Scottish Policy Forum

Focus on the future

STAGE 2 CONSULTATION PAPER

Legal aid

Scottish Labour

1. Introduction

Justice should not be dependent on someone's income. This is a principle which Scottish Labour believes is a cornerstone of a fair society.

Since 1987, Scotland has had a legal aid system that provides publicly funded legal advice and representation for people on the lowest incomes. Legal aid is often the only way that those in financial hardship can secure legal support, often at times when they are dealing with traumatic situations, such as child contact and custody.

2. Overview of Legal Aid in Scotland

The Scottish Legal Aid Board (SLAB) administers legal aid in Scotland via a network of solicitors registered to provide legal assistance in civil and criminal matters, who usually work in private practice and are paid on a case by case basis. SLAB evaluates applications for legal aid and eligibility is based on a person's income and savings.

The total cost of legal aid assistance between April 2023 and March 2024 was £151 million, £85 million of that was spent on criminal legal aid and £52 million on civil legal aid[1]. The Legal Aid Fund is demand led and is not capped.

However, due to underfunding by the SNP, the legal aid system is in trouble, as more and more solicitors are choosing not to take on civil legal aid cases because legal aid fees have not kept in line with inflation and for many solicitor firms, who are effectively small businesses, it is not a viable business model[2]. As well as fewer providers taking on cases, more than a third of current legal aid solicitors are set to retire in the next decade which could result in the possibility of the system collapsing. The impact of this is that vulnerable people in Scotland will not be able to access justice[3].

[1] Scottish Legal Aid Board (6 Nov 2024) Annual Report and Accounts for year ended March 2024
[2] Amnesty International (January 2025), submission to Scottish Policy Forum
[3] Scottish Legal News (19 Nov 2024) Legal aid crisis looks unsolvable

The sector has been raising its concerns with the SNP for years, but "despite numerous consultations and promises from the Scottish Government, meaningful reform still hasn't happened[4]".

3. Types of Legal Aid

Legal aid in Scotland is divided into two categories:

- Criminal Legal Aid: Free legal advice is available to everyone in custody in Scotland. Legal aid is available for people who are charged with criminal offences to cover the cost of representation at court by solicitors or advocates, and for bail applications. Getting criminal legal aid depends mainly on whether it is 'in the interests of justice' that the defendant is legally represented[5]. The most common criminal legal aid cases are to do with assault, sexual offences and offensive behaviour.

- Civil Legal Aid: This covers cases involving family law, immigration, housing and other civil matters, such as road or work accidents. The most common civil cases are to do with child contact or custody, adoption, immigration and asylum cases and deportation. Individuals may seek legal advice and representation in court[6].

The criminal legal aid market generally operates quite separately from the civil legal aid sector.

4. Eligibility Criteria

The eligibility for legal aid is determined by a means test, which considers the applicant's income, capital, and financial circumstances. In addition to determining whether someone cannot afford to pay their legal costs, specific merit tests are also applied to the legal case, ensuring that it has reasonable prospects of success. Depending on how much income a person has, they may be asked to pay towards some of the costs.

[4] Human Rights Consortium Scotland (accessed 1.4.25), Civil legal aid reform
[5] Citizens Advice Scotland Help with legal costs (Scotland)
[6] Law Society of Scotland (20 Oct 2022) Legal aid crisis hitting Scotland's most deprived families, news release

Legal aid is restricted to individuals (community groups, charities etc cannot access legal aid).

5. Changing landscape

There appears to be an increasing specialisation in the legal aid market, with a smaller cohort of providers doing a larger proportion of cases.

Between 2010 and 2020, the number of firms providing civil legal aid decreased by 16% and the number of criminal firms decreased by 25%[7].

The Scottish Legal Aid Board's most recent report states that 596 solicitor firms in 2023-24 submitted one or more legal aid applications, which was a reduction from 621 firms the previous year. Of the 596 active firms, 156 firms (26% of the total) focused on only criminal legal aid, 187 firms (31%) delivered only civil legal aid, and at the multi-sector end there were 137 firms (23%) delivering all types of legal assistance[8].

However, below those top line figures it seems there is a much smaller number that are doing legal aid work on any significant level. The busiest twenty percent of all firms dealt with 64% of all legal aid applications; conversely, 60% of firms dealt with just 14% of all legal aid applications. The criminal only specialist firms made 366 applications on average per firm whereas the civil only firms made 139 applications on average. The 137 firms delivering all types of legal aid averaged 459 applications per firm[9].

The civil legal aid sector is often stratified into subject areas, for example specialist asylum law providers (which are concentrated in the Central Belt). Most providers are private businesses, e.g. solicitor firms, although there are a few law centres and other third sector providers. Third sector models have developed which has seen partnerships between solicitor firms and specialist third sector bodies such as Scottish Women's Aid and Scottish Rape Crisis Centre[10].

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[7] Law Society of Scotland (1 March 2022) Legal aid – fee regulations, submission to Scottish Parliament Criminal Justice Committee

[8] Scottish Legal Aid Board (6 Nov 2024) Annual Report and Accounts for year ended March 2024

[9] Scottish Legal Aid Board (6 Nov 2024) Annual Report and Accounts for year ended March 2024

[10] A Dickson and P Brown (24 Jan 2025) Submission to Scottish Labour's Scottish Policy Forum

6. The challenges

With declining numbers of solicitors choosing to take on legal aid cases – particularly complex cases - and with more than a third of legal aid lawyers set to retire in the next decade, there is concern about the knock on impact on access to justice.

If people cannot afford a solicitor and are unable to secure a legal aid solicitor they may feel that they have no choice but to abandon their claim. Many people are unable to consider the idea of taking a case to court and then also representing themselves, because of the intricacies and inaccessibility of the court system.

The sector argues that fees have not kept in line with inflation and that the costs of taking on legal aid cases do not cover the actual costs of the work done "by a considerable margin"[11]. The rates for doing legal aid are considered to be too low to be economically worthwhile. Civil legal aid funding has increased by only 10% since 1999, compared to 55% inflation[12].

Another issue that has been raised is the restrictive limits the Scottish Legal Aid Board puts on what it considers to be chargeable work. This creates a disincentive to take on complex cases as they are likely to require considerable legal research and legal providers will not be compensated for that time.

Legal aid cases are paid on completion of a case which can cause cash flow issues. This is exacerbated by the uncertainty about how much solicitors will recover in the end because "even if SLAB authorises work, it then audits that work and can refuse to pay for anything it decides was unnecessary or took too long[13]".

Fees for travel were cut in 2011 in response to the financial crisis, which the Law Society of Scotland says led to firms in rural areas closing in the

[11] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland

[12] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland

[13] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland

subsequent decade and a decrease in the number of firms in the Central Belt travelling to other parts of Scotland[14].

Another challenge is firms who predominantly rely on legal aid fees cannot match the pay and conditions that the public sector offers[15]. The Law of Society of Scotland has pointed out the imbalance in the criminal justice system where prosecutors have seen their remuneration increase, whilst those who are defending clients through criminal legal aid have not[16].

Another huge issue is that the legal aid system has become so bureaucratic and complex that even solicitors, far less the individuals seeking support, find the system hard to navigate[17].

7. SNP has failed to take meaningful action

The sector has made its concerns known to the Scottish Government for years now, but little meaningful change has taken place, despite several consultations by the Scottish Government[18]. "Despite Government promises of reform, our legal aid system is crumbling, leaving people in poverty without access to justice[19]".

There was an independent review of legal aid in 2018, but the recommendations from that review still remain largely unimplemented. Instead, there have been one-off funding boosts that don't tackle the underlying structural issues, and no real progress has been made[20].

In April 2024 the Law Society of Scotland, along with other stakeholders withdrew from the Scottish Government's Legal Aid Remuneration Project

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[14] Law Society of Scotland (1 March 2022) Legal aid – fee regulations, submission to Scottish Parliament Criminal Justice Committee

[15] Law Society of Scotland (1 March 2022) Legal aid – fee regulations, submission to Scottish Parliament Criminal Justice Committee

[16] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum

[17] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum

[18] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland

[19]Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland

[20] Human Rights Consortium Scotland (Jan 2025) Submission to Scottish Labour's Scottish Policy Forum

and Research Analysis Group "having lost confidence both in the delayed process of creating a [fee] mechanism and in there being any meaningful outcome if and when a mechanism is agreed[21]".

In February 2025 the Scottish Government published a discussion paper on legal aid reform which has a three stage approach:

- changes to regulations to simplify the current system
- reform of legal aid fees
- introduce long-term reform which includes testing different funding models[22].

However, the Law Society of Scotland's response to the Scottish Government's paper outlined how it fails to reflect the urgency and scale of the crisis in access to justice: "The Scottish Government has finally acknowledged that legal aid is in trouble. However, at a time when legal aid is burning to the ground, the Scottish Government has put in an order for a bucket rather than calling the fire brigade[23]." The Law Society of Scotland highlighted in particular that the paper had nothing to say on the key issue of fees[24].

The Scottish Parliament's Equalities, Human Rights and Civil Justice Committee has also launched an inquiry into civil legal aid[25]. It wants to look at what is working and not working within the current civil legal aid system, and what changes could be made in the short and longer term to address access issues.

The challenges within the legal aid system have been well examined but what is now required is meaningful action.

[21] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum
[22] Scottish Government (27 Feb 2025) Legal aid reform: discussion paper, submission to Scottish Parliament Criminal Justice Committee
[23] Law Society of Scotland (27 Feb 2025) Scottish Government's legal aid plans fail to reflect urgency of crisis, new release
[24] Law Society of Scotland (27 Feb 2025) Scottish Government's legal aid plans fail to reflect urgency of crisis, new release
[25] Equalities, Human Rights and Civil Justice Committee, Scottish Parliament, Legal Aid, call for views

8. What actions could be taken

Improving the fee mechanism

For solicitors, improving legal aid fees is crucial. If providers are to continue to have business models based on legal aid work, then an urgent review of payment is required[26].

An additional £11 million was made available for a 10% increase in fees that came into effect in April 2023 but the Law Society of Scotland said that high levels of inflation wiped out the positive impact of the boost in fees[27].

The sector also wants travel fees and compensation for work that is currently not chargeable to be addressed[28].

The Law Society of Scotland argues that a process for periodic review, taking inflation into account, is sorely needed and that the Scottish Government must deliver an across the board increase in fees[29].

Overhauling the complexity of the legal aid system

The Law Society of Scotland has also said that the "complexity of the system and the challenges around funding" are key to the reduction in the number of solicitors offering legal aid.

The governing legislation was introduced back in 1986, pre-dating the Scottish Parliament and the introduction of human rights legislation[30]. An overhaul of the system is urgently needed to simplify the system.

Improving access to civil legal aid providers

Currently it is up to a network of small businesses (solicitor firms) to decide whether or not it is in their business interests to take on a civil legal aid case.

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[26] Law Society of Scotland (1 March 2022) Legal aid – fee regulations, submission to Scottish Parliament Criminal Justice Committee
[27] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum
[28] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland
[29] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum
[30] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum

Finding specialists in areas like human rights, gender-based violence, or environmental law is difficult and there are no immigration legal aid solicitors north of Glasgow[31].

Pauline McNeill, Scottish Labour's Shadow Cabinet Secretary, has highlighted how a reduction in legal aid solicitors will have a disproportionate impact on women, as victims of domestic abuse seeking non-harassment orders or other emergency representation, could struggle to find someone to take their case on through legal aid. The Scottish Women's Rights Centre, has said that domestic abuse survivors typically contact between 30 and 50 solicitors before they secure representation[32]. This will be even more difficult if someone lives in a rural area or has a complex case.

However, the Scottish Legal Aid Board says there are hundreds of lawyers working in criminal and civil legal aid nationwide but there may be "pockets" where they are harder to access[33].

Analysis by the Law Society of Scotland found that the 139 most deprived communities in Scotland, resident to around 100,000 people, shared just 29 civil legal aid firms between them. There are no civil legal aid firms at all in 122 of the 139 areas. Of the legal firms in these areas, nearly 90,000 people are left without any local access at all[34].

Other incentives are likely to be needed to attract legal aid solicitors in rural and underserved communities[35]. Scottish Labour could look at different ways of supporting new career paths and business models in legal provision.

More can also be done with technology and allowing people to access legal advice through video consultations. There are also initiatives such as mobile legal clinics, which go at scheduled times to under-served areas to provide help and assistance to those who need it.

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[31] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland
[32] BBC News (6 Feb 2025) Divorce case turned down by 116 legal aid lawyers by David Cowan
[33] BBC News (6 Feb 2025) Divorce case turned down by 116 legal aid lawyers by David Cowan
[34] Law Society of Scotland (20 Oct 2022) Legal aid crisis hitting Scotland's most deprived families, news release
[35] Human Rights Consortium Scotland (Jan 2025) Submission to Scottish Labour's Scottish Policy Forum

Improve eligibility of civil legal aid

The means testing regime for civil advice and assistance has not been uprated since 2011. The current eligibility thresholds are considered outdated and exclude many who cannot realistically afford legal representation[36].

When the fee mechanism for solicitors is reviewed, the financial threshold for legal aid should also be looked at. This means that if solicitor fees are adjusted for inflation, then the eligibility levels for those seeking support should also be adjusted for inflation, otherwise fewer people will continue to qualify[37].

Any review should also consider the amount of contributions that people are asked to make towards their fees, as those who do qualify for legal aid are often asked to pay unaffordable contributions.

Simplifying the application process is also crucial. The Law Society of Scotland supports developing simpler systems for means and merit tests that can be understood by clients, solicitors and the public[38].

Scottish Labour should also consider launching a public awareness campaign to let people understand their rights and to make them aware of how to access legal aid services.

Legal aid providers could also take measures to make things easier for clients, such as offering packages of fixed fees for particular types of civil cases, e.g. simple divorce cases.

Law Centre models

Law Centres have historically responded to housing issues, but the law centre model is potentially something that could be developed more. This would require a definition of what a Law Centre is and accountability mechanisms would need to be improved[39]. Law centres could have

[36] Human Rights Consortium Scotland (Jan 2025) Submission to Scottish Labour's Scottish Policy Forum
[37] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum
[38] Law Society of Scotland (Feb 2025) Submission to Scottish Labour's Scottish Policy Forum
[39] A Dickson and P Brown (24 Jan 2025) Submission to Scottish Labour's Scottish Policy Forum

partnerships with community organisations and provide accessible entry points for those who need legal help.

Should legal aid be expanded to groups

Some organisations have asked that legal aid be expanded to groups, NGOs and charities. They argue that the onus should not be on individuals to address systemic issues[40].

Environmental campaigners want to see legal aid expanded to environmental issues because they believe that polluters will act with impunity without the credible threat of legal challenge[41]. The Scottish Policy Forum would welcome views on whether this would be a good use of legal aid and what it would mean for the system, including the affordability of it.

9. Conclusion

For over thirty-five years, Scotland's legal aid system has been a lifeline for those on the lowest incomes. The system needs to change to ensure the sustainability and accessibility of legal aid across the country. A Scottish Labour government will always fight to ensure that that those on the lowest incomes have access to justice.

[40] Human Rights Consortium Scotland, JustRight Scotland, ERCS (4 July 2024) A call for urgent action to reform civil legal aid in Scotland

[41] Environmental Rights Centre for Scotland (January 2025) Submission to Scottish Policy Forum

QUESTIONS

1. How often should legal aid fees be reviewed? What kind of fee payment mechanism would work, whilst still ensuring value for the taxpayer?

2. How can the eligibility for legal aid be changed so that it still remains affordable to the tax-payer but ensures that those on the lowest incomes have access to justice?

3. What can be done to ensure that areas beyond the central belt have access to legal aid representation? What are the barriers – apart from fee levels - to solicitors in rural areas taking on legal aid cases?

4. Is supporting the development of Law Centres something to be encouraged in terms of improving access to justice?

5. Should legal aid continue to be restricted to individuals, and not to groups, charities etc?

SUBMISSIONS

This paper draws out areas that we wish to seek specific evidence and opinions on and we hope to encourage submissions that focus on these questions. However, we welcome responses that are not raised explicitly in the paper.

Submissions should be sent to: **scottishpolicyforum@labour.org.uk**

Please give your name, organisation name (if relevant) and a contact email address.

The deadline for submissions is Saturday 28 June 2025.

Thank you.

Scottish Labour

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