

THE LAW SOCIETY OF SCOTLAND

ADDITIONAL WRITTEN EVIDENCE

I indicated during the evidence session on 22 January that I would write about some aspects of access to justice in the context of the Bill. The Society's civil justice team have provided me with these comments.

The civil legal assistance implications of the new tribunal would likely affect a small number of cases, though in very significant ways. The shift of cases to the First-tier tribunal would remove them from the scope of civil legal aid and bring them into the scope of civil ABWOR (Advice by Way of Representation). The implications for access to justice will be quite wide ranging. A number of people who would previously have received legal aid will not receive ABWOR. For example, in 2012-13, there were 3,490 grants of advice and assistance for housing matters and 758 grants of legal aid for housing/recovery of heritable property.

The number of cases that would be heard by a Private Rented Housing Panel would be significantly smaller. The Scottish Government's Final Business and Regulatory Impact Assessment for a Private Rented Sector Housing tribunal suggests around 100 grants of advice and assistance and 23 grants of civil legal aid annually. However, a large number of housing cases are undefended at the Sheriff Court and a consequence of a new tribunal may be an increase in the number of applications for civil legal assistance. Also, the number of housing cases overall has recently increased: between 2011-12 and 2012-13, the number of advice and assistance grants by 11.9%, the number of civil legal aid applications by 30.5% and the number of civil legal aid grants by 34.2%.

As the Final Business and Regulatory Impact Assessment notes, representation at tribunals is usually met by civil ABWOR rather than civil legal aid. For the small number of private rented sector (PRS) cases, if ABWOR were available, the change could be significant. First, the overall income eligibility for civil legal aid is significantly higher, at £26,239 (after deductions), than for civil ABWOR, at £12,740 (after deductions). The contributions required from a claimant can be higher for civil legal aid, with a contribution of between 33% and 100% for eligible income, than for civil ABWOR, which requires a single contribution of between £7 and £135. In 2012-13, for instance, 640 grants of civil legal aid for housing/recovery of heritable property cases were assessed without contribution and only 129 with a contribution: the average contribution was £2,243 and the median, £1,814.

The most significant factor, however, may be the overall availability. With tribunals intended to be informal and accessible venues for the resolution of disputes. Accordingly, for work before the First-tier (and other) tribunals a test of effective participation is applied. The test is three-fold: first, the case is arguable; second, it is reasonable in the circumstances of the case to grant ABWOR; and third, the matter is too complex for the applicant to present it in person. In 2012-13, for instance, of the total 4,721 grants of civil ABWOR, 2,768 were for mental health, 1,924 for immigration and asylum, 7 for bankruptcy/petition by debtor, 2 for employment, 1 for sequestration and 19 others.

We expect that there will be extremely few cases that receive public funding at the new tribunal. It may be that the informal and inquisitorial nature of tribunal proceedings may suit self-representation. However, it is clear that this will not be suitable for a number of the people likely to use the tribunal. As cuts to publicly funded legal assistance are made across jurisdictions, there is an emerging body of work around the effect and outcome of self-representation. In the United States, for instance, the Greacen Report, *Resources to Assist Self-Represented Litigants: A Fifty-State Review of the "State of the Art"* outlines the challenge:

"Self-represented litigants and their cases present an endless variety of situations, ranging from highly educated and capable persons seeking to obtain the simplest forms of court relief... to persons with limited education, limited English capability, and other handicaps (ranging from hearing and sight impairment to mental illness) seeking to obtain relief in the most complex sorts of legal proceedings... Some litigants can obtain all the assistance they need to vindicate their legal rights from court-provided forms and information. Others need limited legal advice to enable them to represent themselves. Others need full legal representation because of the complexity of the factual or legal issues involved in their cases or because of their lack of the basic skills needed to present them to a court."

In short, the move from court to tribunal, from civil legal aid to civil ABWOR, presents a challenge for people who, despite the less formal and less adversarial process, cannot otherwise receive effective access to justice.

The Law Society of Edinburgh
10 February 2014