

A Sustainable Future for Legal Aid

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Introduction

1. *Renewing Scotland: The Government's Programme for Scotland*, published on 7 September 2011, sets out the Government's intention to maintain and improve access to justice in the current economic climate, including by taking forward a series of legal aid reforms.¹ The proposals in this paper set out how we will do this. The ambition is to maintain a fair, high quality and equitable system which maintains public confidence at an affordable and sustainable level of expenditure.

2. The reforms will be taken forward through the Making Justice Work programme. The aim of the programme, which has been set up by the Scottish Government, is to ensure that Scotland's justice system is fair and accessible, cost-effective and efficient and that it resolves disputes and prosecutions quickly, securing just outcomes.² Widening access to justice is a key part of this programme, with a range of specific projects being developed in order to support and empower citizens to avoid (or resolve informally) disputes and problems wherever possible. The programme will also aim to ensure people have access to appropriate and proportionate advice and to a full range of methods of dispute resolution, including courts and tribunals where necessary, and appropriate alternatives.

3. The proposed way forward for legal aid has four overarching themes:

- ***Focusing legal aid on those who need it most***
- ***Ensuring wider access to justice – the right help at the right time***
- ***Maximising the value of legal aid expenditure***
- ***Making the justice system more efficient***

4. These themes focus, first, on a preventative approach that avoids problems escalating to the point at which they can cause lasting damage and disruption to the people in our communities - which can, of course, have knock on effects in the communities themselves. Second, the themes focus on ensuring that legal aid, a vital public service, is as efficient and as clearly focussed on agreed outcomes as it possibly can be.

5. Even with such reforms, the legal aid system in Scotland will continue to face considerable pressures, including potential costs arising from judgements such as that of the UK Supreme Court in the *Cadder v HMA* case³. Creativity, ambition and innovation will be key to ensuring that access to justice can be maintained by a continued commitment to a non cash limited legal aid fund even in a time of reduced

¹ For details of the Programme for Government see the following press release: <http://www.scotland.gov.uk/News/Releases/2011/09/07120559>.

² For more details on the Making Justice Work Programme please refer to the following pages of the Scottish Government website: <http://www.scotland.gov.uk/Topics/Justice/legal/mjw>.

³ The judgment in this case can be found on the website of the UK Supreme Court at: http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf.

expenditure. This won't be easy. But we believe the challenge can be met if all those involved in ensuring access to justice in Scotland are prepared to work together to meet the pressures we face in a positive spirit. This vision will form the basis for the conversations we intend to have with stakeholders.

Background

6. The Scottish Government is strongly committed to ensuring access to justice. It provides the funding both for the Scottish Legal Aid Board ("the Board"), which administers the legal aid system, and the legal aid fund. The fund allows people, who could not otherwise do so, to be able to pursue or defend their rights or pay for their defence. As such it supports and facilitates the court system and makes a vital contribution both to the system of justice in Scotland and to the Scottish Government's purpose, which is to create a more successful country with opportunities for all to flourish, through increasing sustainable economic growth.

7 In 2007-11 a series of measures were taken to increase access to justice, including increasing financial eligibility for civil legal aid in 2009 so that those with disposable incomes of up to £25,000 could qualify. This change means that over 70% of the Scottish population would now qualify financially for civil legal aid, albeit applicants with higher levels of disposable income are required to pay contributions to their case. In addition, the Government has also provided funding to the Board to enable it to work with the third sector to establish innovative new services to help people with legal problems, including those associated with the economic downturn.

8. The Scottish Government has also remained committed to enabling the legal profession to be fairly remunerated for the work they do, whilst also ensuring value for money for the taxpayer. To this end:

- in 2008 summary criminal legal aid was reformed;
- in 2009 improvements were made to the civil legal aid fee structures for solicitors, including a 10.52% increase in detailed fees and an increase in the block fee unit from £19 to £21;
- in 2010 solemn criminal legal aid fees were restructured and increased by 7%; and
- in 2010 the table of fees for counsel in criminal appeal cases was updated and the relevant fees increased.

9. Finally the Government, under the Legal Services (Scotland) Act 2010, placed a duty on the Board to monitor the availability and accessibility of legal services. The Board is carrying out this important function with the assistance of a new Access to Legal Services Reference Group, which first met in June 2011. The group is made up of bodies who have an active interest in, and experience of, the provision or use of legal services.

The current landscape

10. In Scotland, help with legal problems is provided through a complex framework of providers across the private, public and third sectors. Local authorities directly provide advice services such as debt and welfare rights advice.

Organisations in the third sector such as Citizens Advice Bureaux, Shelter and money advice services are funded from a range of public and charitable sources including local authority grants and grants from the Legal Aid Fund. Solicitors in private practice provide legal services paid for in a range of ways, including private fee arrangements, legal aid and legal expenses insurance. There are also solicitors in law centres who receive funding from a wide range of funders. The Board provides direct legal services through a small network of employed solicitors in the Public Defence Solicitors' Office ("the PDSO") and the Civil Legal Assistance Offices ("the CLAOs"). In addition, there are other advice and representation services such as university law clinics, pro bono initiatives and trade union advice services.

11. The Legal Aid Fund is the biggest single funder of legal services. The majority of legal aid expenditure is on criminal matters. Total legal aid expenditure in 2010-2011 was £161.4m. Expenditure on criminal legal assistance was £104m and on civil net expenditure was £52.1m.

12. Legal aid in Scotland is available for a much broader range of categories of case than in most other countries. Virtually all types of civil disputes and criminal cases have a form of legal aid provision, whether this is Advice and Assistance (A&A), Assistance by Way of Representation (ABWOR, a form of A&A) for representation, or representation through legal aid. Eligibility is controlled by tests set out in the legal aid legislation.

13. As set out in the Board's *Annual Report 2010-11*, applications for civil legal aid in Scotland remain at a historic high.⁴ The independent survey of civil legal aid applicants in 2009 showed that 97% would recommend legal aid to a friend and only 5% had experienced difficulty in finding a solicitor.⁵

14. The Board also reports that the number of firms and solicitors providing legal aid is continuing to increase, as per the major survey carried out in 2010 in which most firms were very positive about their intention to continue to provide legal aid services.⁶ There are around 1400 solicitors and 576 firms registered to provide criminal legal assistance and 654 firms registered to provide civil legal assistance.

15. The majority of legal aid fund expenditure is on legal services provided by solicitors in private practice who are paid on a case by case basis. The legal aid fund also pays for targeted funding, including:

- Direct employment by the Board of 14 solicitors who provide civil legal assistance in 4 offices (CLAOs) around Scotland and 23 PDSO solicitors in 7 offices across the country. CLAO and PDSO solicitors are paid a salary, not on a case by case basis as happens with private solicitors' firms.

⁴ The Annual Report 2010-11 can be found at http://www.slab.org.uk/publications/annual_reports/index.htm.

⁵ The 2009 Applicant survey can be found at: http://www.slab.org.uk/about_us/research/Stakeholderengagement.htm.

⁶ The 2010 Solicitor Survey can be found at: http://www.slab.org.uk/about_us/research/Stakeholderengagement.htm.

- Grant funding of 23 services including well-established In Court Advice projects providing advice and representation in sheriff courts and other projects providing advice and representation services across Scotland. The Government decided that the additional funding made available for grant funding should continue into 2011-12.

16. The landscape in which legal aid and access to justice operates in Scotland is dynamic as well as complex. Following the Cadder case the Scottish Parliament passed the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. This Act enshrined a suspect's right of access to legal advice before and during interview by the police. Subsequently, Regulations were laid placing a duty on the Board to arrange for a solicitor to be available for the purposes of providing advice to suspects detained by the police for interview. This has implications for the fund, solicitors and the Board - resulting in the Board setting up and running, from July 2011, a police station duty scheme.

The scale of the financial challenge

17. Reflecting the drop in Scotland's overall budget as a result of the UK Government's Comprehensive Spending Review in 2010 ("CSR 2010"), the outcome of the Scottish Government Spending Review 2011 will be extremely challenging for all areas of government expenditure.⁷ As can be seen from table 1 below, the budget for legal aid will fall to £132.1m in 2014-15. Table 1 also sets out the Board's current forecasts for legal aid expenditure in the years covered by the spending review. Although these forecasts are as accurate as possible at the current time, legal aid expenditure will, however, continue to fluctuate depending on demand and on changes in legislation or society.

Table 1: Implications for legal aid of SR2011

	Current forecast for legal aid spend	Scottish Government Budget
2012-13	£146.7m	£144.1m
2013-14	£145.4	£138.1m
2014-15	£145.3m	£132.1m

18. The financial challenge would have been much greater and the savings that need to be made now would have been much deeper and more difficult if the Government had not acted quickly after CSR 2010 to make immediate reforms to legal aid. These reforms were designed to preserve access to justice as much as possible.

⁷ The Scottish Spending Review 2011 and Draft Budget 2012-13 can be found at: <http://www.scotland.gov.uk/Publications/2011/09/21104525/0>.

19. Unlike in other jurisdictions, the Scottish Government has not approached this challenge by proposing major changes to the scope of legal aid. The Government's view remains that wholesale reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society.

20. Together, the first package of reforms are currently expected to deliver a reduction in expenditure of about £11m in 2011-12, rising to around £15 - £16m per annum thereafter. Expenditure as a result is already forecast by the Board to come down to £145.3m in 2014-15.

21. The challenge is clear. We need to have arrived at a sustainable level of legal aid spending within the next 2-3 years. This is all the more difficult given the underlying increase in civil and criminal expenditure, driven by factors including the continued high demand for civil legal assistance resulting from the economic downturn, the development and implementation of the police station duty scheme and the UK Government's increase in VAT in early 2011. Further pressures are likely to arise on legal aid including following Lord Carloway's review of the law and practice in light of the Cadder decision.⁸

The first package of legal aid reforms 2010-11

22. The first package of reforms included reductions in fees for summary criminal cases in a number of areas, the reduction by half of the fees for solicitors' travelling time, a limited expansion of the PDSO and the updating of the existing table of fees for counsel acting in civil legal aid cases in the Court of Session and the introduction, for the first time, of a table of fees for counsel acting in civil legal aid cases in the Sheriff Court, which is expected to deliver significant savings. Some changes were made to financial eligibility and verification, in order to obtain best value and protect the taxpayer. The Board also undertook a wide ranging and thorough programme of best value reviews of different areas of its work in this period, including in the fields of mental health, immigration and asylum and in its approach to child contact cases. Finally, the Board's grant in aid was cut by £1.1m in 2011-12, a bigger percentage cut than for the fund.

23. The Government worked very closely with the Board in developing these proposals. We consulted with the Law Society of Scotland ("the Society") and the Faculty of Advocates ("the Faculty") where appropriate, before we moved ahead with any of them. In many cases, we altered our original proposals in response to useful comments and suggestions. The Government published full equality and business and regulatory impact assessments of the proposed savings.⁹ The Government and the Board continue to monitor the impact of the changes.

⁸ For more details of Lord Carloway's review see: <http://www.scotland.gov.uk/About/CarlowayReview>.

⁹ The Scottish Government's Business and Regulatory Impact Assessment for the first package of legal aid savings can be found at: <http://www.scotland.gov.uk/Topics/Justice/legal/17822/legalaid/bria>. The corresponding Equality and Impact Assessment can be found at: <http://www.scotland.gov.uk/Topics/People/Equality/18507/EQIADetails/Q/Id/650>.

The second package of legal aid reforms

24. The proposed second package of legal aid reforms set out below will be taken forward in line with four themes and will be the subject of detailed discussions with stakeholders. There are numerous approaches that could be taken to delivering legal aid savings, some with more damaging and immediate consequences than others in terms of availability of legal assistance and the outcomes it delivers. The direction of travel set out here will be discussed with a wide range of stakeholders so that an effective approach to delivering the required savings can be found that minimises the risk of damaging access to justice.

Theme 1: Focusing legal aid on those who need it most

25. In a time of reduced expenditure it is essential to focus legal aid on those who need it most, including by ensuring that those who are able to pay for at least some of their legal costs do so. This will enable funds that are still available for legal aid to be better targeted. One of the main criticisms of legal aid systems is that because the public purse pays, the client (and the solicitor) does not have sufficient regard to cost. In civil cases it is often said that a non-legally aided client is at a considerable disadvantage, with the risk that cases are drawn out and made unnecessarily expensive. The modification of expenses adds to this protection for the assisted person. A particular area of risk arises when both parties are legally aided.

26. Steps have already been taken to reduce perverse incentives to prolong cases, including the introduction of block fees for a range of work, both civil and criminal. However, in the very difficult circumstances we face we believe more may need to be done to ensure that, while legally aided clients should not be disadvantaged compared to those meeting their own legal costs, nor should they have an unfair or disproportionate advantage. This is sometimes referred to as increasing 'private client reality' and applies, albeit in different ways, in civil and criminal assistance.

27. The Scottish Government consulted earlier this year on a proposal to make changes to financial eligibility and to introduce contributions into criminal legal aid.¹⁰ Contributions are already payable in respect of publicly funded advice and assistance and civil legal aid and will be payable in respect of children's legal aid when the Children's Hearings (Scotland) Act 2011 comes into force. The Board collected about £11m in civil contributions in 2009-10. Criminal contributions are common practice in many other legal aid jurisdictions and indeed are already payable in Scotland within a fairly narrow range in criminal cases funded by ABWOR and across criminal A&A. There are therefore very strong arguments for introducing contributions into criminal legal aid.

28. The Programme for Government has now set out the firm intention of introducing legislation in this area. The Legal Aid and Scottish Civil Justice Council (Scotland) Bill will be introduced into the Scottish Parliament by May 2012. As well

¹⁰ The Scottish Government's consultation paper on the proposal to make changes to financial eligibility and to introduce financial contributions into criminal legal aid can be found at: <http://www.scotland.gov.uk/Publications/2011/03/08135507/0>.

as introducing criminal contributions, the Bill will also establish a Scottish Civil Justice Council to replace the existing civil rules councils. The setting up of the Council was suggested by Lord Gill's Scottish Civil Courts Review and is currently the subject of a second Scottish Government consultation.¹¹

29. In addition we propose to make some further changes to civil and criminal A&A and ABWOR. These changes will be a means of increasing eligibility but will also allow for an increase in private client reality and a further focus on those most in need. At present, the assessment of financial eligibility for A&A carried out by the solicitor is done on the basis of disposable income and disposable capital available in the week immediately preceding the application. This will be revised so that the assessment relates to a much longer period and so that those who are able to pay higher contributions do so, paid over a number of weeks or months depending on the cost of the cases. We will also make changes to ensure that the amount expended on the provision of advice and assistance in any given case is proportionate to the benefit the client is likely to obtain.

30. We also propose to move closer to a system in which legal aid is seen as 'funder of last resort'. In many instances there are alternative sources of funding to legal aid that could have been used – including insurance and 'no win/no fee' arrangements. The Board already has discretion to refuse a civil legal aid application in situations where an applicant has 'other rights and facilities' that make it unnecessary for them to obtain legal aid - or where the applicant has a reasonable expectation of receiving financial or other help from a body of which they are a member. The proposal here is that the Board should review the verification of the information currently required under the existing provisions, in particular in relation to applicants' insurance policies.

31. The Board's programme of grant funded services is currently under evaluation. It allows focus on areas of need in particular subject or geographical areas and helps people to obtain the right kind of help. We are reviewing the amount of funding available for targeted provision, its priorities and objectives.

32. **Overall, we estimate that these measures could save around £4.5m-£5m in total by 2014-15**, with the bulk of those savings coming from the introduction of contributions.

33. Finally, a review looking at the expenses and funding of civil litigation in Scotland is currently underway. The review was announced by Fergus Ewing MSP, the then Minister for Community Safety, on 4 March 2011. The review was recommended by the Lord Justice Clerk, Lord Gill in his report of the Review of the Scottish Civil Courts. Sheriff Principal Taylor is leading the review, which it is anticipated will take around 18 months to complete. The review is exploring a number of areas of relevance to the targeting of legal assistance on those who need it most and is considering the extent to which alternatives to public funding, such as speculative fees, damages based agreements, before and after the event insurance and third party funding, may secure appropriate access to justice. The review will

¹¹ For further details of the Gill review see the following webpages from the Scottish Courts Service: <http://www.scotcourts.gov.uk/civilcourtsreview/>.

issue a consultation paper shortly, with the intention of sending a final report to Scottish Ministers for consideration of further action.¹²

Theme 2: Ensuring wider access to justice – the right help at the right time

34. Under the four year Making Justice Work programme, the Scottish Government will bring forward the most radical reforms of our courts and tribunals for at least a century. The aim of the programme will be to ensure that Scotland's justice system will be fair and accessible, cost-effective and efficient, will resolve disputes and prosecutions quickly and secure just outcomes. This programme will have clear implications for legal aid. Changes to court structures and other dispute resolution processes will inevitably impact on the cost and nature of services provided under legal aid, while new models for the funding or delivery of services supported by the legal aid fund may also be required to support and facilitate changes to the wider system.

35. A key part of the Making Justice Work programme focuses on widening access to justice. This work will aim to deliver the maximum benefits by looking beyond any one form of delivery, encompassing the variety of current models and sources of provision including face to face, telephone and online services delivered by lawyers and other advisers working in the private, public and third sectors. The aim will be to avoid duplication and maximise the outcomes delivered by available resources such that the people of Scotland are better able to deal with and resolve the problems life throws at them.

36. Ensuring people get the right help at the right time will be a major challenge. We need to move towards a system whereby people can access the advice and information they need in the most appropriate manner and in the format and detail that suits them most. To take this forward we will draw together and into the programme a number of existing and developing strands of work to ensure a coherent approach that contributes directly towards the Government's broader outcomes framework and integrates with other ongoing cross-government initiatives. In particular, the programme will reflect and build on:

- the key recommendation in the January 2011 report of the Civil Justice Advisory Group ("the CJAG"), chaired by Lord Coulsfield.¹³ The report recommended that the civil justice system should be designed to permit a 'triage' approach to help inform and guide individuals in identifying the most appropriate route to dealing with civil justice problems at each stage of the 'user's journey'.
- significant recent pro bono initiatives in Scotland, such as the Government provided start-up funding for 'LawWorks Scotland', which was launched in March 2011 with the aim of coordinating, developing and encouraging the provision of pro bono legal services by solicitors in private practice and in-

¹² The consultation paper will be made available on the review's website www.taylorreview.org, together with details of how to respond.

¹³ The CJAG report can be found at: <http://www.consumerfocus.org.uk/scotland/policy-research/legal/civil-justice-advisory-group>.

house university law schools.¹⁴ Although the vast majority of advice, assistance and representation will continue to be provided by public or private funding, pro bono services have an important role to play in ensuring people can get the right advice at the right time.

- important work currently being taken forward by Consumer Focus Scotland, working closely with the Government, with a view to creating “legally empowered citizens” who would have the knowledge, skills and confidence to be able to deal more effectively with law related issues and to help prevent them experiencing legal problems in the first place. There are already many examples of good practice in this area but we believe that more could be done to coordinate and build on this work. As part of the Making Justice Work programme, the Government is working with Consumer Focus Scotland as they establish a working group on legal capability involving stakeholders from within and outwith the justice sector. The working group will aim to define and agree the key elements of legal capability and will conduct a scoping study to identify current legal capability activity in Scotland and areas where further action is needed.
- opportunities to promote other forms of dispute resolution and to ensure that citizens have access to the right information and support to resolve disputes without court action, wherever possible. Specifically, we will be considering how we might better build the use of methods of alternative dispute resolution into the court system as we develop the proposals for civil court reform.
- improved arrangements for access to information on legal matters to help people both to deal with some problems on their own and to know the right stage at which they need more detailed support or advice – and where they can get it. A key part of this approach will be the better organisation and signposting of good quality digital advice and information building on the wealth of online resources already provided by many Scottish organisations. Scotland does not currently have a single site where people can access comprehensive information on rights. The lack of – and need for – such an information gateway was highlighted in the CJAG report and in *Scotland’s Digital Future: A Strategy for Scotland*, published in March 2011.¹⁵ This set out the Government’s intention to bring together information about public services in the most effective way possible via the planned ‘DirectScot’ portal (similar to Directgov, the UK Government’s services and information website), which will aim to improve access to public services and information by providing a single convenient access point.

37. Key to the access to justice component of Making Justice Work will be better coordination and streamlining of advice and information so that available resources are maximised, duplication avoided and the correct information is available as, when, and where people need it. The need to move in such a direction was recognised in

¹⁴ For more details on LawWorks Scotland see: <http://www.lawworksscotland.org.uk/>. Other projects in this area include the GLSS’s Pro Bono Network and the Free Legal Services Unit run by the Scottish Bar.

¹⁵ The Digital Strategy can be found at: <http://www.scotland.gov.uk/Publications/2011/03/04162416/0>.

the 2004 *Strategic Review on the Delivery of Legal Aid, Advice and Information*¹⁶. This review concluded that there needed to be a more strategic approach to the planning and delivery of the overall provision of publicly funded legal assistance, as well as better co-ordination and integration of services provided by lawyers in the private sector with those provided by lawyers in the public and not for profit sectors and by non-legally qualified advisers.

38. In 2005 the Government published a consultation paper, based on the recommendations from the *Strategic Review*, entitled *Advice for All: Publicly Funded Legal Assistance – the Way Forward*.¹⁷ Short to medium term proposals arising from this consultation were largely implemented but following the developing relationship between central and local government between 2007-11 the proposal to create a national body to coordinate publicly funded legal assistance was not taken forward. The original proposals were reviewed last year and the results of that review were shared with stakeholders. This process confirmed that there was still a requirement for a more strategic and coordinated approach to the delivery of publicly funded legal assistance.

39. Much has changed since the proposals for national coordination were originally made in the *Strategic Review* and *Advice for All*. But the current economic situation makes the need for better coordination and streamlining of funding all the more acute. As part of the Making Justice Work programme, the Government will work with the Board, COSLA and other stakeholders to develop proposals in these areas, building on work done before the last election but adapting it to the new economic situation we are now facing. This work should help achieve better targeted advice, enabling people to find the right advice at the right time.

40. In taking forward this work, the Government will also reflect its ongoing commitment to the importance of access to direct advice, assistance and representation. Key to this is therefore the achievement of a sustainable legal aid system. Such a system will remain at the heart of a better coordinated and streamlined approach to ensuring the availability of publicly funded information, advice, assistance and representation.

Theme 3: Maximising the value of legal aid expenditure

41. Making sure that all public expenditure is used in as cost effective a manner as possible and that it produces the maximum impact will be ever more important. The Board has been working hard to further increase value and efficiency in legal aid expenditure. It has an ongoing and vital role in safeguarding public money. It saves the taxpayer more than £40m a year by only granting applications that meet the statutory tests, controlling ongoing costs of cases and minimising fraud and abuse of legal aid.

42. Even though the Board now has more responsibilities, its running costs in 2009-10 were around £1m less in real terms than three years previously following a

¹⁶ The Strategic Review can be found at:

<http://www.scotland.gov.uk/Publications/2004/11/20182/45886>.

¹⁷ This consultation can be found at:

<http://www.scotland.gov.uk/Publications/2005/06/16153135/31377>.

freeze in its grant in aid. In 2011-12 the Board's running costs were further reduced by £1.1m in cash terms. The Board has been able to achieve these reductions through an ongoing review of its processes to find areas where expenditure could be reduced, its continued simplification of the legal aid system and expansion of its much admired online systems, which provide a faster and more effective service to legal businesses and their clients. The Board will be required to make further savings in its administration costs over the next three years whilst still delivering a high quality service. This will lead to **additional savings by 2014-15 of in excess of £1.2m**, a greater percentage saving than that required on legal aid expenditure.

43. The Board will continue its programme of Best Value Reviews, which look at different aspects of legal aid delivery in order to analyse whether practices and processes are producing the required outcomes and whether they do so in the most efficient way possible without affecting access to justice. The most significant of the reviews this year will be on the costs of civil cases (which will be a very detailed and wide ranging piece of work including analyses of expenses, high cost cases and court reports) and reviews of payment of the legal profession's accounts and of the costs of expert witnesses.

44. The specific recommendations of two completed best value reviews will be taken forward. The best value review of mental health cases followed a very significant rise in costs since the inception of the Mental Health Tribunal for Scotland in 2005, for those who become subject to the Mental Health (Care and Treatment) Act 2003. Expenditure from the fund is currently around £4.2m p/a. The review, published in February 2011, recommended development of a system of block or fixed fees and an approach to service delivery grounded in best practice and with greater assurance as to the quality of services being provided. The asylum and immigration review was published in March 2011, again in response to concerns about increasing expenditure. The review contains a number of important recommendations, some of which have already been taken forward, designed to ensure that there is appropriate access to legal help in a way that represents best value for public funds.

45. The Scottish Government has carried out research on bar reporters in child welfare hearings.¹⁸ Following this research, the Government intends to consider further, with key stakeholders, what improvements could be made to the arrangements in place in relation to bar reporters, while ensuring that the principle of the welfare of the child remains paramount. Part of this will be considering the costs involved in relation to bar reports and whether these costs could be reduced. In particular, there is currently no table of fees for those appointed by the court in legal aid cases for remuneration of bar reporters and curators ad litem in family cases or for safeguarders in proceedings relating to adults with incapacity and adult support. A lack of a clear structure for payment of bar reporters and curators ad litem has been raised by various auditors, sheriffs and by Lord Gill in his review. Currently bar reporters who are solicitors, curators ad litem and safeguarders tend to charge either at judicial rates or under the former "General Table."

¹⁸ The Scottish Government research is at <http://www.scotland.gov.uk/Publications/2011/01/07142042/0>

46. It is not possible to predict savings on forthcoming Best Value reviews but we anticipate that these, together with the implementation of existing reviews, including that on mental health and work on bar reporters, could produce **overall annual savings of £2-£3m by 2014-15.**

47. In maximising the value of legal aid expenditure, the Government also proposes to lay Regulations which would allow the Board to move towards a contractual relationship with criminal legal aid suppliers. Contracting could deliver **substantial savings of in excess of £3m by 2014-15** and would encourage firms to create efficient business models to deliver services and ensure that the market operates efficiently. Moving towards contracts in some areas could also have benefits in terms of improving consistent and equitable access to justice, allowing for better planning of service delivery in relation to need. Contracts could be used to clearly set out the requirements for specific types of work, for example by ensuring public sector service level requirements are met (including public sector equality duties). Moving to an effective contractual relationship with civil legal aid suppliers would need changes to primary legislation. But given that civil contracts may be a useful way of managing areas of lack of supply and targeting legal services, in a way which cannot be achieved through the traditional judicare model, this will also be considered by the Government.

48. The Board manages the availability of solicitors to provide representation to accused people through the court duty solicitor scheme. The Board and the Government proposed in 2011-12 that savings could be made by making changes to the court duty scheme, primarily through the increased use of the PDSO on the duty plans. The Government had originally proposed that PDSO expansion should deliver £4.75m of savings in 2011-12. In January 2011, after consultation with the Society, the Scottish Government instructed the Board to increase the share of the PDSO on the duty plans and employ a small number of additional solicitors to be able to take on the additional work when necessary in order to make savings of up to £1.3m. In agreement with the Society, the balance of the originally proposed savings was to be achieved through a series of cuts to summary criminal fees.

49. The Board is currently predicting that the expansion of the PDSO agreed in January 2011 will deliver savings of £0.8m in 2011-12. This is lower than anticipated for a number of reasons, partly as a result of later than anticipated implementation. It was agreed that the share of the duty plan would be monitored and kept under review. This will be undertaken over the coming months with the aim of moving to delivery of the remaining additional agreed **savings of £0.5m in 2012-13.**

50. The Government also intends to progress a number of reforms in relation to the fees paid to counsel. The Government will take forward the agreed review of counsel's fees in criminal cases in first instance proceedings. Initial discussions between the Board and the Faculty have already taken place in respect of this review. Further discussions will be required, including with the Society on behalf of solicitor advocates. The Government also intends to reform the fees paid to counsel for travel time, following on from the reform to solicitor's travel fees in early 2011 and there will be a review of the extent to which counsel are used in cases. Together these reforms could produce **savings of up to £2.1m by 2014-15.**

51. Finally, the Government proposes to look at the level of the fees paid to solicitors for sitting behind counsel in civil legal aid, in children's legal aid, in criminal appeals and in solemn criminal cases. In a time of reduced expenditure, it is right that these fees are examined to see if they are commensurate with the work being remunerated for – given that the solicitor is in effect acting in a supporting role to counsel. The Government also intends to look at the currently available options for seeking additional fees and exceptional case status in civil legal aid cases. Together these reforms if all taken forward could deliver up **to £1.6m of savings by 2014-15**.

52. Given the continuing pressures on legal aid outlined above, the non cash limited nature of the fund and the dynamic environment in which legal aid operates, it may well prove necessary to make further savings in addition to those outlined above in order to ensure that the value of legal aid is maximised. In addition, due to changes in behaviour or other factors, the measures outlined above might not deliver the savings originally forecast. In many other jurisdictions it has already proved necessary to move ahead with across the board fee cuts. The Government, with the Board, will closely monitor the situation and come forward with further proposals if that proves necessary.

Theme 4: Making the justice system more efficient

53. The Scottish Government's Making Justice Work Programme, already referred to, is a collection of projects across civil and criminal justice aimed at improving the Scottish justice system, making it fairer, more accessible, effective and efficient. The programme includes a range of short term measures to improve efficiency, including taking steps to ensure that cases go ahead when planned, with less inconvenience to witnesses and fewer police hours wasted.

54. Longer term measures will include implementation of Lord Gill's major reforms to the civil courts, which will ensure that cases are managed effectively and at the right level, and integration of tribunals into a single, more efficient and user-focused Tribunal Service. Lord Gill recommended that low value civil business in the sheriff court should in future be dealt with under a new simplified procedure, with rules written in plain English, where a new judicial officer will adopt a problem-solving, more interventionist approach.

55. Other projects in the programme will have an impact on the experience of users of the justice system. Affordable access to justice is one of the eight benefits that the programme aims to deliver, and all projects will have to consider the impact that they make on access. This is particularly important, for example, in work to make the system more efficient, such as looking at how the court estate is used.

56. Around half of civil legal aid expenditure relates to family cases. The Government will consider what action can be taken in this area in the short, medium and long term both to produce better outcomes for families and children and to reduce legal aid expenditure whilst maintaining access to justice.

57. As was demonstrated by the recent Audit Scotland report, reform of the justice system needs to be done in a way that considers the requirements of each

element of the system.¹⁹ Legal aid needs to be and is closely integrated into all aspects of Making Justice Work. In particular, the Board is leading the project studying the feasibility of greater utilisation of video conferencing in court proceedings, legal agents' prison visits and advice from solicitors at police interviews. The aim is that video conferencing will reduce the need for solicitors and others paid through legal aid to travel unless it is absolutely necessary, with a view to making **savings from the legal aid fund of in excess of £1.2m by 2014-15.**

58. It would clearly be in the interests of all those involved in ensuring the efficiency of the Scottish justice system if legal problems arising from the original decisions of public bodies could be avoided as much as possible in the first place. The CJAG recommended that "the principle of getting it right first time should be encouraged wherever possible". Similarly, the Administrative Justice and Tribunals Council published a report in June 2011 entitled: "Right First Time."²⁰ This report draws attention to the fact that there are now over a million appeals and other challenges or complaints about governmental decisions made each year to tribunals, ombudsmen and other dispute-resolution bodies and makes a number of recommendations in this respect. Scottish Government lawyers have already undertaken important work in promoting across the public sector their own Right First Time publication, which is designed to reduce the risk of unnecessary judicial reviews.²¹ Over the next months the Scottish Government will consider what further actions could be undertaken in this respect, having considered the recommendations in the reports of the CJAG and the Administrative Justice and Tribunals Council.

Next steps: how we will engage with stakeholders

59. This vision for a way forward for a sustainable future for legal aid will be published on the Scottish Government's website and sent to key stakeholders and to the Justice Committee of the Scottish Parliament. As has been noted previously, there are numerous approaches that could be taken to delivering legal aid savings. The direction of travel set out here will form the basis for the ongoing discussions and consultations we and the Board will have with stakeholders, with the intention of agreeing an effective approach to delivering the required savings in a way that avoids damaging access to justice. Some of the proposals will mainly affect the members of either the Society or the Faculty, in which case the Government will negotiate directly with those bodies as was done in the case of the first set of legal aid reforms. Other proposed changes will need to be discussed with a wider set of stakeholders in the context of the Making Justice Work Programme.

¹⁹ This Audit Scotland report can be found at: <http://www.audit-scotland.gov.uk>.

²⁰ The report can be found at: <http://www.justice.gov.uk/ajtc/index.htm>.

²¹ This publication can be found at: <http://www.scotland.gov.uk/Publications/2010/02/23134246/0>.



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