

Shelter Scotland - Scottish Housing Law Service

Response to the Law Society of Scotland's Discussion Paper on Legal Assistance in Scotland

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Introduction

The Shelter Scottish Housing Law Service (SHLS) is aware that the Law Society of Scotland has published a discussion paper on Legal Aid which proposes wide ranging changes to the current system. It is our view that there are a number of areas of serious concern outlined within the proposals in the discussion paper.

About SHLS

The SHLS is an independent Scottish housing law service, which aims to address unmet need for legal advice and representation in Scotland, and through this to prevent homelessness.

The SHLS provides advice and information on housing law; a consultancy and referral service for Shelter Scotland advisers, fieldworkers and Helpline workers. It also provides direct legal advice and court representation to clients referred to the service. SHLS receives direct funding and makes claims on the Legal Aid fund to carry out this work.

Summary of Key Points

SHLS is aware that the discussion paper is considering proposals to revise the whole Legal Aid system. Given that SHLS only has experience of Civil Legal Aid and Housing Law we have restricted our comments to these areas.

The following is a summary of the key points outlined in this response paper:

- SHLS has grave concerns about the proposal to remove Housing Law from the scope of civil legal assistance.
- Housing Law impacts disproportionately on the most vulnerable in society. The proposals outlined in the Law Society's discussion paper would remove protection currently offered to them.
- Housing Law is a complex, fluid area of law that requires specialist legal advice and representation.

- If Legal Aid were not available and the proposal that advice centres represent individuals instead were to be implemented this would significantly affect individuals' access to justice.
- If Legal Aid were not available to those with Housing Law difficulties there is likely to be a net loss to the overall public purse. Any savings seen in not providing Legal Aid to this area would likely be outweighed by the costs of increased homelessness, and medical services following on the negative impact of lack of or poor housing on individuals.

General Comments

SHLS has grave concerns about the proposal to remove Housing Law from the scope of civil legal assistance. In Shelter Scotland's experience Housing Law impacts disproportionately on the most vulnerable in society. This proposal would remove protection currently offered to them. In addition, Housing Law is a complex, fluid area of law that requires specialist legal advice and representation.

One of the fundamental principles that underpins Legal Aid is equality of arms. The vast majority of Housing Law matters involve corporate landlords (such as local authorities) or mortgage companies. These bodies are usually represented by a solicitor who specialises in Housing Law. To expect individuals defending such actions to seek assistance from someone who is either not a solicitor or not a specialist in Housing Law is unjust.

With the current system of Legal Aid available to all solicitors clients have the choice of who they wish to instruct. This choice should not solely be the preserve of those who can afford it. If Legal Aid were not available and the proposal that advice centres represent individuals instead were to be implemented this would significantly affect individuals' access to justice. If they could not pay a solicitor on a private fee paying basis they would be restricted to a small number of advice bodies. This would be especially so in rural areas. This issue could become more acute if that agency required to withdraw from acting or if there was a breakdown in the relationship. In those circumstances, the individual may not be able to access their only local advice provider.

The existence of a Legal Aid Certificate allows a motion to be made to modify expenses to nil. This recognises that those who are eligible for Legal Aid often are in a poor financial position. The law recognises that, in those circumstances, it would be inequitable for them to be liable for expenses. This is an important protection.

It is noted that the discussion paper concludes that around 75% of the Scottish population are currently financially eligible for civil legal aid. It is submitted that this is a slightly misleading figure in the context of considering savings to the Legal Aid budget.

The upper income limit for Civil Legal Aid is currently £26,239 per annum. Clients require to start paying contributions to their Legal Aid at £3,521 per annum. Therefore, a large portion of that 75% will require to contribute to some or all of the Legal Aid account. In addition, clawback allows the Legal Aid Board to recover funds paid out if the client is successful in obtaining property.

Further, if Legal Aid were not available to those with Housing Law difficulties there is likely to be a net loss to the overall public purse. Any savings seen in not providing Legal Aid to this area would likely be outweighed by the costs of homelessness, and medical services following on the negative impact of lack of or poor housing on individuals. This would therefore turn into a false economy overall.

Advice Agencies

We note with interest in the proposal that bodies such as Law Centres and specialist organisations would offer support which would mitigate the effect of Legal Aid no longer being applicable to areas such as Housing Law. Shelter Scotland has experience of publicly funded projects that provide legal advice and representation to clients.

Funding can be restricted to a particular geographical area. If this were to be how funding were to continue in the absence of Legal Aid, this could lead to a patchwork effect that could impact on universal availability.

Funding can be restricted in subject matter. By way of example, one funder may wish to focus on economic cases (such as evictions due to arrears). This would mean that that project would not be able to, for example, take Judicial Review actions to challenge homelessness decisions made by local authorities.

It is difficult for funders to administer open ended budgets. Therefore it is likely that funding would be subject to a cap. In the nature of litigation it is difficult to accurately anticipate all outlays that will be incurred. By way of example it is conceivable that defending a 'simple' action of eviction due to rent arrears could lead to instruction of an architect to speak to dampness problems and medical experts to speak to medical problems experienced by the tenant. This could lead to outlays of around £1,000. In the current system these outlays would be covered by the grant of Legal Aid provided sanction had been obtained. If Legal Aid were not available advice agencies would require to estimate how many such cases that they would deal with in a year in order to submit a budget for funding. This could lead to advice agencies requiring to avoid or placing a limit on dealing with complex cases for budgetary reasons. As matters stand, Shelter Scotland understands that many advice agencies currently rely upon Legal Aid to 'top up' their funding to address this issue.

Due to restrictions on funding many advice providers require to keep costs to a minimum. This is often achieved by a mixture of Solicitors and Lay Representatives. Lay Representatives are a hugely useful resource and can provide invaluable support to clients. However, if finances were to be restricted then it could be expected that the balance may move towards an increased reliance on Lay Representatives. This could pose the following problems:

- Shelter Scotland's interpretation of the Court Rules as they currently stand is that Lay Representatives cannot competently fully conduct a Proof in Summary Cause actions such as those for recovery of possession.
- Lay Representatives cannot appear in Ordinary Cause matters. Whilst Lay Representatives who are authorised under the Homeowner and Debtor Protection (Scotland) Act 2010 are competent to appear in Summary Application actions relating

to mortgage arrears there are other Housing Law actions (such as actions for Specific Implement) that are Ordinary Cause matters.

- Housing cases can involve the citing of Expert Witnesses such as architects and medical witnesses. Only a Solicitor or Sheriff Officer can cite a witness. In addition, witnesses have the comfort that a Solicitor is personally liable for that witnesses' fees and expenses.

Not all advice agencies are able to provide specialist Housing Law advice and representation. Many are more general in nature. The existence of these general advice providers, whilst providing very significant assistance to many individuals cannot appropriately replace specialist legal advice and representation.

In addition, advice services by their nature are open to all. This could have the unexpected consequence of free legal advice and assistance being provided to those who could afford a solicitor. The present system of Legal Aid means testing means that public funds are not spent on those who could afford a solicitor.

Taking these concerns together the only circumstances where SHLS would not oppose housing being removed from the scope of civil legal assistance would be if the following criteria were established:

- A guarantee is provided that sufficient funding will be available.
- Advice agencies are provided with open ended funding.
- Advice agencies are funded to provide advice and representation on all aspects of Housing Law.
- All of Scotland is suitably provided by appropriately accessible advice agencies.
- The funding is structured to provide an appropriate balance between legally qualified and non-legally qualified staff.

Single Continuing Grant

SHLS agrees in principle that a single continuing grant of Legal Aid would reduce the administrative burden and looks forward to being advised of further information regarding this.

Alternative Funding Methods

With the exception of actions for damages, Speculative Fee Agreements are not usually applicable in Housing Law situations. We can see that this could be extended whereby if a client manages to successfully defend an action for eviction a fee uplift is applied and the client charged. Given that many clients in this situation are in significant financial difficulty such an arrangement would make any victory pyrrhic if they were then to be charged an inflated fee. In any event, it is not entirely clear why those with insufficient income to fund a solicitor on a private fee paying basis should be penalised by inflated fees under a Speculative Fee Agreement.

SHLS also has significant concerns regarding the proposal of a loan to cover legal expenses. Many of the clients whom SHLS acts for are in arrears. This is often due to an overreliance on credit. It would be disingenuous to encourage such clients to get further into debt.

It is not clear if this would be a commercial loan and if interest would be charged on it. It would seem odd if it were not commercial in some way as the administrator would, presumably, wish to profit from it somehow or at least cover costs. In those circumstances, it is not clear why those with insufficient money to instruct a solicitor on a private fee paying basis should be required to, in effect, pay more than those who do have sufficient money. Currently where a client pays a contribution towards Legal Aid if their circumstances change the level of contribution and repayment rate can be reviewed. Under a loan scheme the capital element of the loan would not be capable of change.

In addition, we would be concerned with any proposal whereby solicitors become debt collectors. This would potentially become non chargeable work that firms would have to carry out which would discourage firms from undertaking work for clients with low income.

Payment plans are also not attractive in that these would be detrimental to clients of low funds. The same comments as above regarding debt collection apply.

Contact

For further information in relation to any aspect of this response paper, please contact:

Christopher Dunbar Purcell

Principal Solicitor

Shelter Scottish Housing Law Service

Chris_purcell@shelter.org.uk

0344 515 2414