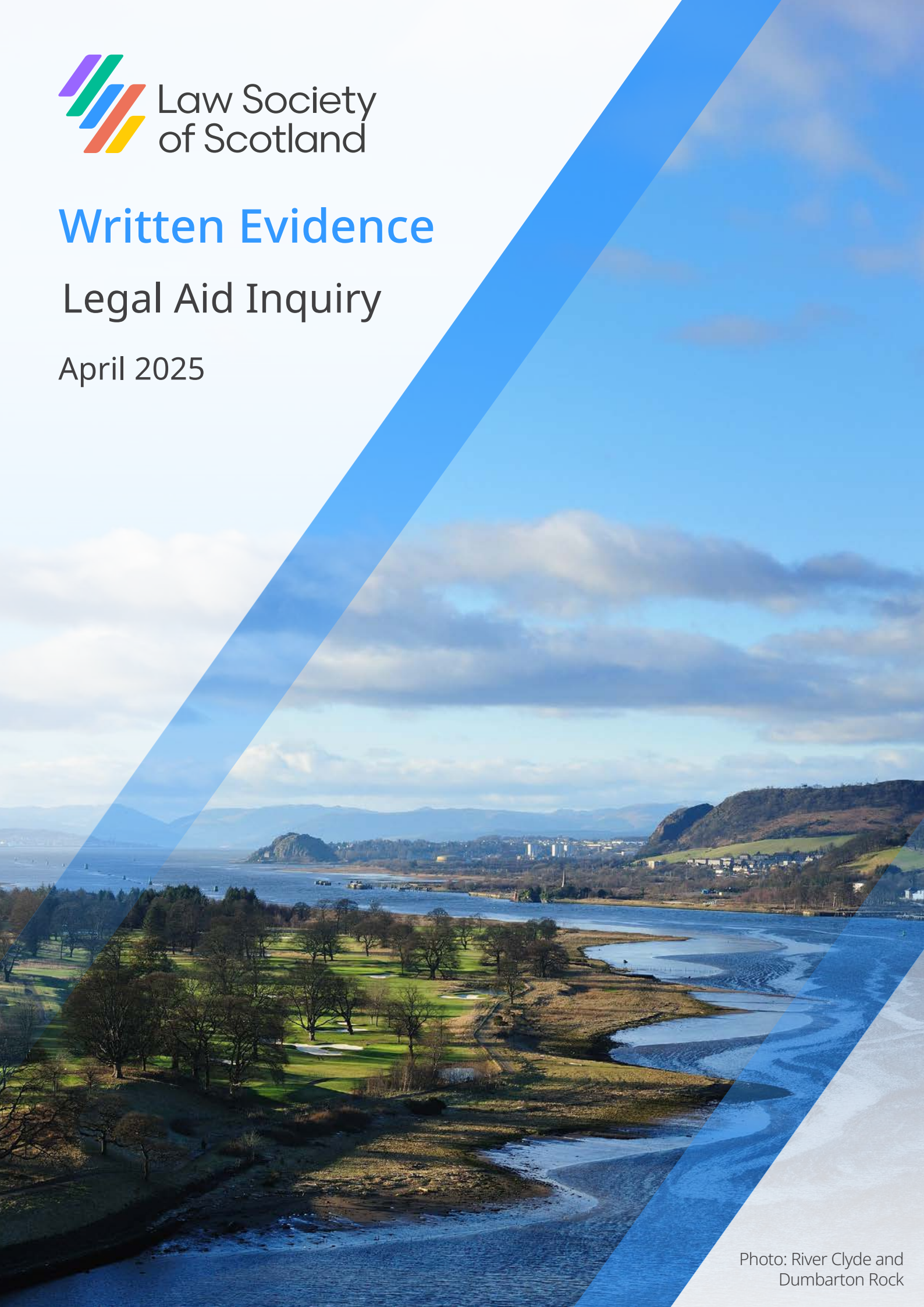


# Written Evidence

## Legal Aid Inquiry

April 2025



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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Civil Legal Aid Committee, with our Access to Justice Committee, welcomes the opportunity to consider and respond to the Equalities, Human Rights and Civil Justice Committee of the Scottish Parliament's call for views<sup>1</sup> as part of its Legal Aid Inquiry.<sup>2</sup> The committee has the following comments to put forward for consideration.

### Question 1

**What are the current barriers to accessing civil legal assistance? Can you give examples from your own experience, or refer to any research in this area?**

The main barrier for accessing civil legal assistance is the extremely low availability, and increasing shortage, of legal aid practitioners as this work becomes less commercially viable. Young solicitors are not remaining in the sector, or moving to the Crown Office and Procurator Fiscal Service (COPFS), the Public Defence Solicitors' Office (PDSO) and in-house where they will find better remuneration, benefits and work life balance. There are succession issues for existing firms, where partners retiring will be more likely to close businesses, or their firm stop doing this work, rather than having existing staff who want, or are able, to continue this work.

We are contacted on a daily basis by members of the public who have exhausted lists of firms and have been unable to find a legal aid solicitor to represent them. Similarly, we hear from third sector advice organisations that have seen massive increases in people contacting them who have been unable to find a legal aid solicitor, as well as those who do not meet the legal aid financial threshold but are also unable to afford a solicitor. This is not only an access to justice issue, but also contributes to significant court delays.

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<sup>1</sup> [https://yourviews.parliament.scot/ehrcj/legal-aid-inquiry/consult\\_view/](https://yourviews.parliament.scot/ehrcj/legal-aid-inquiry/consult_view/)

<sup>2</sup> <https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-equalities-human-rights-and-civil-justice-committee/business-items/legal-aid>

There is also a real need for SLAB to streamline the cumbersome system, through procedural changes and technology, which could make legal aid services more accessible, efficient and quality assured. SLAB could also make contact directly with clients in some circumstances, such as to request pay slips and other financial information, reducing administrative demands on solicitors. Pressures on solicitors in terms of this bureaucracy, as well as issues with eligibility, demand, and the cost of living crisis, compound the issues already faced in this sector.

Many people who cannot afford legal representation fall just outside the financial eligibility criteria for legal aid, leaving them without access to justice. Reviewing and expanding the financial eligibility thresholds would ensure that those with low and middle incomes are able to qualify for legal aid where this is appropriate. This could involve adjusting income and asset limits to reflect the current cost of living.

Some specific examples from solicitors on our committees, and our members, include:

- a client who had contacted around 40 firms before securing services (we understand that this is far from unusual).
- rural areas having very limited numbers of firms offering legal aid, which creates significant difficulties due to the pressure of work and the likelihood of conflicts of interest. It can take a long time to get an appointment with a solicitor, even if there is not a conflict. We understand the Borders, for example, now has only three firms (four solicitors) offering legal aid. This is also expanding out of rural areas and becoming a wider issue.
- Issues around housing and homelessness. There is an increasing demand for legal advice in the homelessness sector as people are turned away from statutory services. This results in people not accessing services they are entitled to. Thought should be given to expanding eligibility relating to these cases, and applying flexibility where appropriate. Organisations which can offer help are heavily reliant on grant funding. Asylum and immigration and medical negligence cases also face similar issues, as do women, children and young people experiencing domestic abuse.
- Local and face to face access to a solicitor is important across the board, but particularly in relation to complex cases. This becomes especially acute in relation to domestic abuse cases where competent legal-aid funded services are vital. Those in rural and island areas especially might face logistical difficulties in finding a solicitor and they will be a considerable distance away, even a ferry/plane journey, if travel from the islands to the mainland is required. A powerful example of these issues can be found in a recent media report detailing one woman's story<sup>3</sup>.
- We are aware of calls to broaden the scope of legal aid to include Non-Governmental Organisations (NGOs) and community groups by amending Regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. These are essentially group actions (charities, groups, communities) which are not

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<sup>3</sup> [Woman's divorce case was turned down by 116 legal aid lawyers - BBC News](#)



currently covered by legal aid. There is, anecdotally, a real struggle to find legal aid solicitors in Scotland who will accept environmental (and related planning law) cases.

It is clear from these examples that legal aid deserts, geographical areas where there is poor or no provision to access local advice and representation, do exist and, from the anecdotal evidence above, appear to be growing across the country, not just in rural areas, and that those solicitors who are still doing legal aid work are doing less in terms of specific cases and areas of practice.

## Question 2

Do you have any suggestions for shorter-term improvements (not involving changes to the Legal Aid (Scotland) Act 1986) which could be made to the current system for civil legal assistance?

We consider that there are a number of areas where improvements could be made to the system in the short term:

### Sanctioned outlays

The current system for reimbursing solicitors for sanctioned outlays is cumbersome and lengthy, resulting in the instructing solicitor often being out of pocket for too long. This could be improved if the Scottish Legal Aid Board (SLAB) could liaise directly with the service provider, eg Relationship Scotland, Sheriff Officers, Child Psychologists, Child Welfare Reporter etc. If this does not happen, at a minimum solicitors should be paid for the time and work required to gather that information.

### Abatements

SLAB must look at an overhaul of the abatement process, which currently creates a significant amount of bureaucracy, requiring a great deal of solicitors' time and effort. Our members report that accounts are routinely abated for reasons which, when challenged, are reinstated. Legal aid rates remain extremely low, compared with private client rates, impacted further when a significant percentage of that fee is abated without good reason. There seems to be confusion in correspondence between SLAB and solicitors towards abatement of work which is carried out in good faith. This creates additional bureaucracy at the application stage as firms make unnecessary applications for sanction or take other procedural steps, for fear of their accounts being abated at a later stage. Consideration should be given to the overhauling and streamlining of the abatement process so that only significant and wholly justified abatements are made, and made consistently.

## Trust in the professional skills of solicitors

Solicitors must be trusted to do the work required, fee for this properly and to instruct experts as needed. There exists, for example, an assumption that solicitors shouldn't have to do any research. This is inappropriate, especially in relation to raising public interest litigation or novel claims where groundwork is imperative.

## Timescales for payment

Timescale of payments and accountability in relation to this is another issue. There should be more formal and enforceable guidelines around payment times. Oversight is key in this area, and more generally.

## Public Legal Education

Public legal education should also play an increased role, so that the public know what is available to them and how to access it.

## Question 3

Is grant funding from the Scottish Legal Aid Board helping to support access to justice? Can you provide examples of any successes or problems with this funding stream?

Legal issues can escalate because individuals lack access to early legal advice, leading to more complex and costly cases. Funding early legal advice services could reduce the overall demand for legal aid in the long term. Many third-sector organisations provide legal advice, guidance and support but are underfunded and overstretched.

Any increased funding and pro bono initiatives in this area, however, must not and will never replace the need for a properly funded and efficient legal aid system and should only be used to complement legal aid services. Access to justice is imperilled by the very limited number of legal aid practitioners, which is directly caused by the low rates of legal aid fees coupled with unnecessary bureaucracy, lack of work/ life balance and retention and succession issues.

The current approach to grant funding should be reviewed and inflation applied. We understand that many organisations who receive grant funding have received this at static levels for well over 10 years. Also, the subject matter for use of grant funding has not been reviewed and is not keeping pace with what could help people better access services. We understand that full cost recovery under earlier grant awards is no longer sustainable due to lack of inflationary increases, with organisations absorbing significant volumes of unpaid work.

Funding often involves a number of partners and is revised periodically. It is wrong that organisations don't know before the end of a financial year if they will get funding for next year. It is simply impossible to operate on that basis. Sometimes

they receive short term extensions and decisions are made after the start of a financial year, creating issues with whether they can take clients on or continue the cases they have. This leaves clients and staff in very difficult positions. We hear from our third sector members that the review cycle for grant funding makes the system difficult and inflexible from an operational management perspective, and harms staff morale. We understand, for example, that following a decision from the Scottish Government that funding in 2024/25 would focus on housing repossession actions, support for services focussed on advice for simple procedure actions ended and, as a result, two projects closed: Western Isles Citizens Advice Service - Western Isles Court Services Project, and Citizens Advice Edinburgh - Edinburgh In-Court Advice Project. Pulling funding in this manner, not least because of the desert caused for the Western Isles in terms of legal advice when the system is already severely overstretched, is a further example of the crisis faced, and the importance of grant funding for projects such as these.

A wider review, consulting with those working in these areas to identify the real needs and issues, is required to allow more innovative and current thinking, alongside a properly funded and efficient legal aid system. Longer term commitments to funding, flexibility and inflationary uplifts are key priorities.

## Question 4

**What do you think are the strengths and weaknesses of the current system for providing civil legal assistance?**

The main strength of the current legal aid system is the dedication and professionalism of the remaining legal aid practitioners, the numbers of whom are dwindling through no fault of their own.

The principal weaknesses of the current system are its low rates of remuneration which is restricting the number of practitioners who offer legal aid, and the complexity of the application process, along with the system of abatements that causes a great deal of unnecessary work.

Some examples of specific weaknesses shared include:

- once a family case in court is sisted there is no mechanism for the solicitors to be paid for negotiating and/or speaking to each other. The only option for the solicitors if they wish to be compensated for their work is to lodge a motion to recall the sist and deal with the matter in court. This leads to unnecessary court procedure.
- there is too much bureaucracy in Adults with Incapacity applications where parties are required to apply for both Advice and Assistance and a Civil Certificate. The complication with this is that there are different eligibility requirements for each and a client may well have to pay for their Advice and

Assistance but not the actual certificate which will cover the costs of the court application.

- Clawback, the right to recoupment from property recovered or preserved, is a real problem if a successful applicant obtains, either by agreement or a court order, a pension sharing agreement which they are unable to implement for many years, or the other party's share in the family home which is required for the foreseeable future to house the children. There is provision for the applicant to make a hardship application but that is stressful and cumbersome. This leaves people with debts in an even more difficult position. Clawback is also an issue in other areas including employment, eviction and mortgage arrear cases.
- Special urgency rules are unclear and solicitors may apply for the wrong type and then need to reapply- this causes significant uncertainty over work being covered, so the client becomes personally liable. Solicitors also cannot carry this liability, while SLAB decides on whether full legal aid can be granted. If a client has legal aid it is understood they are protected from adverse expenses but rules are unclear and the position is uncertain until an order is made by the court. The rules and procedures in this area could be clarified and made more user-focused.

## Question 5

What do you think would be the strengths and weaknesses of reforming civil legal assistance along the lines recommended in the Evans review?

Positive recommendations from this now seven year old review<sup>4</sup> include SLAB dealing directly with the service providers of sanctioned outlays, especially those provided by expert witnesses; that the rules between eligibility for Advice and Assistance and civil legal aid are far too complex and should be simplified; and that reform requires a system where solicitors are paid fair and reasonable fees, particularly in relation to regular, independent fee reviews.

On its publication in 2018, the Society welcomed the Evans report and endorsed the call to "maintain the scope of legal aid, simplify the system and reinvest any savings to ensure access to justice for members of the public", and particularly highlighted that the "recommendation of an independent evidence-based pay review with a commitment to regular reviews, offers a solution to the current issue of providing fair and sustainable fees for hard-working solicitors providing legal aid work"<sup>5</sup>. The Society has been fully involved in work to try and implement this for years, and particularly over the last two years where we were involved in the fee

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<sup>4</sup> <https://www.gov.scot/publications/rethinking-legal-aid-an-independent-strategic-review/>

<sup>5</sup> <https://www.lawsco.org.uk/news-and-events/law-society-news/legal-aid-review-2018/#:~:text=to%20independent%20review-,Legal%20aid%20must%20work%20for%20those%20who%20need,Society%20responds%20to%20independent%20review&text=After%20calling%20for%20an%20urgent,a%20'fundamentally%20new%20approach'>.



mechanism review group until our withdrawal from this in April 2024, having lost confidence in the Scottish Government project following a lack of progress.

The basic concepts in the review of simplifying the legal aid system and potentially increasing legal rates are entirely correct. Unfortunately, very little progress has been made in this regard since the review was produced. We would suggest that much evidence already exists pointing towards the dire state that legal aid is in and that action must now progress before we lose more solicitors who are still doing this work, and we see a further decline in accessing justice.

## Question 6

### What are your priorities for longer-term reform?

Long term reform requires a significant financial investment. Priorities should include an increase in legal aid rates to encourage practitioners to resume offering legal aid or get into this work. Consideration should also be given to greatly simplifying the system through primary legislation, where that is required. At present we have three different civil legal aid schemes: advice & assistance, civil legal aid and children's legal aid. Many clients require multiple applications for different heads of work. An example is a children's case where it was required to appeal the decision of the children's panel three times. That required four separate legal aid applications, one principal application and three separate applications for each appeal. A far simpler and more streamlined system should be introduced, with unnecessary procedures like the case cost limit system being removed. Additionally, legal aid advice and assistance (A&A) ends as soon as a legal aid certificate is obtained. The legal aid certificate is a block fee, a fixed amount of money paid for a specific purpose or stage, with these blocks not covering the reality of work required to negotiate settlements. A solution, such as a template under advice and assistance to allow Solicitors to apply to extend A&A cover to allow further negotiations would assist here as it is often only when a court action is raised that the possibility of a realistic settlement arises.

## Question 7

### Do you have any other comments?

Unfortunately, the legal aid system in Scotland remains in deep crisis, with solicitors leaving in droves and access to justice eroding year on year. A comprehensive plan is required for the profession, and to ensure people can receive the support they need to navigate Scotland's justice system. There is already widespread acknowledgement of the scale of the problem therefore, whilst

the Scottish Government's discussion paper<sup>6</sup> is welcome, we can't afford any further delay. The measures therein fail to recognise the urgency of the situation, which we have been vocal about for many years, and do not deliver on either the scale or timeline needed.

It is essential in a civilised society and for access to justice that everyone, regardless of income or background, has access to legal advice. The current legal aid system is unsustainable and requires root and branch reform. A multi-faceted approach that addresses funding, accessibility, and systemic inefficiencies can create a more equitable and effective legal aid system.

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<sup>6</sup> <https://www.gov.scot/publications/legal-aid-reform-discussion-paper/>



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