



Law Society
of Scotland

Research

#DefendLegalAid

The financial health of legal aid firms in Scotland

A report for the Law Society of Scotland

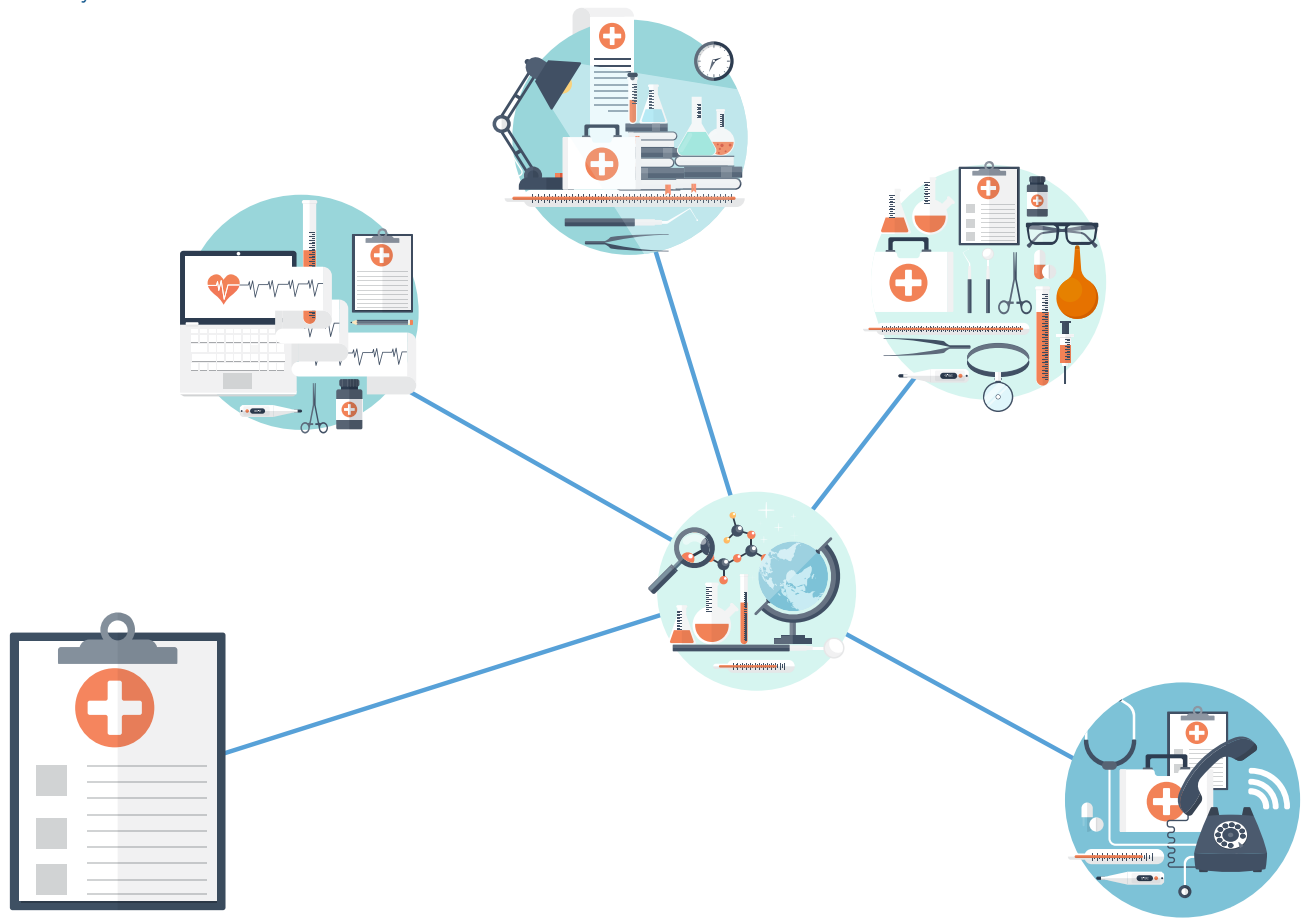
February 2017



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1 Foreword from the President of the Law Society of Scotland



After months of research, I am pleased to present our first ever report on the financial health of legal aid firms in Scotland. Unfortunately it does not make for comfortable reading.

Access to justice through legal aid is a critical element of our justice system. It is vital for not only the rule of law but also social justice. Whether facing unlawful eviction, resolving custody of our children or defending a criminal charge, we should all be able to access expert legal advice in the same way as we seek expert medical advice when we experience ill health.

Yet despite evidence that early access to legal advice can prevent longer term issues and shield other areas of the public purse, the current funding system leaves many of us concerned about its future.

That is why we have welcomed the recent announcement of a comprehensive review of the legal aid system by the Minister for Community Safety and Legal Affairs. We are pleased to see members with experience at the frontline of legal aid involved in the advisory group and look forward to working with stakeholders at all levels on this opportunity to help shape the future provision of legal aid.

This significant report, with responses from firms representing 15% of the total legal aid expenditure in Scotland, provides vital reading for everyone considering the future of the system. It highlights the worrying proportion of hours worked for which solicitors are not paid: around a third of the hours solicitors put into civil legal aid work and a quarter for criminal work. This is not a sustainable business model for solicitors working in small practices, many of which offer a vital service at the heart of their local community.

I am very grateful for the expert work carried out by Andrew Otterburn and his team in drawing up this paper as well as the many others who have contributed. The Scottish Government and Scottish Legal Aid Board provided valuable input early in the exercise and of course the report would not have been possible without input from the firms who took the time to respond and provide such invaluable, detailed submissions.

It is clear to us that change is needed. At a time when the wider court and justice system is being modernised and reformed, there is an opportunity to rethink legal aid, examine where efficiencies can be made and explore how resulting savings can be reinvested into the system.

It is up to all of us who believe in the importance of access to justice to come together to contribute to the debate and comment upon the findings of this report.

Please show your support and give us your views using #DefendLegalAid on social media or email legalaids@lawscot.org.uk

A handwritten signature in black ink that reads "Eilidh AC Wiseman". The signature is written in a cursive, flowing style.

Eilidh Wiseman
President, Law Society of Scotland

2 Executive summary

Introduction

This report summarises the results of our survey of legal aid firms in Scotland on behalf of the Law Society of Scotland (the Society). The research was undertaken in order to gather information about the financial health of legal aid firms in Scotland. It follows on from the Society's consultation with members and other stakeholders in 2015, which resulted in a number of recommendations for reform in Legal Assistance in Scotland - Fit for the 21st Century¹. Responses to that consultation indicated that it was becoming increasingly difficult to operate a legal aid firm on static or reducing revenue, while outgoings continue to increase.

The Society recognised the need for an evidence-based analysis of the supplier base and following consultation with the Scottish Legal Aid Board (SLAB) and Scottish Government, this research was commissioned.

Our research was undertaken by means of a questionnaire, which asked a range of quantitative and qualitative questions. 57 firms completed the questionnaire, which represents 7% of the legal aid supplier base and 15% of the annual legal aid budget. 27 of the 57 respondents achieved annual legal aid fees of more than £100,000, representing 10% of suppliers with legal aid fees of more than £100,000. We are content that the overall response rate is acceptable for a voluntary survey and were particularly pleased with the very strong participation from those firms generating higher levels of income from legal aid.

Principal findings

Our principal findings are that:

- The financial viability of suppliers is related to their size;
- Larger firms, especially those with a turnover greater than £1 million were more viable;
- Smaller firms, with annual fees of under £250,000, had difficulty creating a viable structure that enabled their owners to achieve earnings comparable to what they could have earned if they had been employed elsewhere;
- The owners of the smallest firms that participated with fees of under £100,000 were earning just £6.65 an hour, a level below the living wage;
- The median hourly fee paid to the specialist legal aid firms was £60.02. The median hourly cost of these firms was £91.50;
- Our research found that, on average, criminal fee earners spent around 1,845 hours a year undertaking legal aid work on behalf of clients, of which, approximately 450 hours was time they were not paid for. The position is worse for civil fee earners, who spent nearly 1,900 hours a year undertaking legal aid work on behalf of clients, of which, 600 hours was time they were not paid for. In addition to the time spent working for clients, all fee earners also spend time on "non-client" activities, such as training and administration. Fee earners working in firms generally, that do not do legal aid, would typically be expected to achieve chargeable hours of approximately 1,000 hours a year;
- Partners in the specialist legal aid firms are earning on average £10,700 a year profit or surplus over and above a notional salary that they might expect to earn if they were employed by another firm of £60,000. On average, they are making a profit of £4.19 for every hour they work.



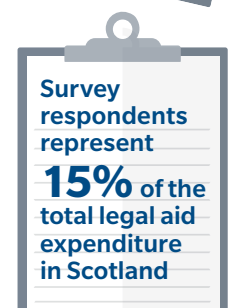
£6.65
an hour



1/3
civil legal
aid work
unpaid



1/4
criminal
legal aid
work unpaid



Survey
respondents
represent
15% of the
total legal aid
expenditure
in Scotland

¹<http://www.lawsco.org.uk/media/391321/legal-assistance-in-scotland-discussion-paper.pdf>

Overall conclusions

Our overall conclusions, based on the quantitative data we analysed, the comments made by participants in the survey, and on our own knowledge of the sector are:

- Our report presents a picture of a legal aid system in great difficulty, in part due to the rates of pay, but also due to the system itself, in particular the undue bureaucracy and extreme micro-management performed by SLAB and its approach to abatements². The latter is often in respect of very small amounts of money and its effect is to make already low rates of pay even less viable due to the amount of time that has to be spent resolving them with SLAB;
- The impact of these issues affects both firms specialising in legal aid work and those where legal aid forms only a small part of their business. It is only by working very much longer hours that the partners in firms specialising in legal aid are able to make their businesses viable. Respondents who carry out a mix of work will have to use the income from their non-legally aided work to subsidise their legal aid work;
- The low rates and long hours required of fee earners and general frustration with the system could have a particular impact on firms where legal aid does not account for a high percentage of their fees because these firms have a choice. There is a significant risk of such firms, which do small but important amounts of legal aid, simply having enough of the problems and ceasing to offer legal aid to their clients. This would have an adverse impact on access to justice, particularly in rural areas. A number of the comments from the participants suggest this is already happening and, in our experience, once a firm ceases to do legal aid, they very rarely return. There is a risk that people in rural areas who would be eligible for legal aid will not be able to find solicitors to take their cases. This would be likely to increase the numbers of party litigants, and cause potentially significant administrative challenges for the judiciary and courts.

The issue is illustrated by these comments from the Dean of a rural faculty:

*“My firm has stopped doing legal aid as it was no longer profitable. The administrative cost of doing legal aid was too high when weighed against the number of cases we were dealing with and the remuneration received for each case. A couple of firms in the Faculty [local area] still do legal aid for guardianships, but not for anything else. Another is doing a small amount of legal aid, albeit reluctantly. **All** other firms in the Faculty have stopped doing legal aid apart from these very limited circumstances. I rather suspect that other rural firms across Scotland, faced with the same considerations as us, will have made similar decisions and that there will now be a real lack of availability of legal aid across rural Scotland. There certainly is in this area.”*

Neither model appears viable in the long term and over time firms are likely to reduce the amount of legal aid that they do or cease offering legal aid. The current system does not appear to represent a viable long-term solution.

It should be noted that whilst our report indicates that some firms are making a profit, this should not be taken as an indication that many people would be prepared to actually take the risk of setting up or running their own firm for what would be a relatively low amount – approximately £10,000 a year after payment of a notional salary. A partner incurs personal liability and will often have to offer his or her home as security, and not everyone would be willing to take that risk. Partners are also vulnerable to any slowdown in cash collection and, if the cash is not there, they may not be paid their drawings. Staff will always be paid first but, if the firm is at their overdraft limit, the partners may have to wait. Reasonable levels of profitability and good cash flow are necessary for a viable business.



² Reductions to the fees claimed

3 Methodology

The respondents

The questionnaire was sent to all firms in Scotland that undertake legal aid, of whom 57 responded. This represents 7% of the 800 firms that undertake legal aid and is a reasonable response for a survey of this nature. Although in other research contexts the response rate might be considered low, it is actually very similar to surveys within the legal sector undertaken on behalf of the Ministry of Justice (MOJ) and the Law Society of England and Wales (LSEW). For example, our 2013 survey of criminal legal aid firms on behalf of the LSEW also achieved a 7% response rate and our 2014 survey of criminal firms for the LSEW and MOJ, which was widely promoted and supported by the MOJ, achieved a 10% response.

Many of the 800 firms undertake relatively low levels of legal aid; indeed, in 2014/15³, only 266 achieved legal aid fees in excess of £100,000. 10% of these firms responded, including 33% of the largest firms that undertake over £500,000 in legal aid fees a year.

Participants by total legal aid fees (per SLAB)*

	Participants	%**	All suppliers	%**
Over £500,000	10	18%	30	4%
£250,000 - £500,000	7	12%	72	9%
£100,000 - £250,000	10	18%	164	20%
£50,000 - £100,000	27	48%	266	33%
Under £50,000	13	22%	144	18%
	17	30%	400	49%
	57	100%	810	100%

* Legal assistance fees paid to firms - 2014-2015

** % of respondents/suppliers

There was an over-representation of larger firms that undertook more than £100,000 of legal aid fees a year and an under-representation of the smallest firms that undertook less than £50,000.

The total legal aid fees of the participants were £14 million, or 15% of the total legal aid expenditure in Scotland, and they therefore account for a reasonable proportion of the legal aid spend. We were pleased that 33% of the largest legal aid firms participated. We are content that the overall response rate is acceptable for a voluntary survey and were particularly pleased with the very strong participation from those firms generating higher levels of income from legal aid.



³ Scottish Legal Aid Board – Legal assistance paid to firms – 2014-2015

A number of people helped us undertake this research and we would like to thank the legal aid, communications and research teams within the Society, together with the various bar associations, in particular the Glasgow Bar Association, who helped promote the survey. We would also like to thank the Criminal Justice Reform Team of the Scottish Government and SLAB for their comments on our draft questionnaire at the outset of this research.

The tables in this report show the median together with the lower and upper quartiles. The median is the middle value in a range and is not influenced by the magnitude of the extreme values (as the arithmetic average or mean can be). The quartiles indicate the range of values. 25% of firms are below the lower quartile, and 25% of firms are above the upper quartile.

This report classifies the participants according to total turnover and the report examines two groups of participants:

- Section 5 analyses the participants who provided financial information and we were able to use five size categories, from turnover of under £100,000 to over £1 million;
- Section 6 examines the 23 participants for whom legal aid accounts for over 60% of their fees. As there were fewer participants, we have consolidated the two smallest and two largest size categories.

Definition of key terms used in this report

LLP	Limited Liability Partnership
Equity partner	An equity partner owns part of the equity (or capital) of a firm and receives a share of the profits as agreed between the partners. They are self-employed and pay tax through Schedule D.
Salaried partner	A salaried partner has the title of partner and is liable for the liabilities of the firm but is paid a salary and pays tax through PAYE (Schedule E), and is included in salaries in the firm’s accounts. They contribute a nominal amount of capital.
Fixed-share partner	A fixed-share partner is not paid through PAYE but is instead self-employed, is allocated a fixed profit share and pays tax through Schedule D. They may receive a small additional profit share dependent on the performance of the firm. They may contribute a nominal amount of capital.



4 The firms that participated in our survey

The survey was based on questionnaires completed by firms from across Scotland:

Location of participants

Glasgow and the West of Scotland	25
Tayside and Central	7
Grampian, Highlands and Islands	8
Edinburgh, Fife and the Borders	17
	57

The 54 firms who provided financial information had a combined fee income of over £39 million, of which 61% related to court:

Fees

	£
Property/Conveyancing	8,367,831
Court	24,226,824
Commercial	621,421
Corporate	88,980
Financial services	327,355
Trust and Executry	4,084,478
Tax advice	110,211
Insurance	18,344
General	1,547,937
	39,393,381



55% of the court fees were in respect of criminal work:

Court fees

	£
Commercial	615,907
Criminal	13,361,366
Personal injury for claimants/pursuers	1,556,587
Personal injury for defenders/insurers	370,774
Non-personal injury work for insurers	31,774
Matrimonial	5,673,541
Other court	2,616,874
	24,226,823

Approximately £14 million of the participants' fees was in respect of legal aid:

Legal assistance fees paid to firms - 2014-2015

	Participants £	All suppliers £	%
Civil Fees (including matrimonial)	3,969,500	30,504,800	13%
Criminal fees	9,222,700	58,250,900	16%
Children's fees	665,600	3,787,200	18%
Total	13,857,800	92,542,900	15%
Number of firms	54		



These firms undertook approximately 15% of the total legal aid spend in Scotland.

Approximately 700 people work in the organisations that responded:

Headcount

Equity partners/members/directors	135
Salaried partners/members (Schedule E)	7
Fixed share partners/members (Schedule D)	12
Other solicitors	135
Other fee earners and paralegals	50
Trainee solicitors	22
Total fee earning staff	361
Secretaries, support staff, and other administrators in departments	253
Central staff (reception, accounts, practice manager, etc.)	93
Total	707

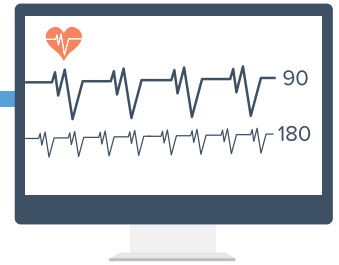
Most of the participants were a partnership, LLP or a sole principal:

Legal status

A partnership/LLP or sole practitioner	43
A limited company	14
	57

Nearly half of the participants based their response on their financial year ending March or April 2015. Approximately a quarter had year-ends in the second half of 2015 and a quarter in the first four months of 2016. A small number of participants had year-ends in autumn 2014.





5 Financial analysis and viability of all of the participating firms

Participants are classified according to the **total fees of their firm** in all of the tables. 57 firms responded to the survey, however three firms did not provide any information on their fees, salaries or overheads.

Fees

The median **total** fees amongst the participants were £363,000. The larger firms in the survey (with annual fees in excess of £500,000) accounted for over 80% of the annual fees of the participants:

Total fees per firm

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	39,000	120,492	317,687	644,843	1,269,783	186,166
Median	59,618	185,123	331,883	682,502	1,658,573	363,498
Upper quartile	78,386	211,909	383,250	770,000	2,883,687	775,000
Total	474,589	1,841,407	4,569,112	7,816,635	24,691,637	39,393,380
%	1%	5%	12%	20%	63%	100%
Number of firms	8	11	13	11	11	54

Note: The quartile values in these tables must be treated with care due to the relatively small numbers of firms in each category.

The median legal aid fees per firm were £101,000. 76% of the legal aid billed by the participants was undertaken by the larger firms, with annual fees in excess of £500,000:

Legal aid fees per firm

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	17,750	12,700	66,900	203,000	62,750	40,975
Median	41,250	62,900	127,700	495,700	434,100	100,800
Upper quartile	53,150	127,550	256,400	561,350	999,350	351,300
Total	280,900	862,000	2,130,100	4,483,200	6,101,300	13,857,500
%	2%	6%	15%	32%	44%	100%
Number of firms	8	11	13	11	11	54

As indicated above, **the participants have been classified according to their total fees**. For example, 13 firms participated with annual fees of between £250,000 - 500,000. Median fees for these firms was £331,883 and median legal aid fees for these 13 firms was £127,700.



On average legal aid accounted for 43% of the participant's fees:

Legal aid fees as a % of total fees per firm

%	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	36%	10%	21%	30%	5%	11%
Median	71%	39%	40%	78%	17%	43%
Upper quartile	100%	76%	64%	84%	47%	81%

A figure most firms will monitor is the level of fees billed by each fee earner. The table below indicates that the overall median fee was just over £100,000, with a very wide variation from median fees of £60,000 in the smallest firms to £131,000 in the largest firms:

Fees per fee earner (total fees - all areas of work)

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	39,000	71,781	82,000	101,462	120,842	82,611
Median	59,618	103,500	98,279	112,400	131,250	105,077
Upper quartile	78,386	130,492	110,500	128,964	159,947	130,655

A key figure relevant to a firm's profitability is the overall fees per equity partner – total fees divided by the number of equity partners, and once again a wide range exists from median fees of £60,000 in the smallest firms to over £400,000 in the largest firms:

Fees per equity partner (total fees - all areas of work)

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	39,000	105,955	136,667	191,167	365,051	110,145
Median	59,618	117,241	158,844	227,501	414,643	180,062
Upper quartile	78,386	139,375	319,117	268,333	647,283	323,529

Profitability

In assessing the profitability of the participants⁴, we have taken the income of each firm, less the salaries of its employees and its overheads, including rent, professional indemnity insurance, practising certificate fees, etc. We have made allowance for a notional cost for each equity partner, and where rent in the firm’s accounts is below the market rate, for example, if the offices are owned by the partners, we have allowed for a market rent.

These adjustments are made because most of the participants were partnerships, sole practitioners or LLPs. One of the key figures missing in the accounts of these types of entity is any remuneration in respect of the equity partners. “Salaries” in the accounts of such firms does not include any salary in respect of the equity partners – for example, a sole principal with no other staff would have zero salaries. We have therefore allowed for a notional salary to reflect a cost for each equity partner as someone working in the firm. This has been based on the salary of the highest paid employed fee earners in the participant firms together with an allowance of 15% to reflect the additional costs that would have been incurred if he or she had been an employee – employers’ NIC (12%) and pension contributions (3%)⁵.

A number of the participants did not actually have any employed fee earners and, of those that did, around half were on low salaries and appear to be more junior fee earners. We looked at the firms that appeared to employ more senior fee earners and the salaries of these people ranged from £50,000 to £80,000. Several were paid around £60,000 and we have used this figure in our calculations on the basis that a partner in a firm may realistically expect to be paid this level of remuneration if he or she was to become an employed solicitor in another firm, as summarised below:

Equity partner notional cost

	£
Notional equity partner salary	60,000
Allowance for employers NIC and pension contributions, say: 15%	9,000
Equity partner notional cost	69,000

It is important to note that this notional cost is intended to reflect the equity partner’s cost as a fee earner working in the firm. If the partner was not producing fees, the firm would have to pay someone else to generate the same fee level. It does not reflect any compensation for the risk and personal liability assumed by a partner in a firm of solicitors.

It is also important to remember that “profit” is not the same as cash in the bank and part of a firm’s profit is often retained in order to fund working capital. The “profit” shown in the accounts of a firm includes fees that have yet to be paid and work that has yet to be billed. It is a paper profit that can bear little relationship to the actual funds the firm has in its bank account. In order to run a viable business, it is necessary for it to be profitable but it is also necessary to bill the work and get paid. Firms fail due to lack of cash not lack of profit.

A number of the participants were limited companies and their salaries figures will include an amount in respect of directors’ remuneration. We have excluded any amounts for directors’ remuneration and have instead charged a notional salary for each director.

⁴ The profitability analysis is based on 53 firms who provided the information required

⁵ We are aware that not all firms will be paying 3% but have applied this across the board for consistency. It should be noted that 3% is significantly below the level an equity partner would need to set aside for retirement.

The table below indicates that the smaller firms are not actually earning sufficient to pay the equity partners a market-rate salary. The median figures for firms where the total fees are less than £250,000 indicate the partners were earning less than they would if they had been working for someone else. Those with fees below £100,000 were earning on average £17,000 a year⁶:

Profit per equity partner (after equity partner remuneration)

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	-48,750	-33,895	-23,216	8,493	24,666	-30,031
Median	-43,074	-5,898	10,667	27,679	98,078	9,964
Upper quartile	-34,156	19,853	30,715	40,307	122,809	41,582

In our experience, equity partners typically work ten hours a day, Monday to Friday, and also work at the weekend. Assuming they work three hours each weekend, and assuming they are at work 48 weeks a year, results in them working approximately 2,544 hours a year.

The table indicates that they make an average profit of £3.92 and they are paid, assuming a salary of £60,000 p.a., an average of £27.51 for every hour they work. The owners of the smallest firms that participated earned just £6.65 an hour, a level below the living wage.

Equity partner profit and remuneration per hour

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Median profit per partner hour worked	-16.93	-2.32	4.19	10.88	38.55	3.92
Median earnings per partner hour worked	6.65	21.27	27.78	34.47	62.14	27.51

Hourly cost

It is important that firms have an understanding of their cost base and in particular they need to be aware of their break-even or minimum hourly fee. They need to understand what an hour of their time costs.

This calculation requires information on the expenses and salaries of the firms, which we were given by the respondents, together with an estimate of the number of hours a fee earner typically is able to bill, and get paid for, each year.

In the Cost of Time Survey⁷, it was assumed that partners would achieve 1,000 chargeable hours a year, trainees 800 and all other fee earners 1,200. Historically, most firms in Scotland have not been good at time recording and in the absence of more reliable information, these figures were used in the survey. Applying these assumed hours to the firms in this survey results in average chargeable hours for each fee earner of 1,027.



⁶ A loss of £43,000 per partner is shown after having included a notional salary for each partner of £60,000, resulting in an actual profit of just £17,000.

⁷ Financial Benchmarking 2014 (The Cost of Time Survey) – The Law Society of Scotland. Published annually up to 2014.

As a matter of interest, RBS/NatWest publish an annual financial benchmarking survey and the 2016 report⁸ indicated a median across the UK of 1,000 hours a year⁹, suggesting that the Cost of Time assumptions had not been unreasonable.

Applying these assumed hours results in a median cost per hour of £94.00:

Cost per hour

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	88.16	72.08	79.46	87.59	86.42	83.30
Median	110.32	93.14	96.88	88.60	107.96	94.00
Upper quartile	127.45	129.50	117.26	102.16	127.53	122.78

Funding

Firms are funded by a combination of partner capital and borrowings.

The table indicates the overall partner capital of the firms¹⁰:

Partner capital - per firm

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	5,000	51,287	40,249	130,428	237,908	46,637
Median	13,865	77,679	97,077	300,438	616,964	119,329
Upper quartile	22,000	203,467	141,692	438,878	1,794,246	404,172

Note: The quartile values in this table must be treated with care due to the small sample.

The capital contributed by each partner via initial cash introduction, together with retained profit and tax reserves is shown in the second table:

Partner capital - per equity partner

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	5,000	33,143	26,300	47,000	102,827	30,008
Median	13,865	47,419	32,729	100,146	148,693	47,328
Upper quartile	22,000	194,888	103,934	146,293	236,085	148,093

Note: The quartile values in this table must be treated with care due to the small sample.

These are not high levels of capital, especially given that the partner's tax liability must be met from this capital.

⁸2016 Legal Benchmark Report – RBS/NatWest

⁹In addition to the time they spend directly working for clients, all fee earners, and in particular partners, spend much time on non-chargeable activities such as management, administration, supervision and training.

¹⁰Based on data from 42 firms

Relatively few of the firms were using an overdraft in the survey as indicated in the table¹¹:

Bank borrowings - per firm

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	2,514	-6,300	53	26,250	3,000	2,000
Median	3,181	1,741	10,000	57,320	75,000	6,000
Upper quartile	4,071	5,341	40,107	178,738	124,063	82,790

Most firms¹² did have a bank overdraft in place as it is important that firms do have some headroom in terms of their bank; even small delays in payment from clients can have a major impact on a firm’s cash position:

Bank overdraft facility - per firm

£	Total fees					Overall
	Under £100k	£100-250k	£250-500k	£500k-£1M	Over £1M	
Lower quartile	4,000	15,000	20,000	25,000	90,000	15,000
Median	5,500	15,000	25,000	40,000	100,000	25,000
Upper quartile	7,000	20,000	60,000	72,500	250,000	87,500



¹¹ Based on data from 47 firms

¹² Based on data from 27 firms

6 Financial analysis and viability of firms that specialise in legal aid

This section analyses in more detail the participants who specialised in legal aid, which we have defined as firms where legal aid accounted for over 60% of their fees. Because this analysis is based on fewer firms, and in order to ensure confidentiality, we have amalgamated some of the size categories used in the previous section. Participants are classified according to the **total fees of their firm**.

There are relatively few firms in each group; however they are sufficient to illustrate the differences between the groups.

Financial performance of the specialist legal aid firms (median values)

	Total fees			Overall
	Under £250k	£250-500k	Over £500k	
Number of firms	9	6	8	23
Total fees per firm £	102,000	366,625	786,500	350,000
Crime fees per firm £	74,514	293,668	786,500	292,500
Legal aid as a % of total fees per firm	95%	68%	84%	86%
Number of equity partners per firm	1.0	2.0	3.0	2.0
Total fee earners per firm*	1.0	3.5	6.0	3.0
Fees per fee earner £	74,514	103,306	120,250	108,333
Fees per equity partner £	102,000	204,200	262,167	155,671
Total legal aid fees across all participants £	1,024,327	2,261,886	7,104,706	10,390,919
%	10%	22%	68%	100%

* including equity partners

Note: These tables do not show the quartiles due to the smaller number of firms in each category.

The table highlights the importance of criminal work for these specialist firms.



The second table indicates the profitability of these specialist firms, having allowed for a notional salary for each equity partner¹³, and illustrates very clearly the contrast between the larger firms, who have sufficient scale to cover their expenditure and achieve a modest profit, and the smaller firms, who do not. A large number of legal aid firms in Scotland would be in this latter category. The table indicates an overall net profit margin of just 7% and indicates the difficulty very small firms face in creating viable businesses:

Financial performance of the specialist legal aid firms (median values)

	Total fees			Overall
	Under £250k	£250-500k	Over £500k	
Profit per equity partner £	-19,005	15,165	33,006	10,667
Median profit per partner hour worked £	-7.47	5.96	12.97	4.19
Median earnings per partner hour worked £	16.11	29.55	36.56	27.78
Net profit %	-18%	7%	16%	7%

The tables highlight:

- The low levels of profitability of these specialist firms, with each partner earning a profit, of just £10,667 a year. The partners are earning £27.78 for each hour they work¹⁴. They are making a profit or surplus, to invest back into the firm or fund working capital, of £4.19 for each hour they worked;
- The poor profitability of the smallest firms. They do not generate sufficient income to pay their employees, overheads and equity partners a reasonable income;
- The dependency on legal aid fees by these specialist legal aid firms;
- The relatively low levels of fees generated by each fee earner in the smaller firms compared with the larger firms;
- The low fees per equity partner in the smaller firms. It is very difficult to run a viable business when the fees per equity partner are just £100,000. The level of fees per equity partner is important as the lower the level of fees, the more difficult it is for a firm to be viable;
- That nearly 90% of the legal aid billed by these specialist firms was undertaken by the larger firms, with annual fees in excess of £250,000.

The larger firms are more viable, however, as highlighted earlier, “profit” is not the same as cash in the bank and larger firms will require greater amounts of retained profit in order to fund working capital. Any delay in payment of fees can affect firms of any size, however, in larger firms the amounts that have to be paid each month – salaries, rent and other expenses – are by definition larger. They become more vulnerable to cash flow difficulties in the event of any delays in payment by their clients and in particular SLAB, itself a key source of funds. Because the amounts needed are so much larger, such firms are more vulnerable to cash flow difficulty. The amounts needed can more easily be beyond what their partners can support.

¹³ Of £60,000 plus NIC and pension contributions as explained in section 5

¹⁴ Assuming, based on our experience, a partner works 10 hours a day, Monday to Friday and 3 hours at the weekend, for 48 weeks each year – a total of 2,544 a year.

Hourly fee and cost

Interestingly, the overall results of these specialist firms are very similar to those presented in the previous section for all the participants. However, the big difference between these specialist legal aid firms and the profession generally in Scotland is in the hours worked by their fee earners.

We asked the participants to estimate the weekly hours typically spent by their fee earners on criminal and civil legal aid respectively that they were paid for, and also those they were not paid for. These are summarised in the table below¹⁵:

Chargeable hours and time not paid for (specialist legal aid firms)

	Crime chargeable hours	Crime hours not paid for	Civil chargeable hours	Civil hours not paid for
Median per week	30.00	10.00	27.50	13.50
Median per annum	1,384	461	1,268	623
Total per annum	1,845		1,891	
Number of firms	17	17	8	8

The table shows that approximately one-third of the hours worked by civil legal aid solicitors for their clients will not be paid and one quarter of the hours worked by criminal legal aid solicitors for their clients will not be paid. The comments received from the participants state that undue bureaucracy, inefficiencies in the system and abatements are the main reasons for this unpaid time. The proportion of hours not paid for, together with the detailed comments by practitioners, suggest a legal aid system that is need of reform.

The table also indicates significantly higher chargeable hours than the hours assumed in section 5 and significant levels of work that is not paid for.

Criminal work was the most significant area undertaken by the participants so, taking the total hours indicated above of 1,845 a year, we calculated an average hourly fee for each firm. This is summarised in the table below, which shows the medians for the different size groups:

Average hourly fee of the specialist legal aid firms (median values)

£	Total fees			Overall
	Under £250k	£250-500k	Over £500k	
Average hourly fee	41.28	57.23	66.62	60.02

It should be noted that this average hourly fee is in respect of all their work, criminal, civil and any non-court.

¹⁵ We asked how many days annual holiday entitlement a typical fee earner received. The average was 29 days, or 6 weeks, so have assumed each fee earner is actually at work for 46 weeks each year (52-6=46). We have allowed one week illness/training, so a typical fee earner would be available for client work 45 weeks each year.

The cost base of the firms was not dissimilar to all of the participants and, applying the same assumed hours as used in section 5, that a firm not doing legal aid would use, results in an average hourly cost of £91.50, as summarised below:

Average hourly cost of the specialist legal aid firms (median values)

£	Total fees			Overall
	Under £250k	£250-500k	Over £500k	
Average hourly cost	91.50	83.88	90.51	91.50

It is only by working very much longer hours that the partners in firms specialising in legal aid are able to make a living. This is not a commercial approach, and there is a risk that such firms could eventually withdraw from the market.

SLAB and the Scottish Government could find that the low rates and long hours required of fee earners and general frustration with the system will have a similar impact on firms where legal aid does not account for a high percentage of their fees.

7 Comments and observations from participants

As part of the overall survey, comments were requested on a range of different elements of legal aid practice, from the challenges of carrying out publicly funded legal assistance compared with privately funded work, to the ways in which new technology might improve the profitability of legal aid firms. Across seven questions, around 200 responses were provided and this appendix to the report summarises the views provided, highlighting a number of the responses received under the following headings:

- I** The challenges carrying out legal aid compared to private work
- II** Possible changes to make the legal aid system more sustainable
- III** Inefficiency and undue bureaucracy in the legal aid system in Scotland
- IV** Areas of the country where it is difficult to access legal aid
- V** The role of technology in enhancing the profitability of legal aid work
- VI** The role and use of first year trainees

I The challenges of carrying out legal aid compared to private work

There were a number of consistent themes around the challenges of carrying out legal aid compared to privately paid work:

- The large discrepancy between rates of pay;
- The large administrative overheads for legal aid work;
- The process of abatement of accounts (where items of expenditure are in dispute between the solicitor and SLAB);
- The amount of work required that does not attract any fee under the legal aid scheme;
- The overall sustainability of legal aid practices.



Rates

Historically, rates for legal aid were set by reference to those available for privately paid work, and set at 85% and later at 90% of those available for private work. This link was removed in 1984, and rates have increased only intermittently since then. There are still elements of criminal legal aid paid at rates last revised in 1992, most fees for core work were last revised around a decade ago and, since the economic downturn, there have been significant cuts. As a result, there is a growing disparity between the rates for legal aid and for privately funded work. A number of respondents observed that legal aid rates could be as low as a fifth (and one respondent suggested a tenth) of the remuneration available for other work. At the same time, firms aim to provide the same quality of service to all clients. One respondent said:

“Legal aid rates for both civil and criminal work are so poor as to make it in many cases hardly worthwhile carrying out this type of work. My own firm has felt for some considerable time that other fields of work are subsidising the legal aid work carried out by the firm. As solicitors, we pride ourselves on providing the same standards of service to clients regardless of whether they are legally aided or private clients; however, that is simply not sustainable in the long term and it is frankly quite demoralising to be so poorly remunerated for legal aid work which invariably involves assisting clients who are particularly vulnerable and needy in terms of time and communication.”

“The disparity between chargeable rates is becoming extreme. We have several private instructions where the agreed hourly rate is ten times that chargeable in some legal aid work. Those solicitors who are able to charge out at higher rates cannot, on any view, dedicate time to legal aid work where the rates are so low.”

Abatements

In addition to the low rate of pay for legal aid, the abatement process (through which any discrepancies between the solicitor and SLAB on the account submitted are resolved) was highlighted. This process was variously described as a “battle”, “attrition”, “petty”, “bureaucratic”, “punitive”, “inefficient”, “absurd” and “unreasonable”. There was recognition that public funds need to be protected, though respondents were highly critical of the proportionality of the abatement process – for instance, protracted correspondence around a £2.90 charge – and there were also concerns around the quality and consistency of decision-making by SLAB overall. For example:

“The time incurred in arguing over necessary work undertaken that SLAB will not then pay for is undermining the system. We are expected to undertake necessary work then be told by SLAB that it was not necessary at the account stage.”

“Rates are below sustainable – especially half travel. Abatements are crippling at times and very labour intensive to deal with. Insurance and private work is much better paid and rarely if ever results in abatements.”



Undue bureaucracy

The issues raised around abatements were consistent, with the wider point raised by most respondents around overall levels of bureaucracy for legal aid work. The levels of administration required are high (one respondent suggested that this took around a third of his firm's fee-earning capacity) and this administration remains wholly unpaid. The tension between professional obligations, where additional correspondence had to be sent or additional client meetings held, which were considered by SLAB to be non-chargeable, was one of the areas highlighted. For example:

"Need to spend an inordinate amount of time uploading applicants' [information] and attachments."

Sustainability

The overall sustainability of the system was called into question by many respondents. The numerous challenges for legal aid work made this work economically unviable and a large number of firms were considering discontinuing legal aid or had restricted the areas in which they would provide legal aid. As a survey of legal aid profitability, firms that had discontinued work in full would not be able to participate, but it is clear that a number of firms have done so – such as the 15% decrease in registered criminal firms between 2007 and 2016. One respondent said:

"Last year was essentially a start-up year for this firm in that I took on an office and secretary having previously worked from home with no employees. This next financial year is likely to have a slightly higher turnover; however my overheads have increased significantly. Carrying the work in progress on a significant number of cases meaning a long lead in for payments combined with low fee rates when payments are eventually received means it is not clear that the legal aid practice is feasible. The high number of hours needed to process a sufficient volume of work and attend to non-chargeable items of work each week makes it very difficult to devote time to changing the focus of this firm to attracting and servicing private work."

It was suggested by a number of respondents that the provision of legal aid in large parts of the country would discontinue on the retirement of solicitors who had provided legal aid throughout their careers, and that there was little incentive for young solicitors to enter legal aid practice. One respondent said:

"The obvious challenges relate to the remuneration rates for work of an increasingly complex nature. The rates of remuneration do not reflect the burden of responsibility, which accompanies the representation of individuals facing either potential incarceration or loss of reputation. They also fail to reflect the high standards expected by the judiciary in case preparation and presentation as well as regulatory compliance. They act as a disincentive to young entrants to the profession and will lead to an ageing criminal bar which, over time, will be unable to meet the demands of the system."

Another respondent said:

"We are unable to recruit anyone to carry out civil legal aid which is one of the main reasons we now do very little. Newly qualified solicitors know that there is no future in a career as either a family or criminal lawyer because these types of cases are funded in the main by legal aid. The criminal bar is growing older and in the next five years, I believe will come to a cliff edge when a vast number will cease to do the work due to legal aid rates or simply retire through age and there will be a massive shortage of suitably experienced solicitors to provide the public access to justice."

II Possible changes to make the legal aid system more sustainable

Respondents were asked about possible changes that would address these challenges around sustainability and a number of suggestions were made including:

- Increasing rates of remuneration;
- Changing the process for expert outlays;
- Permitting interim payment of fees;
- More support from SLAB through training, particularly in rural areas;
- A review or “overhaul” of the legal aid system overall.

Remuneration

The remuneration of legal aid practitioners was repeatedly raised as a change required to address the sustainability of the legal aid system in Scotland. One respondent said:

“Fair remuneration is the main issue here. It is simply unacceptable to expect solicitors who are after all running a business to subsidise from other more remunerative fields of their business the provision of legal aid. Until a real effort is made to address this issue the legal aid system in Scotland is not sustainable in the long term.”

Other suggestions around remuneration included payment of interest for late payments (as with other late payments across the public sector, or even those available to advocates); revising the duty plan arrangements for criminal work, where a third of duty cases are allocated to public defenders in a number of geographic areas across Scotland, distorting the market for criminal defence services; incentivising early resolution of criminal cases through, for instance, adequate s76 fees; and removing the cut to travel fees to support access to justice in rural areas.

Travel fees were mentioned as a significant challenge for access to justice in the context of a 50% reduction in the rate of travel implemented by the Scottish Government in 2011. The rate available for travel, which is payable only in limited circumstances, is £5.45 per quarter hour. Mileage is a separate expense. A number of respondents suggested that, in circumstances where the client is unable to travel to the solicitor, for instance, where detained, rates at this level significantly deter travel by solicitors (and, indeed, can incur loss).

Expert fees

Expert fees were considered a significant issue for cash flow, requiring payment by the firm, often in advance and later reimbursement. One respondent said:

“Outlays are always paid up front before instructing them. Under legal aid many experts are insisting on fees up front which poses problems for cashflow. It also means we can be paying for reports which subsequently turn out to be sub-standard and do not answer all the questions posed but there is nothing we can do about it as the fee has already been paid.”

The process for securing experts was also considered cumbersome, with several quotes required by SLAB. It was suggested that either SLAB meet the costs of experts directly, or offer a directory of experts of sufficient quality (and prepared to work at legal aid rates).

Interim payments

The lack of interim payment for many cases has a significant impact on cash flow. A number of respondents considered the introduction of interim arrangements as an important step towards a more sustainable system of legal aid. One respondent said:

“No account is taken of the fact that we require to wait to the end of the case to receive payment. In private cases payments to account are made. In matrimonial work, this can mean that agents wait many years for a payment which further diminishes its value. Private clients are fed on a regular basis and legal aid does not provide any opportunity for that under advice and assistance or legal aid where there is a potential of recovery.”

Another respondent noted that their firm no longer carried out financial divorce under advice and assistance because of the lack of interim payments, while a private client would pay in instalments.

Training and support

Support from SLAB was highlighted as a need, particularly for firms practising in rural areas. Areas such as accounts were suggested as areas for prospective training, as without appropriate training, some firms required to outsource this work.

Review

A number of respondents suggested that the complexities of the current system could be reviewed, for instance, removing the distinctions between advice and assistance, assistance by way of representation (ABWOR) and legal aid and considering a single, continuing grant. There was a suggestion that the mechanism by which advice and assistance increases were authorised be removed, that the responsibility for solemn legal aid grants be returned to the Scottish Courts and Tribunals Service under supervision of the judiciary, and that an enhanced compliance regime be implemented from the consequential savings of these steps.

One respondent suggested that a review should encompass the business models used by firms practising legal aid:

“Given the investment we have made over many years in staff (legal and support), offices and technology (especially case management systems), it has been disappointing that nothing has been done to encourage this approach as against the sole practitioner.... As there is greater rationalisation of the cases being prosecuted, a process I expect to accelerate, it is essential that there should be a meaningful review of what is sustainable. In particular, when it comes to large and demanding High Court cases, certain firms should not be allowed to undertake these if they do not have adequate resources... There should be a meaningful system for ensuring that firms only undertake work for which they have capacity. The grant of sanction for counsel in the Sheriff Court, although reduced, still seems to operate for some as a means of taking on cases they could not otherwise do - not the purpose of such sanction.”

III Inefficiency and undue bureaucracy in the legal aid system in Scotland

The majority of respondents considered the current legal aid system to be inefficient and unduly bureaucratic and a number of criticisms were made. A particular challenge appeared around consistency of decision-making, where refusal at first instance would routinely be overturned on review. One respondent questioned why taxation (independent decision on fees by an auditor of the court) of one element of an account prevented the payment of the remainder of the account which was unchallenged.

A number of respondents considered that the verification of financial eligibility of clients would be better managed by SLAB because of the time delays, administration and unpaid nature of this process for solicitors. As verification requirements were being more stringently applied by SLAB, this problem was becoming more acute.

There were some positive comments around the Legal Aid Online system for submitting accounts, though a number of criticisms of recent changes, which were considered by some respondents not to be user-friendly and often created significant additional administration.

There was broad support for reducing the overall level of bureaucracy around the legal aid system and moving towards a principles-based approach. One respondent said:

“Currently, the online Handbook and associated “guidance” etc. etc. must extend to thousands of pages. The Board’s staff operate in compartmentalised departments and only generally know the requirements for their own department. We are expected to know the lot, and if we do not and it gives an opportunity to avoid payment the Board will seize it. Their rules are too prescriptive and should be reduced to operate on the basis of more general principles. For example, in applications we will give quite a bit of information about the type of work proposed, but if we apply the wrong type of code (and there are dozens of them) the application is likely to be refused, or payment refused after the work is done.”

A number of respondents suggested that, for criminal cases, there should be an automatic grant of legal aid if the case proceeded to prosecution or if a custodial sentence was possible. One respondent said:

“If the client is charged with an offence which carries a custodial sentence or loss of driving licence legal aid should be granted automatically. The saving of 5% of cases does not justify the huge burden placed on solicitors and the courts for the constant running around for very small sums of money.”

One respondent provided an example of how undue bureaucracy can impact work being undertaken for vulnerable clients at short notice in homelessness cases:

“In these cases we require to put the local authority on notice that we intend to raise judicial review proceedings for breach of the authority’s statutory duty (under Section 29 Housing (S) Act 1987) should they fail to provide our client with temporary homeless accommodation. In many of these cases our clients are actually rough sleeping. In a large number of these cases we find that our clients are particularly vulnerable as a result of their age or health. These are the most desperate and extreme of cases. The law is very clear on this issue- the local authority must provide temporary accommodation where it has reason to believe that someone is homeless. In order to raise Judicial Review proceedings we require to secure Special Urgency funding under Reg 18(b). There is often a delay in this. We understand that urgent requests are dealt with within 24 hours, however we would require to raise proceedings within that 24 hour period if the case cannot be resolved out of court. Whilst we are without legal aid cover, we cannot instruct Counsel to raise proceedings. Where the Regulation 18(b) cover is refused, we require to submit a fresh application. This is all very time consuming.”

Another respondent highlighted the challenges of legal aid for criminal appeals:

“In relation to criminal appeals, a relatively recent change has increased uncertainty and confusion, resulting in payment not being made in several cases where it should have been made. At the outset of a criminal appeal, only Regulation 15 cover is possible. If leave to appeal is granted, a fresh legal aid application must be made. The court’s timescales are such that such a legal aid application must be made urgently at that point as the full appeal hearing will be fixed very quickly, indeed only 4 weeks later in sentence appeals. Not all firms seem yet to realise that there has been this fundamental change in cover for appeals. Regrettably it has resulted in many appeals being undertaken for other firms for which there is no cover and therefore no payment. A single application should suffice, with the grant of leave to appeal resulting in an automatic extension of the original cover, or alternatively converting the Regulation 15 cover into full legal aid without further application or procedure, beyond sending the Board a copy of the grant of leave to appeal. Furthermore, in a summary criminal appeal where a solicitor did not act at first instance (a situation which is not uncommon), a total of three separate legal aid applications must now be made. An application for Advice and Assistance must be made to visit a client in custody to cover the costs of taking instructions and signing the Regulation 15 mandate. Thereafter the Regulation 15 application requires to be made and a full application for legal aid must thereafter be made should leave to appeal be granted. As a result of misunderstandings arising from this unnecessarily complicated change, our firm has many outstanding fees for appeal work, including consultations, appeal hearings and written submissions, etc. , running into many thousands of pounds. As the instructing firms will receive no payment, we will not charge them and accordingly have to write off the fees. In effect, we subsidise a greater number of appeal cases by way of what is, in effect, pro bono work. Appeal work is unattractive for much of the profession due to the already low rates of remuneration compared to the level of work/preparation involved if the work is undertaken correctly. The High Court and new Sheriff Appeal Court police the relevant time-limits for appeals very carefully. The court’s tight time-limits are undermined by a change which has seen far greater uncertainty and more cases which should have full legal aid cover instead hobbled by unjustified bureaucracy.”

IV Areas of the country where it is difficult to access legal aid

Respondents were asked whether there are any geographic areas in which legal aid provision is more challenging to access. There were a number of comments about provision issues in more rural areas, such as the Highlands, Orkney and Shetland, Moray and Argyll. There were also a number of concerns expressed about provision for particular types of work in more urban areas. One respondent said:

“Legal aid for criminal cases is harder to get in [the] Glasgow area, because of heavy reliance on prosecuting cases before lay magistrates. I constantly come across cases out of town which are prosecuted at sheriff summary level and which would only be prosecuted at lay magistrate level in Glasgow. Consequently the threshold for granting is higher and the fees are lower, albeit, the cases can be quite serious and complex.”

Another mentioned the lack of housing provision in Aberdeen:

“We are aware that, despite the significant work of the Civil Legal Assistance office and the work that the Shelter Housing Law Service does, that there are still too few legal aid solicitors practising housing law to cover the demand for this type of work.”

Several respondents mentioned the lack of availability in cases involving financial divorce, in areas such as Edinburgh, West Lothian and North Strathclyde.

Challenges around legal aid cover for children’s work in Fife were highlighted and one respondent said:

“It is particularly difficult to obtain legal aid cover in Fife on an emergency basis where a child has been retained in contravention of an existing residence order and I have experience of the delays in legal aid leading to the client being unable to obtain return of a child as by the time the matter is brought to court some changes have been made to the child’s life (e.g. change of school) with which the court is reluctant to intervene.”

There were concerns around supply reported in the Central region for criminal Justice of the Peace cases, family and employment.

Supply concerns around eviction cases across Scotland were attributed to the current feeing arrangements and one respondent said:

“The block fee system of payment for defending evictions does not reflect the reality of the work undertaken by the solicitor- in terms of the complexity or time consuming nature of certain cases. The legal aid rates which at present stand at £21.11 per half hour of advocacy (where there is special urgency in place) and £87.96 for proof preparation do not adequately reflect the work required. A solicitor’s firm undertaking this type of work solely on a legal aid basis would most probably run at a loss.”

Adequacy of remuneration was highlighted as a significant factor in the number of areas facing supply issues, as well as the general demography of legal aid practitioners, with few young lawyers undertaking these types of work.

V The role of technology in enhancing the profitability of legal aid work

The Scottish Government’s Digital Strategy for Justice in Scotland¹⁶ outlines a number of ways in which new technology will improve overall system efficiency. In recent years, there have been a number of developments, including video-conferencing, secure email systems, electronic disclosure, and Legal Aid Online, that have changed the ways in which courts and practitioners operate. Respondents were asked for views around how technology might affect the profitability of legal aid work: a number of views were very positive around the potential for new technology.

One respondent suggested a wider role for the Society in examining the potential of these new technologies:

“We already use technology widely. We could not do legal aid work profitably without relying on a case management system... Video conferencing, greater use of secure email, electronic analysis and presentation of evidence, and other IT innovations are critical parts of what we do. There is a clear need for greater participation by the Law Society in proposed uses of IT in the justice system.”

However, some were critical of the current provision of technology:

“The lack of VIPER (Video Identification Parade Electronic Recording) suites is appalling, the expense to the accused disproportionate; the lack of ‘joined-up’ thinking for digital format prosecution evidence being played/presented to a witness giving evidence by link continues to be met with ‘can’t do it’ response; the timeous disclosure of same (and other material) is very problematic - and the Crown’s refusal to disclose any evidence before a Not Guilty plea is recorded completely contradicts efforts to resolve matters early and contradicts any ‘discount’ which could be available. SLAB’s refusal to pay ABWOR after first Continuation Without Plea (CWP), although Crown continually have not carried out their reason for the CWP, is contrary to the interests of justice and grossly unfair to the legally aided client.”

¹⁶ <http://www.gov.scot/Resource/0045/00458026.pdf>

Others highlighted the unintended consequences of the move to new technology, for instance, the need for printing despite the development of electronic disclosure:

“Whilst technology is helpful in terms of emails and use of computers - the difficulty is that, certainly in relation to court work, there is still a need to have everything printed and available on paper. Suggestions by SLAB that a “working file” involving notes of important parts of statements could be used is ridiculous. Our costs in respect of printing and paper have risen since the introduction of disclosure because of the need to print everything.”

A number of respondents highlighted that their firms have adopted technology successfully, and at a pace ahead of the wider justice system. One respondent said:

“It may be possible for improvements to profitability under some of the proposed changes. It seems to me that there has been an aspect of procedural changes going quicker than the necessary technology can support. For example, video technology is not yet as reliable as it needs to be for court purposes. We are probably better placed due to our investment in case management software, although even there the Board has been talking about changes to ensure compatibility between its system and others like ours, to avoid unnecessary duplication of effort. This has not happened yet.”

A theme emerging from a number of the comments was that the ways in which technology could transform the court system were being considered without reference to legal aid processes and fees. It was felt frustrating that resources were being found for electronically enabling the justice system at a stage at which adequate remuneration for the people working within the system was being described as unaffordable in the current economic climate. Without consideration of the impact on legal aid practice, there was a significant risk that system-wide efficiencies would not be achieved, and one respondent said:

“It is too early to say what impact these changes will make. They may result in less time being wasted at Court, which at present is often not chargeable. Nevertheless, it is likely the solicitor will have more work to do with regard to case preparation, agreeing evidence and deal with the new interactive Digital Management System. Unless Legal Aid rates reflect this additional work, it is likely more practitioners will decline to engage with Legal Aid and the new digital summary justice reforms. This would seriously impact on the Summary Justice Procedural reforms and render any savings in the new system redundant.”

It was suggested by respondents that the changing nature of criminal procedure, both now and in light of the recommendations of the Criminal Evidence and Procedure Review, should these be implemented, would require reconsideration of the legal aid fee structures overall. As more work would be required from the outset, and to encourage early case disposal, front-loading of fees should be developed. One respondent said:

“If the system of legal aid is front loaded with immediate grants (not advice and assistance grants with a figure), early evidence gathering and examination of witnesses would be achievable. If the system is as cumbersome as now i.e. advice and assistance grants to a fixed figure then legal aid being required after that the system is impossible to work in an efficient manner. Advice and assistance should be repealed and one certificate of legal aid from start to finish including the appeal should be granted.”

There were various means suggested by which technology might improve the justice system. Electronic motions, as used in the Court of Session, should be widened to the Sheriff Court. More widely, paperless processes are to be encouraged, but there needs to be recognition that this will not always be possible, for instance, dealing with clients at hospitals, prisons and residential homes where electronic devices (or connectivity for them) may not be available. Video links could be used as part of a wider approach towards procedural hearings taking place without personal attendance (though there was some scepticism around the use of pre-recorded evidence in substantive hearings).

VI The role and use of first-year trainees

Respondents were asked about the role of first-year trainees. The structure of the legal aid system under the 1986 Act requires admission to the roll to be able to provide advice and assistance or legal aid. Trainee solicitors can apply for admission to the roll after at least 12 months of their two-year traineeship.

Some have argued that this can prove challenging for firms, particularly those providing criminal legal aid exclusively, as the range of fee-earning work that could be carried out by first-year trainees is very limited. It had also been previously suggested that taking on a trainee solicitor, particularly for firms working under legal aid rates, can be economically unviable. Some respondents considered the practice restrictions on trainee solicitors more influential on the decision to recruit trainees or not. One respondent said:

“I would not take on a trainee for the very reason that the limitations mean that the firm would incur a loss in paying their salary and in the time it would take to properly train them. They would require office space but are unable to assist with interviewing and admitting new clients to legal aid, nor to appearing in court. Although they would be permitted to attend children’s hearings, children’s legal assistance does not allow for payments to be made from the legal aid certificates in respect of representation by trainees.”

Other respondents considered the legal aid rates overall to be more influential in the decision to recruit or not. It was noted that the rate recommended for trainees by the Law Society increases every year, while legal aid fees do not, making taking on trainees less economically viable each successive year. One respondent said:

“Until last year, our firm always took on a new trainee every year. Last year we did not do so and we will not do so this year either. This has been largely due to the Court Reform process and the removal of a significant amount of appeal work from the High Court... The likely rates are not sufficient for us to reconsider our changed view on employing trainees. Frankly, it is this rather than any issue with limited functions which has informed our decision. Allowing first year trainees to appear in court, for example, does not appeal as an alternative.”

Another respondent actively recommended that young lawyers avoid legal aid practice:

“Like most legal aid firms we are unable to take on trainees. The cost implications prevent this. More importantly, the hours which principals require to work to generate a reasonable profit leave insufficient time (and energy) to properly train young lawyers. In addition I personally would discourage young lawyers from a legal aid career if they had any reasonable alternative. They are unlikely to earn an income which their abilities, knowledge and enthusiasm merit; and the non-financial satisfaction of helping members of the public who need their assistance in often life-changing circumstances has been eroded almost to the point of non-existent by the stress of daily battles with the legal aid board and inadequate payment.”

There were a number of suggestions around areas that it might be appropriate for first-year trainees to work, if the legal aid scheme were amended. In criminal practice, it was suggested that this could include VIPER parades, prison consultations, intermediate diets and bail reviews. In civil practice, it was suggested that this could include small claims and summary cause (areas which have since become part of the new simple procedure introduced in November 2016). The need for appropriate supervision was stressed, with the supervising solicitor responsible for ensuring that the first-year trainee was not undertaking work for which they were not suitably skilled to undertake.



A number of other comments were made, with respondents expressing views on a range of issues, including:

- The disparity between privately funded and publicly funded assistance, where for the former, trainees can make a fee-earning contribution to the firm in their first year;
- The difference in salaries between a first-year (or even a second-year) trainee, who is limited in the work that they can undertake, and a newly qualified solicitor, who is not limited, is believed to be sufficiently small that many firms prefer to recruit newly qualified solicitors if possible;
- It was suggested that the rules for both first-year trainees and paralegals under the legal aid scheme were unclear, and applied inconsistently by SLAB;
- It was suggested that the time that the Law Society takes to process admission to the roll, where an application cannot be made until at least 12 months of a traineeship have been met, and where the admission process often takes up to two months, leaves less time in the second-year of traineeship to undertake fee-earning work under the legal aid scheme.



8 The researchers

This project has been undertaken by Andrew Otterburn and Vicky Ling, with technical support from Dr John Pollock.

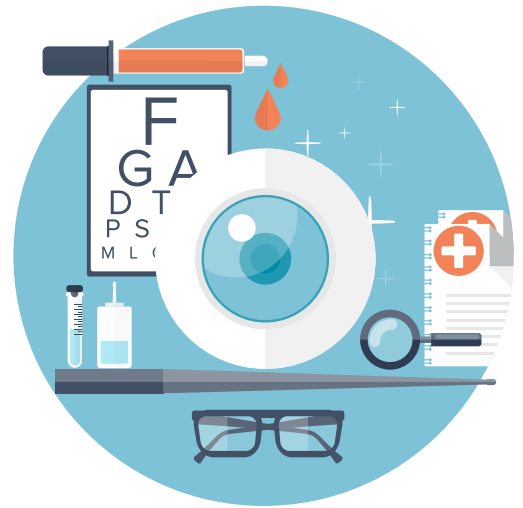
Andrew Otterburn and Vicky Ling are independent law firm management consultants with particular experience of undertaking financial research regarding legal aid firms on behalf of the LSEW and other organisations, including:

- Transforming Legal Aid: Next Steps - A Report for the LSEW and MOJ. 2014¹⁷;
- Price Competitive Tendering for Criminal Defence Services 2013 - A Report for the LSEW. 2013;
- Personal injury marketing and “referral fees” – Association of Personal Injury Lawyers (APIL). 2012;
- Impact of the MOJ Green Paper proposals on legal aid firms - the LSEW. 2011;
- Understanding the supply of legal services by “special bodies” (with Frontier Economics) - Legal Services Board. 2011;
- The impact on the supplier base of reductions in criminal fees from April 2007 - An assessment of the impact on criminal suppliers of Lord Carter’s recommendations during the transition. Legal Services Commission 2006;
- Advice to Lord Carter’s Review of Legal Aid Procurement - survey of criminal firms. MOJ, 2006.

Andrew Otterburn has advised around 250 firms of solicitors around the UK and Ireland, mainly in connection with their profitability, management and strategy and has over 25 years’ experience advising the legal sector. For a number of years, he worked with Dr John Pollock as co-author of the Society’s annual Cost of Time Survey.

Vicky Ling has extensive experience of legal aid, having spent two years with the Legal Aid Board as a senior manager in supplier quality assurance, managed a law centre at North Kensington and as chair of trustees for a Citizens Advice Bureau in London. She was a member of the Civil Justice Council for several years and a member of the Low Commission on social welfare advice and legal support, and has advised a large number of firms and not-for-profit agencies.

Dr John Pollock is a consulting actuary, who specialises in providing expert opinions on a range of matters considered by the UK courts, including personal injury cases, employment matters and family law. From 2002 to 2014, he administered the Society’s Cost of Time Survey, calculating hourly fee rates for individual firms based on their known overheads.



¹⁷ <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps>



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