

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Capability Scotland

Summary

- Capability Scotland welcomes the opportunity to respond to this call for evidence from the Justice Committee of the Scottish Parliament. We have a particular interest in this area having carried out extensive research in 2009/10 on behalf of the Justice Disability Steering Group (JDSG). The JDSG is a group comprised of the key agencies representing the justice sector in Scotland, including the Scottish Legal Aid Board (SLAB) and Scottish Government Justice Directorate, and we continue to work on issues relating to justice and disability.
- Capability Scotland welcomes the creation of a Scottish Civil Justice Council. We hope that such a body will help to ensure a holistic approach to reform and ensure that the views of all stakeholders – including disabled people – are taken into account. We believe that the best way for the legislation to address this would be by requiring the Scottish Civil Justice Council to appoint an equalities representative to ensure that disabled people and those with other protected characteristics have their views and experiences taken into account.
- In relation to changes to Criminal Legal Aid, Capability Scotland accepts that those people who are able to make a contribution towards their legal costs should be asked to do so. However, our concern is that many disabled people who *cannot* afford to make contributions to their Criminal Legal Aid will be asked to do so as a result of this Bill. This will lead to increased poverty amongst disabled people and will create further barriers to justice. This is not acceptable given that our research found that 40% of disabled people do not feel they have equal access to the justice system¹.

Part 1 of the Bill: A Scottish Civil Justice Council

1. As stated above, Capability Scotland fully supports the creation of a Scottish Civil Justice Council. Our main concern in relation to the new council is that it has an adequate understanding of the obstacles to civil and administrative justice faced by disabled people in Scotland. Research conducted by Capability has revealed that 40% of disabled people do not feel they have equal access to Scotland's justice system.

2. Clearly this is not only a practical and moral concern; it is also a legal one. The Human Rights Act 1998, European Convention on Human Rights and the International Covenant on Civil and Political Rights and Fundamental Freedoms all guarantee a right of equal access to justice, free from discrimination. In particular, article 13 of the UN Convention on the Rights of Persons with Disabilities states that,

¹ <http://www.capability-scotland.org.uk/what-is-capability-doing-for-me-now/campaigns/jdsg/>

“State parties shall ensure effective access to justice for persons with disabilities on an equal basis with others including through the provision of procedural accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses in all legal proceedings.”

3. It is therefore essential that all bodies with a role in administering justice, including the Scottish Government, take positive steps to ensure that the needs of disabled people are taken into account at all stages of policy development.

4. We believe that this objective can be best achieved through the inclusion of a disability and/or equalities representative on the Scottish Civil Justice Council. We believe such a person would help to ensure that the work of the Council is beneficial to all sectors of Scottish society and that it helps to develop a system which meets the needs of vulnerable individuals and minority groups. A disability representative would be a welcome addition to the list of members presented in the consultation document previously issued which included persons with experience and knowledge of consumer affairs and persons able to represent the interests of particular kinds of litigants, such as businesses or employees.

5. A person representing the needs of disabled people and those with other protected characteristics might be selected for:

- Direct or indirect personal experience of disability
- Knowledge and understanding of the civil justice system in Scotland including structures, rules and procedures
- Knowledge and understanding of equality and human rights legislation and how it relates to the civil justice system in Scotland.

6. Such an appointment would help to ensure that any reform overseen by the council contributes to the removal of barriers to justice and to the fulfilment of human rights. It would also assist the court service and Scottish Government in fulfilling their duty to make reasonable adjustments for disabled people who face a substantial disadvantage in accessing their services.

7. Whether or not a disability and/or equalities representative is appointed it is essential that the council takes a proactive approach to including and consulting disabled people and others with characteristics protected under the Equality Act 2010.

8. Our involvement work as part of the JDSG highlighted that disabled people do not currently feel that their needs, views or opinions are reflected in Scotland's justice system. We would therefore ask the Scottish Government to consider some of the points raised by disabled people through our work with the JDSG which are relevant to civil justice reform.

Part 2: Contribution for Criminal Legal Assistance and Changes to Financial Eligibility

9. Capability Scotland accepts that those people who are able to make a contribution towards their legal costs should be asked to do so. However, our

concern is that many disabled people who *cannot* afford to make contributions to their Criminal Legal Aid will be obliged to. This will lead to increased poverty amongst disabled people and will create further barriers to justice.

10. While we accept that the Undue Hardship Test is not based on income alone, we would urge the Committee to consider that disabled households are three times less likely to earn over £40,000 than other households². Furthermore, 49% of households including someone with a long-standing illness, health problem or disability have net annual incomes below £15,000³. This is likely to mean that many disabled people who previously qualified for criminal legal aid will now be asked to make a financial contribution to the cost.

11. In applying the Undue Hardship test it is also essential to acknowledge that the disposable income of disabled households is often greatly reduced as a result of the costs associated with living with disability. Research conducted in 2005 concluded that the added weekly cost of having a disability can range from £7.24 to £1,513⁴. We are therefore very pleased to see that solicitors will be encouraged to take '*regular costs associated with disability*' into account when calculating available income. This is clearly a very positive step. However, the difficulty of proving and calculating disability related expenditure should not be under-estimated. Even the Social Work departments of local authorities often have difficulty calculating disability related expenditure or fail to take it into account when calculating how much a disabled person will be charged for their care. This is despite the existence of extensive guidance on the issue⁵.

12. We would therefore recommend that reference is made, either in primary or secondary legislation, to the need to take disability related expenditure into account when calculating available income. We would also recommend that either the Scottish Legal Aid Board or the Scottish Government develop clear and detailed guidance for calculating disability related expenditure in partnership with disabled people and disability organisations.

13. We would also ask the Committee to consider the impact of the following changes on the calculation of a disabled person's contribution to criminal legal costs.

- **Reduction in the number of people eligibility for disability benefits**
The Policy Memorandum accompanying the Bill states that, "*Non-passported benefits will be taken into account as income although they may be cancelled out as being used for unavoidable expenditure.*" We would urge the committee to ensure that Disability Living Allowance and Personal Independence Payments (which will begin to replace DLA from April 2013) are never taken into account as part of an individual's income.

² Scottish Government (2009) *Scottish Household Survey Annual Report - Scotland's People*

³ Scottish Government (2009) *Scottish Household Survey Annual Report - Scotland's People*

⁴ <http://research.dwp.gov.uk/asd/asd5/WP21.pdf>

⁵ For more information see Capability Scotland's 'Rapid Response Report on Disability Related Expenditure' <http://www.capability-scotland.org.uk/what-is-capability-doing-for-me-now/campaigns/rapid-response-reports/disability-benefits-prop-up-the-care-system-for-disabled-people/>

This is essential if disabled people are not to be further discriminated against in relation to accessing legal services.

It is also essential that solicitors are made aware that excluding DLA/PIP from the calculation of income does not exclude them from having to calculate disability related expenditure as well. In many cases DLA will not cover all the costs associated with a person's impairment or condition.

- **Reduction in the number of people eligible for means tested benefits**
The Policy Memorandum also states that "*Those on passported benefits and those who have less than £68 disposable weekly income will not be liable to pay a contribution.*" It is important to highlight that, as a result of the Welfare Reform Act 2012, far fewer people will be eligible for these benefits (and/or their replacement Universal Credit) than is currently the case. We would therefore urge the Scottish Government to consider transitional arrangement that will protect those on the lowest incomes and minimise the administrative burden on solicitors.

14. As well as the financial impact of the changes, we are concerned that the Bill will make it more difficult for disabled people to access a solicitor. In particular we are concerned that a minority of solicitors may take a prejudicial approach to selecting their clients in order to minimise financial risk. They may be less willing to take on clients who will qualify for legal aid due to the arduous process of calculating and recovering a contribution. Given that disabled people are over-represented in lower income groups this is likely to have a disproportionate impact on them. Furthermore, the calculation of available income is likely to be more complicated and arduous in relation to disabled clients who may have disability related expenses which should be taken into account.

15. There is also a real concern that the need to make a financial contribution could lead clients who are under financial strain to change their plea. Facing a fine, for instance, might be a cheaper alternative than paying the legal aid contributions required to plead innocent.

16. The experiences of disabled people also suggest that many solicitors are already reluctant to take on disabled clients. Individuals who use British Sign Language (BSL), for instance, have reported difficulty accessing solicitors for Advice and Assistance or Assistance by Way of Representation because of the need for a BSL interpreter. In some cases, solicitors are reluctant to cover the cost of interpreters – even where the client qualifies for legal aid – because the process of reclaiming their expense from SLAB can take up to 18 months.

17. Many of the participants at our JDSG involvement events also felt that the cost of making reasonable adjustments might dissuade solicitors from taking on disabled clients. One participant discussed the issues he had encountered when trying to access a solicitor to help him with his divorce. The Law Society gave him details for twelve lawyers that could potentially help him with this case. None of the solicitors' offices was accessible and the participant had to phone eight of the solicitors on the list before finding one that would do a home visit. This meant he had

no choice of lawyer. We would urge the Committee to consider how the current Bill could further limit the choice disabled people have when selecting a criminal lawyer.

18. Finally, while we are against clients being asked to make a contribution when they qualify for criminal legal aid, we are in favour of the introduction of the 'undue hard ship test' in relation to Advice and Assistance and ABWOR. This should lead to fairer outcomes for disabled people in that it will allow for disability related costs to be taken into account.

19. Thank you for the opportunity to response to this call for evidence.

About us

20. Capability Scotland will be a major ally in supporting disabled people to achieve full equality and to have choice and control of their lives by 2020. The organisation's direct service provision is combined with campaigning, consultancy and advice to ensure that the organisation functions as an ally of disabled people as they strive to gain full equality, choice and control in their lives.

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