

Legal Assistance in Scotland— Fit for the 21st Century Law Society of Scotland Discussion Paper

I welcome the opportunity to comment on the proposals in this Discussion Paper and their potential impact on children and young people across Scotland.

Role of the Commissioner

As Scotland's Commissioner for Children and Young People, my role is to promote and safeguard the rights of all children and young people in Scotland¹. This extends to young people up to the age of 18 or 21 if the young person has ever been looked after (in care).

Whilst I am conscious of the desire to make savings to Legal Aid, I would urge the Law Society of Scotland to ensure that children and young people are not disproportionately affected by these proposals.

Funding of Civil Legal Assistance for Children and Young People

The Discussion Paper states that there is no intention to amend the scope of children's legal assistance at present. However, for cases falling outside the Children's Hearings system, there continues to be a real barrier to children and young people accessing justice. The Civil Legal Aid (Scotland) Amendment Regulations 2010 and the Advice and Assistance (Scotland) Amendment Regulations 2010 have led to children and young people's eligibility for Civil Legal Aid being assessed on the basis of their parental income, rather than their own (as had previously been the case).

This had had the effect of denying some children and young people a voice in key decisions affecting them. Anecdotal evidence received by my office would suggest that, without legal representation, children and young people can often feel that their views are neither heard nor given sufficient weight. This is particularly true of cases where there is a dispute around family contact.

Article 12 of the UN Convention on the Rights of the Child states that "*a child who is capable of forming his or her own views {has} the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*"² Article 12 goes on to state "*the child shall in particular*

¹ [Commissioner for Children and Young People \(Scotland\) Act 2003, Section 4 \(1\)](#)

² [UN Convention on the Rights of the Child](#)

be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

I would argue that, whilst the changes brought about by the 2010 Regulations may have made some nominal savings, the impact on children and young people is substantial. These Regulations have the potential to breach Article 12 of the UN Convention, as they restrict a child or young person’s ability to seek legal representation and to have their views heard in their own right (where they have the capacity to do so).

I would urge the Law Society of Scotland to seek an early review of these Regulations.

Privately-funded Legal Advice/Loans Scheme

I note the Society’s proposal that the qualifying threshold for Legal Aid should be lowered and an increasing number of cases should be delivered by private providers. This would be funded via a loan arrangement. I would highlight the fact that children and young people would not be able to enter into such a loan agreement, and would therefore be dependent on their parent taking out a loan on their behalf.

Where a child is involved in a family/contact dispute and a parent is already funding their own case, they are unlikely to want (or be able to afford) the additional expense of funding their child’s case too. This will effectively remove the child/young person’s right to be heard.

Where a parent is not another party to the case, the financial implications are still likely to put many families off pursuing a case, even when there are clear indications that a child/young person’s rights are being or have been breached.

Areas Eligible for Civil Legal Assistance

I also note the intention to remove certain areas from the scope of civil legal assistance, as part of a broader shift towards advice being provided by support/advice agencies.

I am unclear as to the reasoning behind the choice of areas to be removed. It would appear to me that areas such as housing and debt are most likely to affect those with other vulnerabilities.

For example, a young person leaving care may struggle to maintain a first tenancy and need legal assistance fighting an eviction. A mother having experienced domestic abuse may also need help with housing and or debt issues. Without that help, there is a risk that the whole family could become homeless.

Whilst support and advice bodies can help with these issues, and already do so to a very high standard, there are some cases where legal assistance will still be required. Under the new proposals, this would not appear to be available without paying for it privately.

It seems to me illogical that those who are financially most at risk should be asked to get into further debt in order to resolve their difficulties.

Availability of Advice/Support Agencies

There is a further issue in that access to advice services may not be equitable across Scotland. Children and young people in rural and remote areas may find it more difficult to access these services than their peers in urban settings. Other groups of children and young people may also find it more difficult to seek advice (e.g. children with disabilities, Gypsy Traveller children, children for whom English is not a first language etc.).

Despite the stated intention to ensure that these services are adequately funded, given the current financial climate, there is a significant risk that funding (and it is unclear from the Discussion Paper where it's envisaged this should come from), will be cut in future.

Whilst there are many excellent advice services across Scotland, only a small proportion is geared exclusively towards children and young people. Not all advice agencies will be able to handle difficulties in a child and young person friendly way. My own office regularly refers children and young people onto specialist child law centres. These centres are staffed mainly by solicitors and funded through a variety of sources, including Legal Aid. The proposals contained in this Discussion Paper run the risk of constraining these services and reducing access for children and young people to advice tailored to them. Children and young people require a particular brand of support and advisors who are aware of and sensitive to their needs. The child and young person specific services that currently exist are excellent and well used, although as previously mentioned, not universally available.

Wider Impact

The impact of this proposed approach is likely to go beyond an individual child or young person. Cases that are taken to court on behalf of children and young people can also provide useful precedents and lead to wider change for children and young people. Removing eligibility to Legal Aid for children and young people in these circumstances, and directing children and young people instead towards other advice bodies, could have the unintended consequence of preventing this wider systemic change taking place. This would seem to run counter to children and young people's best interests³.

Early Resolution of Cases

The Discussion Paper outlines an intention that changes to Legal Aid should prevent future cases becoming unnecessarily lengthy. I would agree that in many cases, it is in

³ [UN Convention on the Rights of the Child, Article 3](#)

the child's best interests to have matters resolved as soon as possible. However, I would not want this to rule out the possibility of a case being brought back to court at the child/young person's own request. As the child or young person grows in age and maturity, they should have the opportunity to revisit a decision, should they want to do so. Again, a change to the 2010 Regulations would be helpful in ensuring that the child could access Legal Aid independently, without reference to parental income.

Children's Rights Impact Assessment

Whilst this Discussion Paper states that it is not primarily focused on children and young people, the proposals contained within it are far-reaching and likely to impact negatively on vulnerable children, young people and their families. For this reason, I would recommend that a Children's Rights Impact Assessment (CRIA)⁴ is carried out to measure the full impact of these proposals on these children and young people, prior to any proposals being progressed.



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⁴ See (<http://www.sccyp.org.uk/search-results/?keywords=cria>) for details of the Children's Rights Impact Assessment model developed by Scotland's Commissioner for Children & Young People.