RESPONSE TO THE LAW SOCIETY OF SCOTLAND’S DISCUSSION PAPER ‘LEGAL ASSISTANCE IN
SCOTLAND: FIT FOR THE 21ST CENTURY’

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15th DECEMBER 2014

I welcome the opportunity to provide feedback relating to the proposals contained in the Society’s
recent discussion paper ‘Legal Assistance in Scotland’ (LAS). I read the paper with interest,
particularly in light of my involvement as Co-Researcher on the research project ‘Citizens Advice
Bureaux and Employment Disputes’ – for further information, see the project website:
http://www.bristol.ac.uk/law/research/centres-themes/aanslc/cab-project/.

While I welcome the Society’s aim to modernise and simplify the system of civil legal assistance, I am
concerned by the proposal to consider the removal of employment law from the scope of such
assistance. In the following response I will set out the rationale on which my concern is based.

Research on CABx and Employment Disputes

The programme of research with which I am currently engaged focuses on the perceptions and
experiences of individuals with employment disputes who are advised and assisted by Citizens
Advice Bureaux. The project, which is funded by the European Research Council and jointly
conducted with colleagues at the University of Bristol’s Law School, provides longitudinal data which
tracks over 130 cases over a two-year period. Approximately 60 of those cases are Scottish in origin
and all have been identified as potential Employment Tribunal claims. As our data shows, the cases
result in a range of different outcomes including resolution through agreed settlement between the
parties, mediation, conciliation (Acas and other) and adjudication by the Employment Tribunal as
well as decisions by the potential claimants to take no further action. The overriding aim of this
research is to examine how workers who cannot easily afford to pay for legal advice resolve
workplace disputes, hence my particular interest in the current discussion paper.

Variety of Support Offered by CABx

I agree strongly with the principle of ‘...a fair accessible system for civil disputes’ (LAS, at p.1) and our
data supports the statement regarding the impact of a lack of access to justice in areas of civil law
expressed in the document’s introduction (at p.1),

‘Without the ability to seek resolution, civil justice issues can lead to serious impacts on
mental and physical health, relationship breakdowns, and loss of income and confidence. It
is essential that people who may not have the necessary financial resources, can still access
legal advice and services.’
As you will be aware, fees have been payable for most claimants to the Employment Tribunal since 31st July 2013. Although the instigation of the cases featured in our research largely predate the introduction of fees, it shows that in the pre-fees era many individuals found legal advice and representation prohibitively expensive and were thus reliant on the support available through local Citizens Advice Bureaux (CABx). The growing number of employment disputes being reported to CABx has substantially increased the overall workload for local bureaux placing extra strain on a service which is already under pressure to maintain coverage across a wide range of advice areas with limited resources. The overall effect is that specialist employment advice is not always available and, where it is provided, it is done so under a number of different arrangements so that the service offered varies from one bureau to another with most unable to offer representation at Tribunal. Nevertheless, the CABx provide an undoubtedly valuable service to many individuals who lack the financial resources to pay for legal advice and representation and who do not have any other available means of support. Such individuals often find the whole process of seeking to resolve an employment dispute extremely difficult for a variety of reasons including, but not restricted to, financial hardship.

**The Impact of Employment Tribunal Fees**

As has been widely reported, the introduction of fees has had a substantial impact on the number of individuals lodging claims with the ET with official statistics recording a total reduction across all employment jurisdictions of 81% between Q4 2012-13 and Q4 2013-14. The remission system, which is intended to provide fee waivers or reductions for those individuals who are unable to pay fees, has been found to be inordinately difficult for many to navigate for a number of reasons.

The fees structure, thus, represents a significant barrier to access to justice for claimants, a view which is supported by research from various sources. Citizens Advice (the umbrella organisation in England and Wales) has reported that the imposition of fees is putting claimants off pursuing otherwise viable claims, see further: [http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20140727.htm](http://www.citizensadvice.org.uk/index/pressoffice/press_index/press_20140727.htm). This finding is echoed by research recently carried out in Scotland by members of my research team at Strathclyde Law School in partnership with Citizens Advice Scotland. Furthermore, The Law Society of Scotland’s own report issued on the one-year anniversary of the introduction of fees (Law Society of Scotland, ‘Employment Tribunal Fees’, July 2014) found that fees presented ‘...a serious challenge to access to justice’ as ‘claims that would have been successful are simply not being brought as a result of this change.’ The report found that,

> These fees exacerbate challenges elsewhere, such as the complexity of the remission process and the likelihood of successful recovery of any award. We believe that wider consideration [should be] given to the process of resolving workplace disputes, how a tribunal service should be funded, how capacity should be managed and ultimately, how to fairly balance the system for both claimants and employers.

Given the overwhelming evidence that claimants to the ET experience particular barriers to justice, it is of crucial importance that any means of financial support currently available which is capable of alleviating the difficulties experienced by such individuals is retained. Such support should include the provision of independent legal advice and support up to and including representation at Tribunal.
The Removal of Employment Law from the Scope of Civil Legal Assistance

Whilst I welcome the Society’s ‘key proposal for civil legal assistance’ (LAS, at p.5) which would see the streamlining of such assistance with the current complex system replaced by a simpler process targeted at those most in need, I cannot reconcile the achievement of this goal with the proposals for amending its scope so as to remove employment law. This proposal seems totally at odds with the current views of those working in the field be it as legal practitioners, advice agency advisors and researchers who, according to the findings reported above, appear to be advocating for more financial assistance to be made available to individuals with employment disputes as a means of enabling them to access legal services.

The statement in your report (at p. 37), that the removal of certain areas from the scope of legal assistance ‘is contingent on there being a properly funded and widely available advice network, separate to the traditional network of firms of solicitors providing pro bono and legal assistance work’ assumes that such a network exists in the field of employment law. This is an unfounded assumption as, whilst it is true that the CABx and other advice services (including the Strathclyde Student Law Clinic) do indeed have expertise in employment law, these organisations are finding it increasingly difficult to manage often meagre resources making it difficult for them to provide more than the most basic of support in many cases. The legalistic nature of employment-related litigation makes the ET an extremely difficult arena for the litigant in person to represent him or herself.

Moreover, if claims to the ET continue to fall or are maintained at current numbers, it is likely that levels of expertise within the advice sector will decline with specialist employment advice becoming a thing of the past. This means that it is even more important that claimants have access to legally qualified representatives. Of course there may be many ways in which the advice sector and legal practitioners could work together to ensure a consistently high quality of service for those who are unable to pay for such support in line with the report’s conclusion (LAS, p. 45),

In civil law, we believe that legal assistance could be much more focused on the areas where people may genuinely struggle to obtain a private solicitor to assist them with a case that has real merits, and suggest that there are ways in which the system could support and complement a robust advice sector and a competitive private market.

I would argue in the strongest terms that the removal of civil legal assistance from employment cases within the current context is highly likely to militate against, rather than to support, this laudable aim.

I note that your invitation for responses raises the possibility of face-to-face meetings and I would be more than happy to meet with your representatives to discuss the contents of this response by sharing our research findings.

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