Introduction

The Law Society of Scotland welcomes the Justice Committee’s scrutiny of the Scottish Government’s Spending Review 2011 and Draft Budget 2012-13 and is grateful for the opportunity to respond to the call for written evidence on the impact of this Spending Review on the effect upon the justice system, and in particular, legal aid.

Legal Aid

The settlement for legal aid outlined in the Spending Review will present a significant challenge, amounting to a cut of around 7.2% to the Legal Aid Fund for the Spending Review period:

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<tbody>
<tr>
<td><strong>Legal Aid Fund</strong></td>
<td>£142.3m</td>
<td>£144.1m</td>
<td>£138.1m</td>
<td>£132.1m</td>
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<tr>
<td><strong>SLAB Grant-In-Aid</strong></td>
<td>£11.8m</td>
<td>£11.7m</td>
<td>£11.2m</td>
<td>£10.7m</td>
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<td><strong>Total Legal Aid</strong></td>
<td>£154.1m</td>
<td>£155.8m</td>
<td>£149.3m</td>
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Expenditure on legal aid is demand-led, with a number of external factors determining the overall expenditure: the recent increase in civil legal aid expenditure, with a 20% increase in the number of applications between 2008-09 and 2009-10, is a result of the difficult economic climate; equally, in criminal legal aid, changes in legislation and case law, notably the decision of the Supreme Court in the *Cadder v HMA* [2010] UKSC 43 case, could have an overall impact on expenditure.

Legal aid solicitors provide a high quality service of value to the public purse in ensuring access to justice for those who need it most. While other areas of public expenditure have increased in recent years in both cash and real terms, legal aid expenditure has not kept pace with inflation. A recent Scottish Legal Aid Board report notes that the cost of legal aid in 2009-10 was around 10% less (£13m) in real terms than in 1998-99.

Legal aid has already seen a substantial cut for the financial year 2011-12, with a package of measures designed to save around 8.2% (£12m) implemented. These included cuts to core and case disposal fees for summary legal aid and also a reduction in travel fees for solicitors to 50% of the previous rate. These will have a significant impact on overall expenditure, as the Scottish Government’s White Paper, A Sustainable Future for Legal Aid, makes clear. Expenditure in 2010-11 was £161.4m on the Legal Aid Fund is forecast to reduce to £146.7m in 2011-12.

Scottish Government White Paper

Discussions between the Law Society, Scottish Government and Scottish Legal Aid
Board have commenced on the proposed changes to the legal aid system outlined in the White Paper, “A Sustainable Future for Legal Aid”. We will be looking to engage with our members on the effect of these proposed changes over the next three financial years to 2014-15.

The White Paper sets out a number of themes for the future reform of legal aid:

**Focusing legal aid on those who need it most**

The White Paper outlines proposals for the introduction of contributions for criminal legal aid in the Criminal Contributions and Civil Justice Council (Scotland) Bill; reaffirming legal aid funding as a ‘last resort’ by ensuring that legal expenses insurance is verified and the promotion of ‘no win, no fee’ arrangements. These reforms project overall savings of £4-5m per annum by 2014-15.

We responded to the Scottish Government’s consultation paper on the introduction of contributions to criminal legal aid. While we are broadly supportive of the principle that those who can pay for their defence should pay for their defence, there are a number of practical details which will need further consideration. These include issues around collection of contributions, our view being that these should be collected by Scottish Legal Aid Board rather than by individual firms of solicitors, since the Board already has infrastructure in place for collection of civil legal aid contributions. There needs to be some caution over the collection of contributions in some criminal cases where there may be a Proceeds of Crime action, to avoid contributions being paid through funds obtained illegally. The question of whether legal aid contributions could be recovered in the event that the prosecution discontinues, or the individual is acquitted, needs determination (and possibly the wider question of whether those paying on a private client basis would have the same recourse). The impact of purely criminal firms being required to collect contributions should also be investigated, as it is likely to have implications for the current insurance premium discount scheme in place for firms with an exclusively criminal practice. This would have a significant impact on the operating costs of such firms.

The Board already stands as a funder of last resort, and the proposal that reasonable steps are taken to verify the cover provided by legal expenses insurance seems practical. The promotion of ‘no win, no fee’ arrangements will require some consideration, pending the outcome of the Taylor Review into civil litigation costs. A similar review conducted by Lord Jackson in England and Wales suggested a number of difficulties with the ‘no win, no fee’ regime and its overall effect on costs.

**Ensuring wider access to justice – the right help at the right time**

The proposals include structural reforms to court processes as part of the Gill reforms and the Scottish Government’s Making Justice Work programme and the promotion of pro bono, for instance, LawWorks Scotland and work on legal capacity and public legal education with Consumer Focus Scotland; there are no estimated savings to legal aid from these changes. As detailed above, we are supportive of the changes to the court system recommended by the Scottish Civil Courts Review. We promote pro bono, with solicitors already offering a unique and valuable contribution through their volunteering, though this cannot be a substitute for an adequately
funded and sustainable system of legal aid. A number of our members volunteer with advice-sector organisations, notably Citizens Advice Bureaux, and the work of these organisations is valuable in ensuring that individuals receive prompt advice to their problems. We are also working with Consumer Focus Scotland on their project into building legal capacity.

**Maximising the value of legal aid expenditure**

The White Paper outlines a range of reforms, including: cuts of £2.3m through implementation of SLAB Best Value Review recommendations, including fixed fees for mental health and immigration and asylum cases and changes to the bar reporting system; contracting for criminal legal assistance, which would cut £3m per annum (and consideration of whether to introduce the same for civil through primary legislation); review of PDSO duty allocations, which were intended to save £1.3m but have only saved £0.8m, and will need to save a further £0.5m; cuts to counsel's fees (particularly travel) which will save £2.1m; changing the fees for solicitors sitting behind counsel, the range of cases in which counsel would be available and also changing the additional fee and exceptional case provisions in civil work, which would save £1.6m; and the paper also notes that while across-the-board fee cuts, as in England and Wales, have not been proposed, these may be necessary if the savings required cannot be met through these proposals.

The savings projected for the implementation of the Scottish Legal Aid Board's programme of Best Value Reviews may see a number of changes to mental health and immigration and asylum cases. Both areas have recently seen substantial increases in expenditure, equally, both areas entail obligations under the European Convention on Human Rights and also involve extremely vulnerable individuals. We are working with the Board and others on the recommendations for mental health work and understand that a fixed fee model will shortly be proposed. We will look to engage with practitioners in this area to ensure that the feeing arrangements for this work allow sustainable practice and ensure access to justice.

We believe that further changes can be made to the current system of bar reports to provide best value and savings, and also that there are significant savings to be found in the use and payment of experts under legal aid.

The proposal to introduce contracting for criminal legal aid by statutory instrument and to consider the introduction of the same for civil legal aid through primary legislation would be a major change to Scotland's legal aid system. Much will depend on the model of contracting proposed, and we will require full details of the proposed model to ensure that access to justice and an effective legal aid system are preserved. We are keen to work closely with the Scottish Government and the legal profession in considering these proposals and ensuring that lessons are learned from the difficulties encountered in the use of contracting in other jurisdictions, notably the United States and England and Wales.

We also note from the White Paper that across-the-board fee cuts may be required if the savings from these proposals cannot be realised. Noting that expenditure on legal aid has decreased in real terms over the last decade, in common with most developed legal aid systems internationally, we believe that this would represent a
damaging step. We believe that targeted savings can be made to legal aid in order to keep legal aid funding within budget and sustainable and that the use of an across-the-board cut would have an indiscriminate effect which could only be damaging to access to justice.

Making the justice system more efficient

The White Paper deals with changes to the court systems under this theme, implementation of Gill reforms, and a right first time approach to reduce the number of government and public body decisions challenged on appeal; a review in the short, medium and longer term on family legal aid expenditure to make savings and improve outcomes without lessening access to justice; the increased use of videoconferencing in court proceedings and for prison visits and police station advice) to make a saving of £1.2m.

We support the use of videoconferencing in court proceedings, for prison visits and for police station advice. Depending on the outcome of Cadder issues in future cases, the Carloway Review and future ECHR jurisprudence, videoconferencing could be a significant step in ensuring a suspect’s access to legal advice while detained. However, it is important to ensure that videoconferencing supplements personal attendances. There may be a number of situations in which a solicitor would want and need to attend in person, for instance, with detention of children or other vulnerable suspects and the legal aid system should be able to accommodate such visits. We have provided Scottish Government and Scottish Legal Aid Board with a paper on videoconferencing, will meet shortly to discuss next steps and engage with the profession on possible options.

Cadder v HMA [2010] UKSC 43

The effect on legal aid expenditure from the developments arising from the Cadder case is currently difficult to estimate. Scottish Legal Aid Board estimated in the Financial Memorandum to the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 that the costs to the legal aid system may realistically be between £500,000 and £1.7m. This seems reasonable at this stage, though as the system for police station advice matures, the uptake of advice is likely to increase from the current rate of around 25% to nearer 50%, the rate for advice in England and Wales. The Carloway Review may result in changes that would change the uptake rate, or evidential procedure (for instance, allowing an adverse inference from silence) which could increase the complexity of the advice provided at the police station, and possibly a change in the uptake of personal attendances instead of advice by telephone.

As with criminal legal aid in general, the costs of police station advice are a vital safeguard to Scottish citizens, ensuring procedural fairness, meeting our international obligations and ensuring that Scottish citizens receive the same safeguards as citizens elsewhere in Europe.

Justice expenditure in other areas

The cuts to other parts of the Justice portfolio are likely to have a substantial effect
on court practice and by extension, legal aid.

The proposed savings to the SCS budget are as follows:

- Balancing the demands on the courts with the available staffing and capacity;
- Developing reforms to the structure and processes of the court through *Making Justice Work*;
- Working with other justice bodies to deliver a more efficient and lower-cost criminal justice system;
- Enhancing the use of technology in how services are delivered;
- Reviewing the level of court fees which offset the costs to public funds of providing civil justice and OPG services;
- Continuing the essential redevelopment of the historic Parliament House court complex;
- Reviewing the distribution of business across the wider court estate.

There may be a number of changes that affect legal aid, for instance, the reduction in court time at rural courts, or a consolidation of business between neighbouring courts (Alloa, Stirling and Falkirk an example), which see efficiencies for SCS but which could see increased costs for practitioners as a result of prioritising work at one court over its neighbour (through travel and other costs).

The Law Society of Scotland would welcome the opportunity for greater engagement with the Scottish Government in the development and implementation of reforms to the justice system.

Law Society of Scotland
21 October 2011