.

As a subsidy, the system has worked well and the Scottish legal aid system is well regarded internationally. Compared to many other jurisdictions, the system is wide in scope, with broad eligibility and high per capita funding levels. Very few criminal legal aid clients report having any difficulty finding a solicitor, and most are very satisfied with the service they receive, suggesting that the system is generally meeting their needs in terms of access to quality representation. In addition, the results of peer review also suggest that the quality of services delivered by solicitors is usually good and sometimes outstanding.

Scotland's criminal legal aid system remains largely as it was when the current legal aid legislation was enacted in 1986. While the framework has been updated regularly to reflect new rights, procedures or forums, the basic delivery and payment model for legal aid continues largely to reflect that developed in the post-war years - demand

led legal aid delivered primarily by private sector solicitors alongside other business (solicitors employed by SLAB in the Public Defence Solicitors' Office and Solicitor Contact Line comprise around 4% of criminal legal assistance spending).

Over the decades, the legal profession has become more specialised, and the same is true of many of those delivering legal aid services. Around 60% of those providing criminal legal assistance do so alongside other forms of legal aid – the remainder are criminal specialists (although may have other private business).

While the trend towards specialisation in the wider profession has led to a wide range of business models - from generalist high street firms to large international commercial firms employing hundreds of solicitors - the practice of criminal legal assistance remains largely the preserve of smaller firms. Almost three quarters of active criminal practitioners operate in firms with five or fewer criminal practitioners (and they account for 70% of all criminal legal aid expenditure); 22% are the only criminal practitioner in their firm; and fewer than 10 firms have 10 or more criminal practitioners. The data we hold does not tell us whether solicitors actively providing legal aid also undertake privately funded work, how many other solicitors there are in those firms undertaking other work, or what proportion of a firm's income is derived from legal aid.

We do know that a significant proportion of criminal work is concentrated in a relatively small minority of firms. In the last year, over 60% of solemn and summary applications were submitted by fewer than 25% of active firms. By contrast, 20% of firms submitted 10 or fewer summary applications – a combined total of just 0.7% of all applications. The data suggests that this concentration is becoming more pronounced, with the more active firms taking on an increasing proportion of cases.

Challenges and limitations of the current legal aid regime: particular focus on criminal legal aid services

Trends in prosecutions

Case by case funding delivered through a subsidy to the private sector allows supply to meet demand for criminal representation effectively. Falling demand, with numbers of criminal court cases declining, puts the suppliers of services under pressure as businesses need to adjust to less work, and less income flowing from that work, as well as changes in the type of work available and, more recently, changes in the court system to meet the challenges of Covid-19 and the associated backlog of cases. This is particularly challenging for those firms exclusively focused on criminal work, as it is likely to be harder for them to divert any spare capacity into other areas of work.

This long term reduction in court business levels (35% over ten years) would have been even more financially challenging for firms if it had not been accompanied by changes in the number of solicitors undertaking criminal work. Pre-covid, the number of active practitioners had been reducing at a slower rate than business levels (20% over the same ten year period), with the result that each practitioner was on average handling less business and legal aid funded cases were being spread more thinly amongst active solicitors. The recent increase in the concentration of criminal work

may suggest that the market is now responding to this challenge, with those most committed to high volume legal aid work managing to increase their market share and so either stabilising their caseloads after several years of reductions, or more recently seeing them grow as overall prosecution numbers have risen slightly.

The initial impact of lockdown was a further sharp reduction in prosecutions and general court activity. Information from the Law Society suggests that around 35% of criminal practitioners may have been furloughed at that stage. From summer 2020 onwards, prosecution levels recovered and for the most serious cases, exceeded pre-covid levels by the end of the year. The challenges of managing court business during this period, and again with the fresh lockdown in early 2021, meant that more cases were started but fewer were concluded.

These substantial shifts in both volumes and timescales have had a significant impact on the pattern of legal aid expenditure over the last 18 months. While gross spending dropped by around 23% in 2020-21, we expect it to revert to broadly pre-covid expenditure levels this year and then exceed these in future years as backlogs are addressed, the increase in solemn cases works through the system and the recent and upcoming fee rises take effect.

Legal aid fees

Fee structures and rates for legal aid work are set by regulations approved by the Scottish Parliament. Fees have been updated on an irregular basis over the last 25 years or so, with many changes being accompanied by structural reforms, such as the introduction of fixed or block fees. Each reform has followed negotiation between government and the legal profession, as a result of which some individual fees were left unchanged for extensive periods, while others were either significantly updated to reflect wider policy objectives or were rolled into newly created block payment structures, often accompanied by a net increase in overall fee levels.

The complexity of the fee system, the extent of fee reform and the ad hoc updating process makes it hard to track fee rates over time. Between 2004 and 2010, solemn criminal legal aid fees were updated and/or reformed such that they broadly reflected inflation since the previous fee level was set in 1992. Significant reforms of fees for summary criminal legal assistance in 2008 were designed to deliver an overall increase in fee levels for this work. These fees were then reduced in 2011 as part of the government's response to the financial crisis. Apart from the introduction of substantially increased and reformed payments for police station work in early 2018, no other fee changes took place until an across the board 3% rise in 2019. This was followed by a 5% rise earlier this year, itself to be followed by a further 5% rise in due course.

While fee levels are a matter for Scottish Government, SLAB fully supports the conclusions and recommendations of the Legal Aid Payment Advisory Panel (LAPAP) that fair remuneration for those providing legal aid services is essential, as is a more rational and evidence informed way of assessing and regularly reviewing the fairness of the level and structure of legal aid payments. Better evidence would provide an objective basis for conclusions on the adequacy or otherwise of current fees, either individually or in aggregate.

The LAPAP also concluded that better evidence is needed on the health of the legal aid system and the supplier base, recognising the need for an evidence informed and constructive dialogue to achieve a better collective understanding of the nature, scale, causes of and potential solutions to any challenges facing the sector. We fully agree that better information is needed on the sustainability and diversity of the supply base, the working patterns and conditions of those delivering this crucial service and any measures that might be needed – within or beyond the legal aid system - for the sector to retain and continue to attract sufficient talent to help ensure the continuing availability of high quality defence services to those who need it.

In the meantime, we continue to work with government and the profession to identify short term changes to criminal legal aid fee structures that would reduce complexity and bureaucracy and associated costs for solicitors, increase speed and certainty of payment, lessen the risk of disagreement around account assessment and support the early preparation and resolution of cases where appropriate.

Ability to respond to changing demands

The ability of an uncapped demand led system to expand and contract in line with prevailing criminal justice trends can be regarded as a key strength of the Scottish model. However, the experience of the last ten years or so suggests that a market-based system can place providers under financial strain and in turn create pressure for increased funding to make up for loss of business.

There is no mechanism within the legal aid system to match the availability of supply to actual or predicted demand. The overall capacity of the system is determined by decisions taken by hundreds of predominantly small, often highly specialised firms, who face the challenge of fine tuning their capacity in response to or in anticipation of incremental changes in demand. The risk for providers, their potential clients and the system as a whole is either over or under supply. The former creates financial challenges while the latter may mean people struggling to find representation.

A further layer of difficulty is that overall trends may vary locally – for example the reductions in business volumes over recent years appear to be larger in Glasgow than elsewhere, meaning that some areas may see over-supply while others are more finely balanced.

There are few levers within the system to design services to meet particular needs or deliver priority public policy outcomes. The system does not operate like a modern public service might be expected to – although individual firms, solicitors and advocates within it can rightly be proud of the high quality advice and representation they deliver, there is nothing in the system itself that can give the public confidence that those services will be accessible for them when and where they need them, will be tailored to their specific needs or will connect them to other services that can help them in a more holistic, whole system way.

Ideas for reform

Short term, there are opportunities to further simplify the system. We have already started on this process by simplifying the operation of the interests of justice test in

sheriff court cases, meaning we need less information from solicitors before we can grant legal aid. The fee reforms mentioned above would also reduce some of the complexity and difficulty associated with aspects of the current payment regime. A more general shift towards interim fees – introduced as an emergency measure during the pandemic - could support solicitor cashflow and, with legislative change, simplify accounting practices.

More strategically, our response to the Scottish Government’s consultation on the legal aid review set out a range of approaches that could in time better link supply and demand, provide greater assurance about the ongoing availability of the full range of services and enable targeted action to be taken at a local level should evidence emerge of supply problems.

There is also scope for complementary funding or delivery models to support new forms of service, perhaps developing technology based solutions, providing dedicated support to care experienced young people finding themselves in the criminal justice system, or connecting clients with other support services to provide a clearer pathway to support with housing, debt, benefits, family, employment or addiction problems.

In this way, the criminal legal aid system could align with and support work being undertaken elsewhere in the criminal and community justice systems to recognise the impact of trauma and adverse childhood experiences, diverting young people in particular from prosecution or providing alternatives to custodial sentences with a view to reducing reoffending. Many practitioners already engage with other support agencies, and some have made it an integral part of their practice. But it is difficult for a case by case system to recognise and fully support this kind of work, or to make sure that it is available consistently or coordinated with other public, private or third sector services. Alternative funding and delivery models may unlock the potential of the legal profession to support their clients’ wider needs in these ways for the benefit of their clients, victims, the criminal justice system and society as a whole.

Written submission from the Scottish Solicitors Bar Association (SSBA)

Introduction to the SSBA

The SSBA was launched on 7 April 2021. The aim of the Association is to represent and promote the interests of criminal defence practitioners across Scotland. The majority of our members are primarily engaged in legal aid work. The committee of the SSBA is comprised of two representatives from each of the Sheriffdoms in Scotland. Those representatives maintain close relations with local bar associations.

Current State of the Criminal Legal Aid Profession

The profession is in crisis. The number of solicitors working for legal aid rates has been declining for years. Firms struggle to retain staff as other public bodies offer better salaries and those that remain have to shoulder more and more work.

In June 2011, the number of individuals registered to provide criminal legal aid in Scotland was 1,415. By June 2021, that number had fallen to 1,054, a drop of 25.5% in just ten years. That trend continues and has been exacerbated by the impact of the Covid 19 pandemic.

For example, 85 solicitors (excluding the Public Defence Solicitors Office) were registered on the Edinburgh Sheriff Court Duty Plan for the period 12/7/19 to 2/4/20. There are currently 76 solicitors (excluding the PDSO) registered for the period 2/7/21 to 3/3/22. Since the start of 2020, 16 solicitors practising at Edinburgh Sheriff Court have left defence work, most have not been replaced. 7 of those solicitors have moved to the Crown Office and Procurator Fiscal Service, 1 to the Scottish Government, 1 to the Scottish Children's Reporter Administration and 1 to the PDSO. In other words, 10 have left to work for publicly funded bodies.

The criminal defence bar is unable to compete with the salaries offered by other public bodies. This has been exacerbated by the increase in pay for Procurator Fiscal Deputies and the current recruitment drive by COPFS. We need to achieve greater parity between solicitors working for public bodies and those employed in criminal legal aid work.

We welcome the Traineeship Fund to subsidise trainee placements in the legal aid profession but retention of qualified staff remains an issue unless funding to the defence bar is significantly increased.

We are not in a position to offer competitive terms and remuneration to our solicitors because the legal aid system has been underfunded for decades. Perhaps the starkest illustration we can give is the rate payable for a summary case. Summary cases make up the bulk of business at Sheriff Court level. These range from shoplifting to assault and carry a maximum sentence of 12 months imprisonment. These cases are paid by a fixed fee. The fixed fee payable was introduced in 1999 and was based on the average cost of a case in 1992. Cuts to legal aid have resulted in the fixed fee for the majority of cases being less in absolute terms in 2020 than it was in 1999. This is without even contemplating the effect of inflation on the real value of the fee.

We welcome the increase in fees of 10% over two years announced at the end of last year as a step in the right direction. However, it is not enough to rectify decades of underfunding. Access to justice depends on the availability of quality legal advice and representation. Unless significant investment is made, we will continue to see solicitors leave the profession and we will struggle to attract new talent.

Access to Justice in Remote and Rural Areas

The problems outlined above are more acute in remote and rural areas. Our members describe a significant lack of younger solicitors in such areas. We note that a handful of firms make a conscious decision to service rural courts but we are concerned about who will replace them when practitioners retire or leave the profession.

For many firms, the time and expense of travel to remote or rural areas is not financially viable. We note that the continued use of hub custody courts in some areas means that firms who previously practised in a local court now have to absorb the additional burden of travel.

Impact of Covid 19 on the Legal Aid Profession

The problems faced by the profession have been exacerbated by the Covid 19 pandemic. When lockdown was introduced in March 2020, most of the business in the Sheriff Courts ground to a halt. Many solicitors were placed on furlough and suffered a significant drop in income. Self employed practitioners saw a dramatic decrease in earnings. Other 'Justice Partners', such as COPFS and SCTS, remained on full salary throughout.

Legal aid practitioners were required to cover urgent business, predominantly custody cases. Like many key workers, we put our health and safety at risk. We did so willingly in recognition of the essential role we play in the administration of justice. We are very proud of the way practitioners adapted quickly to new ways of working. Unfortunately, the skill and professionalism demonstrated by legal aid practitioners in the face of new challenges is not often recognized.

The Scottish Government was slow in offering specific support for the profession whilst Covid 19 restrictions remained in place. Members of the Edinburgh Bar Association and the Glasgow Bar Association agreed to boycott the St Andrew's Day holiday court in protest at the failure to assist legal aid practitioners. In December 2020, the Scottish Government pledged £9 million to a 'Resilience Fund' for the profession and £1 million to subsidise traineeship salaries.

The Resilience Fund was designed to provide grants to firms in recognition of the state of emergency we were in. The Law Society of Scotland (LSS) took significant time and resources to produce a detailed model of how the funds might be distributed to best support the profession. The LSS proposals were not adopted. The model chosen was an abject failure. Of the 287 firms that applied, less than a third (92 firms) were awarded grants. Just £2.3 million of the £9 million promised was distributed. It is difficult to overstate the level of disappointment and frustration felt by an already overstretched and undervalued profession.

On the 17th May 2021, 6 months after the announcement of the Resilience Fund, a number of Bar Associations (including Edinburgh and Glasgow), took the difficult decision to boycott the holiday court. The boycott was accompanied by a letter to the Scottish Government expressing the concerns of the profession. That letter was endorsed by 17 local Bar Associations across the country. Many faculties took part in the highly successful #gownsdn social media campaign to draw attention to our plight. The profession demonstrated the high level of commitment and unity of our members in defending access to legal aid.

We are pleased to report that negotiations with the Scottish Government, LSS, local faculty heads and the SSBA have proved to be positive and productive. The SSBA was able to canvass members on new proposals to administer the remainder of the £9 million fund. The model agreed upon is similar to that initially suggested by LSS. It is frustrating that grants are only now being paid some 15 months after the LSS first wrote to the Minister for Community Safety highlighting the crisis caused by the effects of the pandemic and the need for emergency funding, hardly the response of a government which recognises the vital nature of our work. However, we hope this demonstrates the benefit of working with the profession. We want to identify solutions and we have the knowledge and experience to assist.

The Traineeship Fund was launched on 3rd June 2021. This provided subsidies for 40 traineeship placements. As of the morning of 4th June 2021, the LSS had already received more applications than the number of grants available. This indicates that firms anticipate sufficient levels of business to require new solicitors. In order to tackle the backlog of cases, the declining number of legal aid practitioners has to be addressed. We would welcome an extension of the Traineeship Fund to allow more firms to recruit and train new staff. However, the retention of qualified solicitors remains a concern as we are unable to compete with other public bodies.

Addressing the Case Backlog

The greatest challenge for the administration of justice is tackling the significant backlog in cases. In particular, those cases where accused persons are remanded in custody or subject to stringent bail conditions.

The current system of legal aid is not conducive to early resolution of cases. There are significant gaps in funding available at the early stages in the process and the system fails to adequately recognise the preparation and responsibility involved in negotiating early pleas. This is particularly acute in solemn cases where a plea is tendered early by way of a s76 letter or at a First Diet. In all cases, there is next to no funding available for representations made (with a view to resolution or avoiding prosecution) before a case calls in court.

Barriers to early resolution also exist in the way that the court process operates. A large amount of case marking is undertaken by a COPFS 'marking hub' rather than at local level. Is it incredibly difficult to contact deutes at the marking hub before a case calls in court or to negotiate pleas on the day. In addition, we are witnessing a lack of experienced Procurator Fiscal Deutes (i.e. those senior enough to take decisions) available in the custody courts or dealing with cases at an early stage.

Reform

The Independent Review of Legal Aid found 'no evidence' for an increase in Legal Aid Fees. It was painfully apparent to all in the profession that the conclusion was unfounded at the time and recent events serve to discredit the findings even further.

The Legal Aid Payment Review Panel has failed to produce any meaningful results.

The SSBA is engaging with the Scottish Government to consider appropriate reforms to the legal aid regime. In particular, we wish to see a restructuring of solemn fees to better reflect the volume and difficulty of preparation and negotiation at the early stages in case procedure but also to ensure fairer payment for all work undertaken. We acknowledge that the current regime requires change but those reforms must include a significant increase in funding to fully address the problems for the profession and the wider administration of justice.

Our work with the Scottish Government on the Resilience Fund proved productive and we firmly believe that close cooperation with the profession is the best approach for all. We welcome the opportunity to provide evidence to the members of the Criminal Justice Committee. We welcome members of the Committee to join us at court to see how the system operate in practice.

Written submission from Scottish Women's Aid

The case for a legal service model that supports women and children affected by domestic abuse: Findings from research commissioned by Scottish Women's Aid and the Legal Education Foundation, completed in August 2021

About the Research

Children and women living with domestic abuse, whether or not they live with the abuser, consistently suffer often insurmountable obstacles to accessing legal services and justice. Survivors, support workers, and researchers have told us and governments this for decades, with little response.

Scottish Women's Aid, with the support of the Legal Education Foundation (LEF), is engaged in two linked projects to evidence the nature and extent of these obstacles (LEF1) and to test a comprehensive and accessible model for providing legal services (LEF2) by hosting a specialist lawyer where children and women across Scotland get support—local grass roots Women's Aid services.

This briefing describes the research and findings from LEF1, which was interrupted by COVID and is just winding up. LEF2 is just starting and involves hosting of a specialist domestic abuse solicitor in Edinburgh Women's Aid. Funding for LEF2 allows just 6 months of actual service provision, and we hope to secure enough funding to extend that service to 18 months.

LEF1 supported the collection of quantitative and qualitative information to aid a better understanding of what women and children experiencing domestic encounter when seeking legal services. The research was commissioned to gather evidence about the nature and scale of problems victim/survivors face and to answer the following questions:

- What is the extent of the problem?
 - How many victim/survivors are unable to access justice?
 - What are the reasons for this?
- What are the solutions?
- Is there a need for a specialist legal service for victim/survivors of domestic abuse?
 - How might this be organised and funded?

Research Methods

The research employed mixed methods, including a quantitative data collection exercise to understand the type of and prevalence of legal issues amongst women presenting to Women's Aid Centres, and semi-structured qualitative interviews with a range of stakeholders to explore the issues in greater depth. Methods comprised:

- Scoping interviews and email discussions with key stakeholders from SWA, Scottish Women's Rights Service (SWRS), JustRight Scotland and the Scottish Legal Aid Board (SLAB)

- A legal issues data collection exercise (Dec 2021-Feb 21)
- Interviews with Women's Aid Centre staff
- Interviews with family lawyers with expertise in domestic abuse cases
- Interviews and case studies with women survivors of domestic abuse

Key Findings

Barriers and Challenges to Accessing Justice

The evidence from this research shows that significant number of women and children are being failed by the arrangements that currently exist for accessing legal advice and representation in cases of domestic abuse. Despite some examples of good practice, there are a wide range of barriers, challenges and in some cases poor and even dangerous practice facing a woman and her children trying to access justice while experiencing domestic abuse. Some of these include:

- **Scarcity of lawyers**, particularly for legal aid cases where the number of lawyers who are prepared to take on legal aid cases for women affected by domestic abuse was reported to have steadily declined.
- **Geographical issues** posed a great issue where the average distance women travel to see a solicitor ranges from 4 miles in East Ayrshire to 231 miles in Shetland.
- **Women not properly advised of their entitlement to legal aid**, where women find it difficult to work out whether or not they are eligible for legal aid.
- **Lack of consistency in quality and skill** of legal aid solicitor. This is coupled with a lack of understanding of the complexity of some women's cases, particularly where there are immigration issues.
- **Child contact** cases were routinely cited as complex, painful and retraumatising, reflecting the legal system's presumption in favour of contact and ignorance about the intersection of child welfare and domestic abuse.

The costs of not being able to access justice

The failure of the current system to deliver justice to women and children has multiple impacts and costs, such as:

- **Physical and mental impacts**, reported by women victim/survivors, including eating issues, sleeping problems, suffering from mini strokes caused from stress, having migraines and developing panic and anxiety attacks.
- **Financial Impacts**. Women who have to spend money on fighting cases can also *suffer acutely financially*, often jeopardising their prospects of future security in an attempt to extract themselves from current abuse.
- **Impact on children**. Current lack of access to needed legal services has a *severely negative effect on children*, particularly those caught up in protracted child contact cases. Where contact is insisted upon against the mother's and the child's wishes, the impact can be profound – bed wetting, nightmares and disruption to education are commonly reported.

- **Support services are forced to use scarce time and resources** as caseworkers spend hours trying to find lawyers, acting as interpreters where this is needed (for free) and attending court to provide some minimal level of protection for a woman who may be severely anxious about attending on her own.
- **The legal system as operating currently wastes resources of time and money** when lawyers with insufficient time or understanding of domestic abuse prepare cases are neither representing their clients' interests nor using court time effectively. The most egregious element is the deliberate manipulation of the courts by perpetrators to prolong and/or renew child contact disputes and the ensuing burden on overstretched courts.

Specialist and knowledgeable legal service

The findings from this research suggest that in the immediate term the following could resolve many of the issues identified through this research:

- **A specialist, knowledgeable legal service offered as part of a comprehensive support service** would reduce the harm that women and children are experiencing through their encounter with the justice system.
- This service could help to **change the culture in legal services** and build the capacity of the legal sector to better understand and support victims of domestic abuse.

SWA's has proposed a model whereby specialist family law solicitors hosted by local Women's Aid services will **intervene earlier, reducing harm and risk to women and children and court burden**. Our financial model, which is based on assumptions drawn from the findings from this research, demonstrates how a specialist service would **save money for the public purse** by reducing court burden and time wasted when the client-solicitor relationship fails to work effectively in domestic abuse cases. The emotional, social and health consequences also have costs to individuals and employers, and the model attempts to quantify the financial impact that could be avoided through earlier and more appropriate intervention.

Human rights obligations

Under the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Scottish Government has the obligation to protect women from gender-based violence, including domestic abuse, and to ensure their equal access to justice. Effective access to legal services forms a key element of ensuring women's equal access to justice in practice.

The Committee which monitors the implementation of CEDAW highlights that justice systems should be accessible to women and that economic accessibility requires the **availability of "free or low-cost legal aid, advice and representation" at all stages of judicial processes**. CEDAW also recommends **that legal service providers should be "competent and gender-sensitive"** and that any means testing for access

to legal assistance should be based solely on the woman's income because she may not have access to "family income".¹

This information is excerpted from the final report prepared by research consultants On the Tin. SWA would be happy to share more information as requested.

¹ UN Committee on the Elimination of all forms of Discrimination Against Women (CEDAW), General recommendation No. 33 on women's access to justice, UN Doc. CEDAW/C/GC/33, para 36-37