

INFORMATION NOTE

Free legal advice services in Scotland

1. Introduction

1.1 This information note provides members of the Panel on Administration of Justice and Legal Services with information on the legal aid system and free legal advice services in Scotland. It briefly introduces the legal aid system, free legal advice services, parliamentary scrutiny on the provision of legal aid, major relevant agencies, and recent trends of development on the subject matter.

2. Legal aid system

2.1 The operation of the Scottish legal aid system is governed by the *Legal Aid (Scotland) Act 1986*, supplemented by regulations made by the Scottish Ministers. Until 1987, the legal aid scheme had been administered by the Law Society of Scotland, the governing body for Scottish solicitors. Following the release of a report by the Royal Commission on Legal Services in Scotland which criticised the administration of the scheme by the legal profession itself, the Scottish Legal Aid Board ("SLAB") was set up in 1987 to manage legal aid in Scotland.

Scottish Legal Aid Board

2.2 Established under the *Legal Aid (Scotland) Act 1986*, SLAB is a non-departmental public body responsible to the Scottish Government but operating independently of the legal profession and the government. SLAB's work is overseen by a board comprising at least 11, but not more than 15, members who are appointed by the Scottish Government. A specified number of members are required to be legally qualified and a further member must have experience of the procedure and practice of the courts.

Scope

2.3 In Scotland, there are two main schemes of legal aid help: "Advice and Assistance" and "Legal Aid". Together they constitute "Legal Assistance".

- (a) Advice and Assistance Scheme covers a wide range of matters, so long as they are matters of Scots law and the applicant qualifies financially. Apart from some exceptions specified under "Assistance By Way Of Representation" ("ABWOR"), this scheme will not cover representation. Nevertheless, under the scheme, a solicitor or an adviser can help the applicant prepare the case and negotiate settlement of a claim. Other areas which the scheme covers are general advice on any legal problems, writing letters, negotiation, getting an advocate's opinion, and getting a medical report for an accident claim or a benefit appeal.
- (b) Legal Aid Scheme provides funding for a solicitor to put the case in court and some tribunals. It covers the preparation work and the hearing itself, as well as funding for advocates, experts and other costs. Civil Legal Aid provides for legal representation in a wide range of civil proceedings before the main Scottish courts and a few specified tribunals. Criminal Legal Aid covers legal representation of an accused person in criminal cases. Different rules and procedures apply for summary and solemn cases.¹

2.4 While in practice people often get help from the Advice and Assistance Scheme before applying for Civil Legal Aid, the two schemes are separate. An applicant does not need to have received Advice and Assistance before being able to proceed to apply for Legal Aid.

¹ Summary cases normally result in a fine or a prison sentence of up to six months if the accused is found guilty. Solemn cases are more serious cases which normally result in a prison sentence of more than six months. Solemn cases, if they go to trial, take place before a sheriff or judge and jury.

Funding

2.5 All forms of Legal Assistance are funded by the Legal Aid Fund, which is provided for in the Scottish Government's justice budget and administered by SLAB. This budget is not capped, but is demand driven and therefore increases and decreases according to the actual demand for such services.

Eligibility

Advice and Assistance

2.6 The assessment of financial eligibility carried out by the service provider is based on applicants' income in the week immediately preceding the application. The relevant statutory financial limits are updated annually via secondary legislation. From 11 April 2011, the following rules apply:

- (a) An applicant in receipt of Income Support, income-based Jobseekers Allowance, or with a disposable weekly income of no more than £105 (HK\$1,302), and with a disposable capital of less than £1,716 (HK\$21,278) will be eligible for Advice and Assistance without payment of a contribution to the costs.
- (b) An applicant whose weekly disposable income is between £105 (HK\$1,302) and £245 (HK\$3,038), and whose disposable capital does not exceed £1,716 (HK\$21,278) will be eligible for Advice and Assistance subject to the payment of a contribution to the costs of the case on a sliding scale.
- (c) An applicant whose disposable income exceeds £245 (HK\$3,038) or whose disposable capital exceeds £1,716 (HK\$21,278) is not eligible for Advice and Assistance, regardless of their disposable capital/income or eligibility for a benefit.

2.7 The applicant will also need to show that help is not available to him from anywhere else, such as a trade union, an insurance company or a professional body.

Civil Legal Aid

2.8 Civil Legal Aid is available on application through a solicitor, provided that SLAB is satisfied that the following conditions are met. Firstly, applicants must have a legal basis for their case, known as a "probable cause". Secondly, it is reasonable in the particular circumstances of the case that applicants should receive Legal Aid. Thirdly, financial help is not available from somewhere else, like a trade union, insurance company or professional body. Fourthly, applicants' income and disposable capital are within the current financial eligibility limits.

Criminal Legal Aid

2.9 An applicant for Criminal Legal Aid is not required to pass any financial test, but the applicant must demonstrate that he could not meet the expenses of the case without causing undue hardship to himself or his dependants. In addition, the applicant should not be able to get help with the costs of the case from anywhere else. In order for SLAB to grant the Criminal Legal Aid, it must be shown that it is in the interests of justice. For an accused who pleads not guilty under a solemn procedure, Criminal Legal Aid may automatically be available initially without having to make an application.

3. Free legal advice services

Scope

3.1 There are two types of Advice and Assistance in civil cases: standard and diagnostic. Standard Advice and Assistance covers advice on general legal problems on a list of case categories which includes divorce and other family law matters; reparation; debt; breach of contract; conveyancing; benefit appeals/reviews; employment; immigration and asylum; wills and the winding up of deceased person's estate. Most cases where Civil Advice and Assistance is granted are likely to fall within the Standard Advice and Assistance categories. Standard Advice and Assistance usually has an initial authorised expenditure limit of £95 (HK\$1,178). Nevertheless, an initial limit of £180 (HK\$2,232) applies in certain specified situations where either Advice and Assistance or ABWOR is given. Despite the initial limit, SLAB can authorise an increase in the permitted expenditure for a particular case at a later stage.

3.2 Where the work to be done is not in an approved Standard category, Civil Advice and Assistance can still be made available by way of a Diagnostic Interview. The purpose of the interview is to allow a solicitor or an adviser to diagnose the individual's problem and determine whether further assistance is required. The solicitor or adviser can offer the client a Diagnostic Interview or other piece of legal work up to a maximum cost of £35 (HK\$434). If the solicitor or adviser identifies a significant issue that is on the list of case categories in the course of this initial work, the client can then apply for Standard Advice and Assistance if he is financially eligible.

3.3 Standard Advice and Assistance allows the solicitor or adviser to do a fairly small amount of work. If the work done by the solicitor or adviser has already reached the limit set by the scheme, i.e. £95 (HK\$1,178) or £180 (HK\$2,232), he can apply for an extension to finish the work. The amount of extension granted varies in accordance with the type of cases. SLAB has "templates" which set out the criteria for granting increases in authorised expenditure and the amount of authorised expenditure under each type of cases. The solicitor or adviser cannot carry out any further work on the case until the extension is granted. If this is refused, it is up to the client to decide whether he wishes to pay for further work out of his own pocket.

3.4 There is no such kind of division between Standard and Diagnostic categories in Criminal Advice and Assistance. The initial limits of expenditure are £35 (HK\$434), £90 (HK\$1,116), £185 (HK\$2,294), £550 (HK\$6,820), or £165 (HK\$2,046), depending on the type of Criminal Advice and Assistance or ABWOR being used.

Service providers

3.5 While Advice and Assistance might only be provided by lawyers in the past, section 67 of the *Legal Profession and Legal Aid (Scotland) Act 2007* has altered the position in relation to Advice and Assistance in civil cases by enabling SLAB to make payments out of the Legal Aid Fund to advice organisations registered with SLAB. Through section 67(6), new sections 12A and 12B are inserted into the original section 12 of the *Act*. Section 12A provides that a register of advice organisations is to be established and maintained by SLAB. Section 12B enables regulations to be made which specify the categories of circumstances in which an adviser approved by a registered advice organisation may provide Advice and Assistance. With the commencement of section 67 on 30 July 2007,² it is possible to have Advice and Assistance being provided by non-lawyers.

Application process

3.6 An applicant must complete an application form for Advice and Assistance in the service provider's office. The form asks for details of the applicant's savings and income over the previous seven days. The solicitor or adviser should help the applicant fill in the form and will determine immediately whether the applicant is eligible for help under Advice and Assistance; and if so, whether he has to make a financial contribution. Any such contributions are payable directly to the service provider.

3.7 The solicitor or adviser will ask to see evidence of the applicant's income and savings. As such, during the meeting of the applicant with the service provider, he should take along any benefit books or letters of award, wage slips, bank or building society statements or any other written evidence of income and savings.

² The *Legal Profession and Legal Aid (Scotland) Act 2007 (Commencement No.3) Order 2007* has brought into force sections 12A, 12B, 67, 68 and 74 of the *Act*.

Advice projects funded by SLAB

In-court advice projects

3.8 The in-court advice service in Edinburgh Sheriff Court was introduced in 1997. It was the first time when free legal and other advice services were provided to unassisted litigants in a Scottish court. The service mainly covers small claims, summary cause (including housing) and ordinary cause actions where the *Debtor (Scotland) Act 1987* applies. Since 1 April 2009, SLAB has funded the in-court advice projects across local courts in Scotland. There are currently eight in-court advice projects funded by SLAB. The services have been enhanced to provide advice and/or representation to people facing eviction or repossession of their homes as part of SLAB's wider programme to improve access to advice for people affected by the economic downturn.

Other grant-funded projects

3.9 In 2009-2010, SLAB launched a new programme of 16 grant-funded projects, which used around £2 million (HK\$24.8 million) of additional Scottish Government funding to tackle advice needs arising from the economic downturn, particularly those targeting issues such as repossession and debt. In the last six months of 2009-2010, the projects took on over 900 cases.

3.10 The projects help meet local need resulting from the economic downturn; complement and build on current provision, including that provided by solicitors working in private practice and in law centres, solicitors employed by SLAB, the existing in-court advice services and other advice agencies; make advice and representation services at court more readily available across local courts; and provide legal advice and representation for people facing repossession and other problems.

Assistance by Way of Representation

3.11 ABWOR is a form of Advice and Assistance which allows a lawyer to represent a client in specified civil and criminal proceedings in certain courts and tribunals. Regulations currently limit the proceedings in which ABWOR is available to a relatively narrow range of proceedings.

3.12 ABWOR is available in relation to the following civil court proceedings only: a petition for the appointment of an executor to manage a deceased person's estate; a petition by a debtor for his own sequestration; proceedings arising from a failure to pay a fine or other sum or obey an order of the court; proceedings before an employment tribunal, the Asylum and Immigration Tribunal, the Mental Health Tribunal for Scotland, the VAT and Duties Tribunals; and custody appearances under the *Protection from Abuse and Matrimonial Homes Act*.

3.13 Regarding criminal matters, ABWOR is usually employed in summary criminal proceedings. ABWOR provides representation of a person charged under summary procedure in a limited number of specified circumstances, most commonly where an accused wishes to plead guilty. In such cases, a solicitor could be paid for explaining to the court any circumstances which might justify a more lenient sentence. ABWOR is not available where the accused pleads not guilty (even if the accused subsequently seeks to revert to a plea of guilty).

4. Parliamentary scrutiny on the provision of legal aid

4.1 SLAB administers the legal aid system in Scotland and is responsible to the Scottish Ministers. However, the Scottish Ministers are prohibited by law from intervening or commenting on SLAB's handling of individual applications.

4.2 The "Management Statement and Financial Memorandum for the Scottish Legal Aid Board" sets out the broad framework of legal aid, which states how SLAB operates and defines the roles and responsibilities of the Scottish Ministers and the sponsor department in monitoring and facilitating SLAB's work. According to the Memorandum, the Scottish Ministers are ultimately accountable to the Scottish Parliament for the activities and performance of SLAB.

4.3 The Scottish Ministers are responsible for drafting the legislation to set the rules for legal aid and the fees to be paid to the legal profession. The Scottish Parliament will scrutinize and propose amendments to the relevant legislation. In the Scottish Parliament, legal aid falls within the domain of the Justice Committee. The remit of the Justice Committee is to consider and report on:

- (a) the administration of criminal and civil justice, community safety, and other matters within the portfolio of the Cabinet Secretary for Justice; and
- (b) the functions of the Lord Advocate, other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

4.4 Accordingly, legislative proposals in relation to legal aid will be referred to the Justice Committee for consideration. After deliberation, the Justice Committee will report and make recommendations (if any) to the Parliament.

5. Major relevant agencies

Scottish Legal Aid Board

5.1 A large part of SLAB's job is to decide whether Legal Aid should be granted. If Legal Aid is granted, the money will be used to pay for solicitors and other costs of the case. The solicitors concerned could be in private practice, employed by SLAB or in a law centre. SLAB's work includes:

- (a) advising the Scottish Ministers on how the legal aid system is working, and ways to develop it;
- (b) managing the Legal Aid Fund and deciding whether to grant applications for Legal Aid;
- (c) deciding if people have to pay towards the cost of Legal Aid, then collecting these contributions;

- (d) assessing solicitors' and advocates' accounts for legal aid work, and paying them for the work they have done;
- (e) registering firms and solicitors who provide legal aid services and making sure that these firms and solicitors maintain high standards of service;
- (f) investigating and tackling fraud and abuse of legal aid;
- (g) developing a network of SLAB-employed solicitors who offer criminal legal advice and representation, and developing advice services on civil matters using SLAB-employed solicitors; and
- (h) exploring new ways of delivering legal aid services.

5.2 With the commencement of the *Legal Profession and Legal Aid (Scotland) Act 2007*, the work of SLAB also includes:

- (a) assessing applications for Legal Aid in serious criminal cases (which was previously carried out by the courts);
- (b) registering agencies and their specialist advisers who are not legally qualified to provide Advice and Assistance, and making sure that they meet standards set out in a Code of Practice; and
- (c) granting funding to advice services.

Public Defence Solicitors' Office

5.3 The Public Defence Solicitors' Office ("PDSO") has been serving those in need of Criminal Legal Assistance since 1998. It provides both Advice and Assistance and Legal Aid in all criminal matters. Advice and Assistance provided by PDSO covers work in the initial stages for giving advice and making preliminary investigations in the case. At the first meeting with the client, the PDSO solicitor will obtain details of the case from the client. The PDSO solicitor will identify any work that needs to be done, and if necessary, advise the client on issues relating to Legal Aid application and assist him in completing Legal Aid application.

5.4 Any person involved in a criminal case who is eligible for Legal Aid can choose either a private solicitor or a PDSO solicitor to represent him. PDSO may deal with a case from start to finish, i.e. from the first calling of the case, through trial to appeal where appropriate. When considered necessary, PDSO may provide the client with information on other agencies, which can offer help with problems such as drug and alcohol abuse.

5.5 PDSO has a network of seven offices across Scotland. PDSO is a non-profit-making organization funded by SLAB. PDSO solicitors are paid a salary rather than on a case-by-case basis as private solicitors. When processing applications, SLAB assesses applications for Criminal Legal Aid submitted by PDSO solicitors in the same way as those submitted by private solicitors.

Civil Legal Assistance Office

5.6 The commencement of Part V of the *Legal Aid (Scotland) Act 1986* allows SLAB to employ solicitors to give Advice and Assistance under the *Act*, to act for persons receiving Legal Aid, or to work with local organizations. Accordingly, SLAB has introduced a legal service to help with clients' unmet legal need, utilizing full-time solicitors employed by SLAB. In 2008, the Civil Legal Assistance Office - Highlands and Islands was opened for people in the Highlands and Islands having difficulties to find legal help or services of a solicitor. Subsequently, additional Civil Legal Assistance Offices have been opened in Edinburgh and Aberdeen, which focus mainly on recession-related problems.

Scottish Association of Law Centres

5.7 The Scottish Association of Law Centres ("SALC") is the representative organization for Scotland's community law centres. While law centres are charities aiming at tackling the unmet legal needs of those in poverty and disadvantage, law centres in some larger towns and cities also provide free and independent legal advice to people who live or work in the area. Some of them may specialise in a certain field, like social welfare and housing law, refugees, immigration, debt, mental health, dementia, rights of victims, education law, and discrimination law.

Citizens Advice Bureau Service

5.8 The Scottish Citizens Advice Bureau ("CAB") Service is made up of Citizens Advice Scotland ("CAS") and Citizens Advice Bureaux. CAS is an umbrella body that provides essential services to Scottish Citizens Advice Bureaux, which are independent, local charities that are members of Citizens Advice Scotland. Citizens Advice Bureaux in over 200 locations provide advice and information to people in need. CAS works with Citizens Advice in England and Wales to launch the web-based AdviserNet system, which provides detailed information on an array of subjects from employment and benefits to housing and debt.

6. Recent trends of development

6.1 In 2005, the previous Scottish Executive³ published a consultation paper entitled "Advice for All: Publicly Funded Legal Assistance – the Way Forward". Short to medium term proposals coming from this consultation exercise were largely implemented during the Second Session of the Scottish Parliament (2003-2007) via administrative and regulatory changes, or were contained in the *Legal Profession and Legal Aid (Scotland) Act 2007*. Some further proposals have been implemented in the Third Session of the Scottish Parliament (2007-2011).

Changes on civil matters

6.2 The main changes contained in the *Legal Profession and Legal Aid (Scotland) Act 2007* in relation to civil matters were provision for Advice and Assistance work by non-lawyers registered with SLAB (section 67) and provision for SLAB to make grants to fund, support or develop civil legal advice provision (section 68). The reform of Civil Advice and Assistance aims to improve the delivery of services, as the type of work carried out under Civil Advice and Assistance engages the full range of providers, from solicitors in private practice and law centre solicitors to non-legally qualified advisers in advice agencies and other settings.

³ The Scottish Executive is the executive arm of the devolved government of Scotland. On 2 September 2007, the term "Executive" was changed to "Government".

6.3 As part of a civil simplification project, major changes were introduced to the financial eligibility test on income for Civil Legal Aid on 7 April 2009. Up to a million more people were then eligible as financial eligibility had been extended to those with disposable incomes of up to £25,000 (HK\$310,000).⁴ Also on the same date, a tapered system⁵ of contributions for Civil Legal Aid was introduced.

Changes on criminal matters

6.4 On criminal matters, a new provision of the *Legal Profession and Legal Aid (Scotland) Act 2007* was made for the transfer of the court's power to grant Legal Aid in solemn criminal proceedings to SLAB (section 64). This provision was brought into effect on November 2010 by the *Legal Profession and Legal Aid (Scotland) Act 2007 (Commencement No.6) Order 2010*.

Proposed future reforms

6.5 The longer term proposals which the government is considering include the creation of a territory-wide body over Scotland to co-ordinate publicly-funded Legal Assistance in relation to both civil and criminal matters. Moreover, the introduction of means-tested contributions in relation to Criminal Legal Aid (to bring Criminal Legal Aid in line with Civil Legal Assistance and other forms of Criminal Legal Assistance) has also been suggested as a possible course of future action.

⁴ The upper disposable income limit, above which the applicant would not be financially eligible for Civil Legal Aid, was £10,306 (HK\$127,794) before the change. The limit has been further raised to £26,239 (HK\$325,364) in 2011.

⁵ A tapered system raises the eligibility threshold whilst increasing contributions for those higher up the income scale who are brought into eligibility for the first time. Those in the new upper ranges of eligibility will be asked to pay a higher rate of contribution than those who are currently eligible.

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