Justice Committee

Scottish Government Draft Budget 2012-13 and Spending Review 2011

Written submission from the Scottish Legal Aid Board

Introduction

1. The Scottish Legal Aid Board (“the Board”) welcomes the opportunity to respond to the Justice Committee’s invitation to submit written evidence on the Draft Budget for 2012-13 and Spending Review 2011.

2. We are the body with statutory responsibility for administering and advising Scottish Ministers on legal aid. By doing so we support the Scottish Government in its aim of enabling access to justice. We support the Scottish Government’s intention to maintain and improve access to justice during the spending review period; while maintaining public confidence in legal aid at an affordable and sustainable level of expenditure.

3. Funding for legal assistance is supplied by the Scottish Government through the Legal Aid Fund (which covers the cost of legal aid cases, most notably the fees and outlays of solicitors and counsel). The Government also supplies the funding for the Board’s administration budget.

The Board’s Administrative Budget

4. Our administrative budget is capped and covers our staff, accommodation and IT costs. As part of the Scottish Government’s drive to make savings, the administrative budget was frozen at £12.9m between 2007-08 and 2010-11. In 2011-12 the budget was then subject to a cash reduction of £1.1m to £11.8m. The 2012-15 Spending Review settlement makes a further cash reduction of £1.3m (11%) over the spending review period. This is a £2.4m cash reduction (19%) since 2007-08, which in real terms means that the Board’s running costs will have reduced by around 33% between 2007-08 and 2014-15.

5. We have managed our frozen budget and subsequent cash reduction in 2010-11 through a series of efficiency measures. This has been delivered predominantly through our digital strategy which includes the development and implementation of Legal Aid Online and consequent reductions in staff numbers. All applications for legal aid are now made online and a substantial proportion of solicitors’ accounts are now submitted online. We have also reduced our accommodation costs by around a third and made significant savings through more effective procurement.

6. The further reductions in our administration budget over the spending review period will require further reductions in staff numbers, which we will aim to achieve my natural turnover or other mechanisms.

Q. What impact will the proposed funding reductions have on the efficient and prompt handling of civil and criminal cases?
7. We and the Government have sought to bring forward options which will not detract from, and will in some cases support, efficient and prompt handling of cases. There are however pressures on the Board which will need to be carefully managed. Although our running costs have reduced over recent years, and will continue to do so, our workload has increased. For example, the Scottish Government transferred responsibility for granting solemn legal aid applications (around 11,000 per year) from the courts to the Board in November 2010; the grant funding scheme started in April 2009; and civil legal aid applications are at a historically high level as a result of the recession. From July 2011, we were also required to set up and run the Police Station Duty Solicitor Scheme which includes a 24 hour/7 days a week telephone advice line operated by the Board. Further, the Children’s Hearings Act will transfer additional responsibilities to the Board from next summer.

8. The various proposals in the Scottish Government’s ‘A Sustainable Future for Legal Aid’ paper will require substantial amounts of development work by us if these initiatives and changes are to be successfully implemented.

9. Over recent years we have worked hard to reduce our turn-around times for dealing with legal aid applications. For example, we aim to decide 99% of summary criminal applications or requests to employ counsel or an expert in 5 days. Our most recent figures show that we actually take on average 1.5 days to take a decision on a summary criminal application.

10. The use of Legal Aid Online will greatly assist us in maintaining short turn-around times. However, we will need to look at further ways of reducing workload pressures. A major initiative we are undertaking is to identify ways of reducing the number of interactions between us and solicitors/applicants in individual cases. Unfortunately we currently have to reject or continue many applications and accounts because insufficient information has been provided. For example we have to return 75% of the civil legal aid Financial Form 2 (for those with non-passport benefit income or capital) we receive from applicants because essential information is missing. This is despite the outcomes of our applicants’ survey where they told us that they find the financial forms easy to use. And we have to return 40% of the civil legal aid final account forms sent to us by solicitors for essential information. We are working with the profession to increase the numbers of cases that we deal with without the need for continuation or rejection. Success in this project will enable us to manage with reduced resources but will also benefit solicitors and their clients.

11. We do have concerns about the adequacy of the allocation in 2014-15 due to the significant costs associated with the expiry of the lease on our main accommodation. We are discussing the implications of this with the Scottish Government.

12. As well as facilitating access to justice for those who could not otherwise afford to pursue or defend their legal rights, the Board has an important role in safeguarding the taxpayers’ interests in relation to legal aid fund expenditure. Our work in assessing solicitors’ and advocates’ accounts, determining applications and investigating fraud and abuse directly saves in excess of £40m per year. There is a direct relationship between our staff resources and expenditure on the legal aid fund.
The Legal Aid Fund

13. The Legal Aid Fund covers the cost of legal aid cases and is one of the biggest single funders of publicly funded legal services in Scotland. Expenditure on the legal aid fund is not cash limited and is demand led. The Scottish Government ensures funding for the cases that pass the statutory eligibility tests. Around two thirds of expenditure goes on criminal legal assistance, around a third on civil legal assistance and around 3% on children’s legal assistance.

14. Significant upward pressures on expenditure have been witnessed since 2009-10 with an increase in demand for civil legal aid due to the economic downturn (applications in 2009-10 were the highest level for 10 years); increases in the rate of VAT from January 2011 (adding £3.5m to expenditure in 2010-11); increases in fee rates for solicitors and counsel agreed by the Scottish Government; and the introduction of the police station duty scheme as a consequence of the Cadder case. The financial implications of Lord Carloway’s Review and the Government’s decisions on it are not yet know.

15. The Scottish Government’s paper ‘A Sustainable Future for Legal Aid’ starkly sets out the challenge in delivering the spending review settlement for the legal aid fund and the plans for further legal aid reforms to manage within these reduced budgets.

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<thead>
<tr>
<th>Year</th>
<th>Current forecast for legal aid expenditure</th>
<th>Scottish Government Budget</th>
<th>Difference</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012-13</td>
<td>£146.7m</td>
<td>£144.1m</td>
<td>£2.6m</td>
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<td>2013-14</td>
<td>£145.4</td>
<td>£138.1m</td>
<td>£7.3m</td>
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<td>2014-15</td>
<td>£145.3m</td>
<td>£132.1m</td>
<td>£13.2m</td>
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16. The current expenditure forecasts take account of the savings to be delivered through the first package of legal aid reforms introduced in early 2010 following negotiations between the Government, the Board and the legal profession (£11m in 2011-12, rising to around £16m per annum thereafter).

17. Achieving further savings of the scale required to meet the Government’s planned provision will be very challenging. Our forecast of expenditure shows positive signs this year that the first savings package introduced in 2010-11 will produce the expected savings for this and future years.

18. We are also beginning to see some signs of the historically high numbers of civil legal aid applications beginning to reduce. However, there are substantial uncertainties:
• We do not yet know the financial impact of Lord Carloway’s review;
• Any worsening in the economic situation in Scotland may lead to further increased demands on civil legal aid;
• Unforeseen consequences for legal aid of other changes in legislation or court decisions.

19. These risks aside, we believe that it is possible to make the level of savings required to meet the Government’s spending plans. We support the approach set out in ‘A Sustainable Future for Legal Aid’ paper. However, to achieve this very difficult task it will be essential that there is effective joint working across the various stakeholders within government, the legal profession and the advice sector. As highlighted in the Government’s paper, a substantial engagement is planned with various stakeholders to agree an effective approach to deliver the required savings in a way that avoids damaging access to justice.

Q. How will funding cuts impact on access to justice and will any groups be particularly affected?

20. We do not believe that the current strategy for delivering savings in legal aid expenditure will have a significant negative impact on access to justice in Scotland.

21. We welcome and support the Scottish Government's commitment to maintain and improve access to justice in the current economic climate and in so doing, not make significant reductions in the scope of legal aid.

22. Although there is some freedom to amend the scope of civil legal assistance, if the Scottish Government so wished, there is little benefit in doing so. Although there may be a small number of areas where reductions in scope may have a minimal impact, we agree with the Government that wholesale reductions in scope could have a damaging impact on access to justice and adverse consequences for other parts of the justice system as well as wider society. This is especially so at a time of continuing economic uncertainty.

Q. How will the additional costs arising from the Cadder ruling impact on the legal aid budget?

23. Expenditure on criminal legal aid will be impacted by the recent ruling in the Cadder case which gave suspects in police detention the right of access to a solicitor before interview. We are now responsible for ensuring the availability of legal advice in these circumstances and this is being delivered through a roster of private practice and publicly employed solicitors. Expenditure in this area will be dependant on the take up and types of advice given (e.g. face to face advice or telephone advice). The current legal aid fund expenditure forecast includes £620k in 2011-12 and around £1.2m per year for 2012-13 thereafter to cover the cost of advice and the operation of the Solicitor Contact Line.

24. Lord Carloway will shortly publish his review of criminal practice and procedure in Scotland. The review is looking at a number of issues including arrest, detention and questioning of suspects; the nature of police questioning; the grounds for detaining in custody; the length and continuity of custody; the admissibility of
statements by an accused and co-accused; and the sufficiency of evidence (including corroboration). We do not know what the impact of this will be but there is the potential for this to impact significantly on the cost of legal aid through the need to change legal aid processes or the additional use of solicitors.

**Q. In what ways could legal aid rules be changed to fairly reflect more limited resources (e.g. through more contributions or restricting the types of cases covered)?**

25. The rules governing the different types of legal assistance are very complex. There are ways in which the rules could be changed to reflect more limited resources. The Board supports the direction of travel set out by the Government, including:

- the principle that where a person can afford to pay a contribution towards their legal costs, they should do so.
- that applicants should closely monitor the way in which their case is run and the costs involved - encouraging them to have regard to expenditure levels in the same way as a privately paying client.
- to protect taxpayers’ interests, the legal aid fund should be the funder of last resort. Those who wish to defend or pursue cases should ensure that there are no other forms of funding available before applying for legal aid. For example, the legal expenses cover available through some insurance policies.

26. Following consultation, the Scottish Government has announced its intention to introduce legislation to introduce financial contributions in criminal legal aid and to change the financial eligibility test for criminal legal assistance. We support the Government’s proposals. Introducing financial contributions will make savings for the legal aid fund. Currently, there are different financial eligibility tests for the different types of legal aid available in criminal cases and different factors considered in the assessment of eligibility. No financial contributions are due where someone pleads not guilty but this is not the case for the type of legal aid used where someone pleads guilty. This can lead to perverse incentives to plead not guilty and therefore could affect the efficient operation of the justice system.

27. The Board will also continue its rolling programme of Best Value Reviews which look at specific areas of legal aid to assess whether services can be delivered more cost effectively while ensuring the best outcomes. We have recently published reviews of legal aid in mental health and immigration and asylum cases as well as our approach to work done under the special urgency provisions and one of the statutory tests for civil legal aid. The findings have been well supported and will result in savings. We will continue this programme of work and this year our focus is on reviews of civil legal aid costs and the assessment of solicitors’ and advocates’ accounts. We expect these reviews to identify further options for making savings in legal aid improving delivery and reducing bureaucracy.

**Q. In what ways could legal aid rules be changed to promote efficiency within the justice system?**

28. The Board supports the Scottish Government’s intention to look at the availability and introduction of alternative methods of resolving disputes, rather than
the current norm of negotiation and court action. There are important options such as the increased use of mediation which could help improve individuals’ experiences of the justice system and also help the justice system to operate more efficiently. This could play an important role in the Government’s intention to look at more effective ways of dealing with family disputes, particularly those involving contact with children.

29. We will also be working with the Scottish Government to identify and remove any remaining perverse incentives in the criminal legal assistance system, which could lead to behaviours that could have a negative impact on the operation of the justice system.

30. The Scottish Government’s Making Justice Work Programme is making good progress and builds on the considerable joint-working already taking place across the justice sector. This programme is expected to lead to changes which will further improve the efficiency of the justice system. We are supporting the Scottish Government in the development of the project to widen access to justice. The Board is leading on the project to roll-out video conferencing across the justice sector. It will improve the operation of the justice system through reduced travel to and from prisons and police stations by accused persons and legal representatives. A second phase will also facilitate the operation of court cases through the use of video-conferencing in courts. The increased use of virtual contact between solicitors and clients (through video or telephone advice) has the potential to significantly reduce costs and the amount of CO2 emissions produced through travel. The changes to the court structure being taken forward under the Making Justice Work Programme could have an impact on legal aid and we are discussing this with the Scottish Courts Service.

Q. What is the future for the in-court advice services?

31. In-court advice services are funded by the Board through a targeted funding programme, funded by the Scottish Government from the legal aid fund. The services paid for through targeted funding include: the direct employment by the Board of 14 solicitors who provide civil legal assistance from the four Civil Legal Assistance Offices around Scotland; and grant funding of 23 services, including projects that deliver advice and representation at court as well as early intervention and in depth casework. These projects deliver essential advice, assistance and representation, particularly focused on those struggling with the effects of the economic downturn such as debt, repossession, rent arrears and employment problems.

32. We are currently evaluating the grant funding programme and the Scottish Government is reviewing the amount of funding available for targeted provision, its priorities and objectives and we hope that the Government is able to make early decisions on this important programme.

33. We are also working with the Scottish Government, COSLA and others to achieve more strategic planning and co-ordination of advice services and a clearer relationship between need and provision.
**Going forward**

34. We and the Scottish Government will be discussing with justice sector partners, including the Law Society and Faculty of Advocates, the various proposals for savings and to identify other possible options for savings.

35. We will work closely with the Scottish Government to monitor expenditure trends in legal aid and how these might impact on the level of savings required.

Scottish Legal Aid Board
21 October 2011