



Law Society
of Scotland

Country Report – Scotland

The Law Society of Scotland's report to the 45th
European Presidents' Conference

January 2017



Law Society of Scotland Country Report

Strategy and Structure

2015-2016 has been the first year of operation under our new five-year strategy and a restructured staff team. Acting on the new, more proactive strategy and through the rationalised staff structure has had a significant impact on the work of the Society which is now organised through five overarching departments – Education, Training and Qualifications; External Relations; Finance & Operations; Member Services; and Regulation.

Public Policy

As part of our restructure and new strategy, we have moved towards a focus on public policy as a key element of our law reform and external relations work. Our Law Reform Committee has been stood down, with a newly formed Public Policy Committee taking its place. This committee has solicitor members and lay members, as well as specific representatives from the new lawyers (less than three years qualified) and in house groups within the profession.

Membership options

As part of our strategy to grow our membership, we are reconsidering our current membership options and working towards new categories of membership and a wider range of ways for individuals and organisations to engage with us.

We have now launched a student associate scheme which is open to all LLB and Diploma in Legal Practice students/graduates. It is free to join, and is linked to opportunities such as our Street Law programme, career support, and access to our CPD for new lawyers events. In the first month of the scheme, we had over 500 students sign up.

Lawscot Foundation

We recently established the Lawscot Foundation, a charity which will help academically talented students from less advantaged backgrounds in Scotland through their legal education journey. It will offer financial assistance, mentoring and other support to students during the law degree (LLB) stage, right through the diploma in professional legal practice.

We will also support the bright legal stars of the future by providing mentoring throughout their legal education from an experienced Scottish solicitor to help enhance the student's confidence, skills and knowledge.

Outcome of the Scottish Parliament election

The Scottish Parliament election was held on 5 May 2016. The SNP won 63 seats, two short of a majority, and six fewer seats than they held in the previous session. The Conservatives won 31 seats (up 16), Labour won 24 (down 13), the Greens won six seats (up four) to overtake the Liberal Democrats, who stayed the same at five seats. Turnout was 55.6%, which is up on the last Scottish Parliament election in 2011, but lower than the Scottish turnout to last year's UK general election as well as for the Scottish independence referendum in 2014.

This was the first election of the Scottish Parliament where 16 and 17 year olds were eligible to vote.

Referendum on UK membership of the EU

On 23 June, the UK held a referendum on whether the UK should remain a member of the EU. The overall result was 51.9% for leave, and 48.1% remain. The different regions of the UK were, however, divided between leave and remain as follows:

England: 53.4% leave, 46.6% remain

Wales: 52.5% leave, 47.5% remain

Scotland: 38% leave, 62% remain

Northern Ireland: 44.2% leave, 55.8% remain

There is still a great deal of uncertainty following the vote to leave the EU and at this early stage there are more questions than answers. Withdrawal from the EU will have a significant impact on the Law Society, our work and our members. We will be monitoring developments closely and will update our members and advise them on the practical effects of the negotiations at every stage.

We have a role in representing the public interest and the interests of our members to law and policy makers throughout the negotiation period and during the implementation of the withdrawal agreement and have offered both the UK and Scottish Governments and Parliaments access to the legal expertise that we as an organisation have available. We will seek to assess what the outcome of the negotiations will mean for our members; for their business; for the domestic legislative process and for our future interaction with the EU.

We have identified a list of key issues for both the public interest and the profession. These include ensuring consistent application of the law; cross-border freedom, security and justice issues; recognition and enforcement of citizens' rights; immigration, residence, citizenship and employment status; the impact on the devolved administrations; continued professional recognition within the EU and respect for legal professional privilege as it applies to Scottish solicitors; continued rights of audience before the EU courts; and continuity of business regulation. Using these priorities, we have drafted a negotiations proposal document, and sent this to UK and Scottish Governments.

There are of course the discussions around Scotland remaining in the EU. The Scottish Parliament has approved a motion which 'mandates the Scottish Government to have discussions with the UK Government, other devolved administrations, the EU institutions and member states to explore options for protecting Scotland's relationship with the EU' and the the Scottish Government has published a paper setting out its preferred approach and proposals for a differentiated settlement for Scotland. Again this is something we will monitor closely to ensure that we are part of the debate on behalf of our membership and their clients.

Further information on our work in this area, including copies of our submissions to the Scottish and UK Parliaments can be found [on our website](#).

Court Reforms

A significant programme of court reform has been continuing over the last eighteen months, with the introduction of a new Sheriff Appeal Court, a new Personal Injury Court, and the replacement of the current small claims and summary procedures with a new 'simple procedure' which came into force on 28 November 2016. Simple Procedure is designed to be a swift, inexpensive and informal process, usable by people who do not have legal representation, to sort out problems about matters of lower monetary value (£5,000 or less). The new procedure will be available online via a digital Integrated Case Management System being introduced by the Scottish Courts and Tribunals Service, likely spring 2017. This will provide an online portal, allowing the legal profession and the public to start actions, submit case documents, pay fees and track progress.

As part of the legislative statement of the new government, an Expenses and Funding of Civil Litigation Bill was announced, which will implement the legislative recommendations of the Taylor Review, including the introduction of qualified one way cost shifting, damages based agreements, multi-party actions, sliding caps for success fee agreements and other means to improve access to justice for civil litigants in Scotland. We are supportive of the changes to be implemented, though believe that 'opt out' as well as 'opt in' should be considered for multi-party actions.

The Scottish Government recently increased court fees. The government has been pursuing a policy of moving towards full cost recovery, which we have historically opposed, and in order to secure this, offered either a flat fee rise of 24% or targeted fee rises to secure the same. Following feedback to their consultation, it was decided to target these increases to work at the Court of Session rather than the lower

civil tiers, though as a result many of the fees for Court of Session work have more than doubled.. We believe that increasing fees will present challenges for access to justice , and seen in context of the overall decline in civil litigation over the last decade, may merit further consideration.

Tribunals

We are in the process of seeing further devolution to Scotland, including in the tribunals system. Recent consultation on the devolution of certain functions of the Employment Tribunal to the First-tier Tribunal for Scotland highlighted a number of concerns around draft proposals.

However, we are pleased that the Scottish Government has committed to abolishing fees in the Employment Tribunal when it is competent for it to do so. We believe that the introduction of fees in 2013 led to a significant reduction in access to justice.

The UK Government also reversed in November 2016 increases to immigration tribunals (which had only been introduced the month previous). The fees payable in the Immigration and Asylum Chamber saw an increase of around 500% in many situations – a level far higher than for any other tribunal in the United Kingdom, many of which are free to access, and more expensive than most court fees as well. Though these fee increases have been reversed, there will remain significant financial pressure on fees for courts and tribunals for the foreseeable future. We believe that the principle of full cost recovery from court and tribunal users risks a vicious cycle: increasing fees may reduce claims, requiring ever higher contributions from these users, reducing claims and so forth.

Legal Aid

In the context of ongoing pressure on the legal aid budget, and continued calls for solicitor rates to be increased, the Scottish Legal Aid Board has commenced an engagement plan comprising of three strands of work – identifying opportunities to streamline, simplify, and modernise the system, updating the Code of Practice for Criminal Legal Assistance, and reviewing the police and court duty schemes. While many of the proposals can be supported in principle, there remains considerable concern over the sustainability of the rates being paid to solicitors.

In the run-up to the Scottish Parliament elections, we launched a campaign to raise the issue of legal aid with candidates. This included producing a short video aimed at members of the public on the importance of legal aid, creating an email lobbying tool that allowed individuals to tailor and send a message to their local candidates asking them to commit to defending legal aid. Our #defendlegalaids campaign was hugely successful with over 450 people writing to their parliamentary candidates asking them to #defendlegalaids, resulting in over 19,000 emails being sent. Candidates in over 70 constituencies were contacted and candidates from eight political parties, as well as independents, pledged to #defendlegalaids on social media.

The Scottish Government announced in October 2016 that an independent review of the legal aid system would be established and we expect the review group to be announced in early 2017.

Following our commitment coming out of our Legal Aid recommendations paper, last year we commissioned research into the financial viability of legal aid firms in Scotland. This involved a detailed survey looking at costs, income and structure, as well as the views and concerns of firms in relation to the legal aid system. 57 firms across the country completed the survey, representing a wide range of size, volume of legal aid work, proportion of legal aid to private client work, and geography. The results are currently being analysed.

Minimum Age of criminal responsibility

On the 1st December 2016, the Scottish Government announced that they will be increasing the age of criminal responsibility in Scotland from eight to 12 years. This is a change in the law that we had been arguing strongly for since 2009.

Under the current law, Scotland still has one of the lowest ages of criminal responsibility in the world, at eight, although the minimum age of prosecution is 12. Children below this age are dealt with through the Children's Hearings system. However, this can still result in a referral to the Sheriff Court, and in the child acquiring a criminal record. This can cause confusion over people's understanding of the criminal law and its application to children. It is also below the age that the UN Committee on the Rights of the Child has identified as internationally acceptable.

We recommended that if the Scottish Government wished to legislate to change the minimum age of criminal responsibility it should do so by introducing a standalone Bill on this issue. The Scottish Government confirmed that they would introduce a standalone Bill on this issue.



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Equal rights for all! – Disparities in justice across Europe

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Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the European Presidents' Conference on the theme of Equal rights for all! – Disparities in justice across Europe. We have the following comments to put forward for consideration.

General Comments

In January 2016, the Equality and Human Rights Commission published a report on the state of equality and human rights in Scotland.¹ This report looked at trends over the previous five years in a wide range of areas, including Justice, and the experiences of people with different characteristics, for example, sex, disability, age, and race.

In addition to the information available in that report, we consider the following issues to be ongoing challenges to equality and access to justice in Scotland.

Court and Tribunal Reforms

Court Closures

Between November 2013 and January 2015, ten Sheriff Courts and seven Justice of the Peace Courts were closed across Scotland as part of a programme to modernise and rationalise the court estate as well

¹ Equality and Human Rights Commission, [Is Scotland Fairer? The state of equality and human rights in 2015](#) (2016)

as to achieve cost savings. Considerable concerns have been raised that these closures not only damage access to justice in Scotland, but will also fail to deliver significant cost savings in the long term. Calls for wider cost analysis and consideration of alternative cost savings measures were not accepted prior to the implementation of the closures.

The equality impact assessment accompanying the consultation suggested that a number of groups will be adversely affected by these proposals, in particular, women, those under 29 and above 60, and who are more likely to use public transport.² Socio-economic disadvantage is not considered in such assessments, though the increased travel costs to a smaller number of courts, whether through closure or consolidation, will affect those who can least afford it. The significant increase in time and expense for some individuals travelling to court continues to be a concern, together with logistical travel issues meaning witnesses and parties may find themselves with no realistic option other than to travel on the same bus or train service. In addition, we consider that the lack of proximity of courts to local communities is itself damaging to the principle of access to justice. Further details on the issues raised by the court closures programme can be found in our 2012 response to the consultation.³

Concerns have been raised that there continues to be increasing pressure on the court system in Scotland, and that it is taking longer for criminal cases to progress through the court system. A report by Audit Scotland found that fewer summary cases were being completed within the 26 week target, with a fall of eight percent from 2010/11 to 2014/15.⁴ A slowing down of criminal cases was also cited by the Scottish Legal Aid Board as a factor contributing to the eight percent drop in overall legal aid expenditure from 2013/14 to 2014/15.⁵ Various arguments have been suggested for this slowing of cases, including the increasing complexity of the case types prosecuted – such as sexual offences – and an increase in numbers of cases prosecuted as a result of the consolidation of police constabularies across Scotland into a single entity. Case processing times appear to be improving and we are monitoring the situation.

² *Equality Impact Assessment Record*, Scottish Court Service, August 2012

³ Shaping Scotland's Court Service, The Law Society of Scotland's Response, December 2012 – <https://www.scotcourts.gov.uk/docs/default-source/court-services-consultation-responses-april-2013/the-law-society-of-scotland.pdf?sfvrsn=4>

⁴ Audit Scotland, Efficiency of prosecuting criminal cases through the sheriff courts, September 2015 – <http://www.audit-scotland.gov.uk/report/efficiency-of-prosecuting-criminal-cases-through-the-sheriff-courts>

⁵ Scottish Legal Aid Board, Annual Report 2014-15 – http://slab.org.uk/common/documents/Annual_report_2014_2015/Annual_Report_2014-15.pdf

Legal Aid

Budget and Fees

The real term decline of legal assistance can be traced back much further than the 2008/09 economic downturn. The 2016-17 budget allocation for the legal aid fund has been set at £126.1 million, the lowest it has been for well over a decade. This is a reduction from the 2015-16 budget of over 7% (from £136.¹ million to £126.1 million). Over the last two decades, the number of criminal cases has reduced, certainly, though the number of civil cases, particularly following the economic downturn, has been increasing. Over the same period, the complexity of cases has also been increasing, a notable example the right to advice at a police station following the *Cadder* decision, the ramifications of which, over five years later, have still to conclude.⁶ Despite increasing complexity, many fees have remained unchanged for significant periods. The justice sector overall has kept track of inflation and other cost drivers, for instance, court fees, judicial salaries or sheriff officer charges. Legal assistance, however, has not done so, and from our consultation,⁷ which was open from November 2014 to January 2015, we heard that law centres, the advice sector and other front-line services have similar challenges around funding. The fact that solicitors presently undertake legal assistance work does not mean that, long term, they will be able to do so at the rates of pay presently offered. Public funding is an issue for all frontline services, but we believe that with the high prevalence of justice problems and the social, emotional and financial cost of leaving these unresolved, investment to halt the ongoing real-terms decrease in resource is crucial.

Legal aid spending is demand led and not limited by the budget and so we would expect the Scottish Government to continue to meet all its obligations in terms of demand for legal aid. However, through its savings initiatives, the Government tries to reduce expenditure to meet the budget allocation.

The Scottish Government has set the financial target for 2016-17 at a level that is lower, in cash terms, than levels of legal aid expenditure from over 20 years ago (in 1994/95 the total expenditure on legal assistance was £132.1 million). This is clearly unrealistic if you are trying to maintain an effective and sustainable legal aid system. Given existing figures, in order to reach its target, the Government would need to cut expenditure by at least £10 million by the end of 2016-17. We do not see how this can possibly be achieved without seriously damaging both access to justice and the justice system.

The Scottish Government announced in October 2016 that an independent review of the legal aid system would be established and we expect the review group to be announced in early 2017.

⁶ *Cadder v HM Advocate* [2010] UKSC 43

⁷ Legal Assistance in Scotland – Fit for the 21st Century, Law Society of Scotland Discussion Paper- <http://www.lawscot.org.uk/media/409526/legal-assistance-in-scotland-discussion-paper.pdf>

Access to Legal Advice for Children

On the issue of children's rights, we have concerns over the ability of children in Scotland to have effective access to independent legal advice on matters of civil law. We have heard concerns that child applicants struggle to access legal aid, in particular due to the rules in place, and their interpretation, regarding aggregation of resources of persons with an obligation to aliment (an obligation to contribute to the maintenance of the child).⁸ The original intention of the rule around aggregation of resources was to manage a specific set of cases where children were being used by parents to apply for legal aid, when the parents themselves would not have been eligible. This was largely felt to be an issue for school placement cases. However, the impact of the changes has been much wider. This approach to assessing a child's resources is relevant to many categories of case, such as family law issues, community care assessments, and cases of medical negligence at birth.

Since the implementation in 2011 of the rule regarding aggregation of resources, there has been a considerable decline in the number of applications for legal aid by children, and in the amount paid out by the Scottish Legal Aid Board ("SLAB") in cases where the assisted person was a child at the time of application.⁹ The decline is most obvious in the 15 and under, and 16-17 year old categories. However, it should also be noted that the total amount paid out is still significantly higher than ten years ago, and only small numbers of applications (between one and four each year) are refused on the grounds of parental obligations to aliment.

In addition to disputes around SLAB's assessment of resources, whether a young person should be assessed as a child or not, and exercise of discretion to disregard the resources of persons with an obligation to aliment, SLAB has had to clarify the application of these rules to children who qualify as adults under the Adults with Incapacities legislation. Further, the lack of cooperation of a person with an obligation to aliment in providing details of their resources (whether because they do not support the child's application, do not want the child to know their financial situation, or for any other reason) can mean that a child cannot receive legal aid, even if they may have been eligible.

There have also been reports that solicitors are requiring financial information of persons with an obligation to aliment to be given upfront, before any discussion of the child's issue or any advice is given. This not only limits the usefulness of SLAB's discretion to waive the requirement to aggregate resources, but also effectively creates a situation where a child cannot seek legal advice from a solicitor without parental permission.

Aside from the practical issues generated by these rules, we believe that it is wrong in principle for a child applicant to be assessed with reference to any other person's resources.

⁸ Civil Legal Aid (Scotland) Amendment Regulations 2010

⁹ Information received from SLAB, January 2016

The ability to access confidential and independent legal advice and support is of fundamental importance in a wide range of areas that may impact on a child's life, and this ability is currently compromised by the requirement to aggregate resources.

In addition to believing that there are specific issues with the operation of the rule regarding aggregation of resources, we believe that as an issue of principle, it is not appropriate for a child applicant to be assessed with reference to any other person's resources.

A positive development in the area of children's rights in Scotland has been the announcement that the Scottish Government will be bringing forward a Bill to increase the age of criminal responsibility in Scotland from eight to 12 years.¹⁰ This is a change in the law that we had been arguing strongly for since 2009.

Mental Health and Disability

As a matter of urgency Scotland must improve the efficiency and effectiveness of the operation of the combined jurisdictions in relation to adults with incapacity, adults in need of compulsory mental health care and treatment, and adults who are vulnerable and at risk. In particular, the current position under the Adults with Incapacity (Scotland) Act 2000 ("the 2000 Act") is inefficient and ineffective. The fragmented operation of the three jurisdictions is inefficient because of the waste of public resources in terms of the current operation, in particular of the AWI jurisdiction by the courts and the drain on Legal Aid funds. The operation of the AWI jurisdiction is also expensive for litigants meeting their own costs, and time consuming and stressful for many of those involved in its procedures. This situation does not use the available resources of the Office of the Public Guardian and others with statutory roles to best effect. Most seriously of all, from the perspective of the Society in relation to its responsibility for the public interest, the current fragmented operation of the three jurisdictions and the current operation of the AWI jurisdiction in particular, frequently and seriously lets down vulnerable people, their families and carers.

In our view, both in terms of adequately meeting the needs of vulnerable people and of the compelling requirement, particularly in the current climate, to eliminate inefficient use of resources and achieve maximum value for money, there is a need to consolidate the three jurisdictions within a single tribunal, formed by expanding the Mental Health Tribunal for Scotland ("the MHTS") to encompass the adults with incapacity and adult support and protection jurisdictions.

The experience of those with whom the jurisdictions engage would be much improved by all of the advantages of the MHTS system. Importantly, the needs of any one vulnerable adult will often engage two of the three jurisdictions, or all of them. That is particularly so in the case of elderly adults, over 65. The main growth in applications to the MHTS in recent years has related to such elderly adults. Efforts to involve the adults with incapacity and/or adult support and protection jurisdictions, when such needs are identified before MHTS, where the MHTS can do no more than make requests or references (and

¹⁰ Scottish Government, *Minimum age of criminal responsibility*, 1 December 2016 <http://news.gov.scot/news/minimum-age-criminal-responsibility>

sometimes attempt to back these up with making recorded matters) are inherently inefficient. Having one forum to decide the appropriate intervention whether compulsory treatment, an adult support and protection intervention, welfare, property or financial guardianship, would reduce duplication in pre-hearing resources and in judicial time and, most significantly, reduce the number of proceedings to which the vulnerable adult is exposed. Taking this combined approach may also better determine questions of deprivation of liberty. Such needs for cross-referral arise within the adults with incapacity and adult support and protection jurisdictions, giving rise to similar inefficiencies, where they are addressed at all.

Further areas of reform that we consider necessary in relation to the law around the combined jurisdictions can be found in our consultation response to the Scottish Government's Consultation on The Scottish Law Commission Report on Adults with Incapacity.¹¹ The reforms to the 2000 Act which are required to achieve compliance with CRPD were outlined in our response to the Scottish Government Consultation on the UN CRPD Draft Delivery Plan 2016 – 2020.¹² As we pointed out in that response, the UK Government has ratified CRPD without any of the reservations which some states introduced with a view to permitting continuation of so-called “substitute decision-making” procedures. The General Comment is clear that all substitute decision-making must be replaced with supported decision-making. The work of the Essex Autonomy Three Jurisdictions Project published a position paper on this issue in June 2016.¹³

¹¹ Scottish Government Consultation on The Scottish Law Commission Report on Adults with Incapacity – the Law Society of Scotland's Response, March 2016 – <http://www.lawscot.org.uk/media/745234/mhd-consultation-on-the-slc-report-on-awi-final-.pdf>

¹² Scottish Government Consultation on the UN CRPD Draft Delivery Plan 2016 – 2020 – the Law Society of Scotland's Response, January 2016

¹³ Towards Compliance with Art. 12 in Capacity/Incapacity Legislation across the UK, Essex Autonomy Project, June 2016 - <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>



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