

Response to Call for Evidence by the Commission on Justice in Wales

Submitted by Swansea Law Clinic

28 June 2018

1. We welcome this opportunity to respond to the Commission's call for evidence. In the interests of full disclosure and transparency: Swansea Law Clinic is part of the Swansea University Legal Centre located within the Hillary Rodham Clinton School of Law at Swansea University.
2. The Clinic is a *pro bono* service and has been operating since March 2017 when a Miscarriage of Justice Project was established. Since then we have been running projects in prison law, legal aid exceptional case funding, a Litigant Helpdesk in Swansea Civil Justice Centre, and, since November 2017, we have been providing an initial advice and assistance service. The latter involves face to face client interviews mainly in the following areas of law: housing, relationship breakdown, employment, equality, and consumer issues. Our model uses undergraduate and postgraduate law students as Student Advisers. They work under supervision and following ethical training they advise our clients. We aim to complement and not replace existing legal advice services, as well as complementing provision that is eligible for legal aid. The Miscarriage of Justice Project is making a separate response to the Commission's call for evidence.
3. In our first year of operation up until March 2018 one hundred and fifty-two student advisers assisted fifty-two clients. These numbers will expand as the Clinic develops. It is our intention to use new technologies to scale our service. Although most of our clients are members of the public our service is also available to small businesses.
4. Our umbrella organisation, Swansea University Legal Centre (SULC), which also consists of the Children's Legal Centre, supports our operations and the administrative team is shared between Swansea Law Clinic and the Children's Legal Centre. This enables us to work together closely. The Children's Legal Centre have referred cases to us and we are already seeing issues where parents of children with special educational needs are having difficulty in accessing advice. We have also seen examples of a school professing a rights-based approach with promises to listen to the children's voice, but this not happening in practice.
5. We make the Children's Legal Centre aware of advice issues involving children and young people that we see in our practice where we think further research would be useful. This includes access by children to joint visits to their parents when both parents are incarcerated; the effect on children of child contact cases in divorce proceedings where both parents are litigants in person, which, in our experience, is happening a lot; and how tech savvy children and young people are when accessing legal advice online, as that tends to involve areas of the internet they do not normally access.

6. The Director of the Children's Legal Centre, Professor Jane Williams, and the Director of Swansea Law Clinic, Professor Richard Owen, liaise regularly on cases that the Children's Legal Centre see where people in very vulnerable situations are having difficulty in accessing advice to see what support the Clinic can provide.
7. Some of our projects work in association with a number of other organisations. The Miscarriage of Justice Project works with a charity, Inside Justice, and a solicitors' regulated practice and charity, the Centre for Criminal Appeals. The Prison Law Clinic works with the charity, the Prisoners' Advice Service. The Legal Aid Exceptional Case Funding Clinic receives support from the charity, the Public Law Project. We have run an outreach clinic at Maggie's Swansea, Singleton Hospital. We also receive assistance from LawWorks Cymru and the Equality and Human Rights Commission's Advisers' Helpline. The Clinic is a registered clinic with LawWorks.
8. Our area of interest in submitting this evidence is access to justice in Wales. Consequently, the submission is mainly relevant to the *Access to Justice and other overarching issues* work stream. However, as Swansea Law Clinic is a university law clinic some of the issues we discuss will touch peripherally on issues of interest to the *Legal and Vocational Education and Training* workstream.
9. We mainly seek to address the following questions, which have been put forward by the Commission as suggestions when preparing submissions:

Does the justice system in Wales currently provide access to all who require its services, including advice? How would you improve access to justice in Wales?

Is access to Welsh law properly available?

Some general observations

10. Wales, as a constituent part of the legal jurisdiction of England and Wales, has certain advantages as fora exist here which bring different stakeholders together when no comparable fora exist at the England and Wales level.
11. The Legal Wales Foundation, and its annual Legal Wales conference, bring together all relevant stakeholders including the judiciary, the legal profession, the third sector, and academia.
12. The National Advice Network and the Independent Advisor Forum together provide a means to identify a Welsh agenda when it comes to the provision of free legal advice services. LawWorks Cymru provide a forum for free advice clinics in Wales.
13. We seek to work with other free advice providers to complement their provision in order to maximise our impact. These bodies provide us with an opportunity to identify gaps in provision where we may be able to assist. We would like to see the work of these bodies maintained and kept under review so that they retain their leading edge. The work of university law clinics - with their research and caseload

functions – needs to be periodically reviewed so that their contribution to free legal advice work in Wales can be optimised.

14. It is particularly important that these existing assets are used to optimum effect. *Pro bono* advice is not spread evenly throughout the jurisdiction of England and Wales. There is a concentration in the south east of England due to the cluster of ‘magic circle’ law firms in the City of London.

Avoiding the ‘pro bono trap’

15. Our *pro bono* service is a complement to, and not a replacement for, legal aid provision. It has been said that there is a ‘moral hazard at the troubled interface between *pro bono* and legal aid’.¹ In other words, there is a risk that in providing improved and better *pro bono* services the case for a properly funded legal aid system is undermined. *Pro bono* services can never be a proper replacement for legal aid and do not seek to be so.
16. Although there is no unanimity on this issue, many law schools hold that the primary purpose of clinical legal education is pedagogical: to enhance students’ legal education.² Duties to clients need to be discharged with utmost professionalism and efficiency, but duties to clients are ancillary and are acquired as a result of activity’s main purpose which is to enhance law students’ education. This has implications for the number of client instructions university law clinics can accept and their ability to respond to unmet legal need.
17. There is a right to civil legal aid under Article 6 of the European Convention on Human Rights. However, the extent of the right is unclear and could be influenced by external factors such as the provision of *pro bono* advice and we have even heard anecdotally of a case where legal aid was denied because of the possibility of crowdfunding. The existence of such services may mean that that publicly funded legal aid is not ‘necessary’ within the meaning of Article 6.
18. There are reports that the possibility of this ‘*pro bono* trap’ are having a chilling effect on the establishment of new *pro bono* projects.³ In Germany, the *Beratungshilfegesetz* (literally, ‘advice help law’) avoids the trap by providing that ‘the ability to consult a lawyer for free or on a Conditional Fee Arrangement cannot be an “alternative option for assistance” under section 1(1)(ii)’. We would like to see section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 amended, in terms similar to the ‘advice help law’, to ensure that there is a right for publicly funded civil legal aid which cannot be usurped by the possible provision of *pro bono* advice, conditional fee arrangements or crowdfunding.

¹ Paul Yates, ‘Disabling the trap: *pro bono* and exceptional case funding’ (*Legal Voice* 29 October 2015) < <http://www.legalvoice.org.uk/disabling-the-trap-pro-bono-and-exceptional-case-funding/> > accessed on 26 June 2018

² For a dissenting view see Donald Nicolson, ‘Our roots began in South Africa: Clinics to maximise social justice ends’ (2016) Vol 23 No 3 *International Journal of Clinical Legal Education* 81

³ N. 1

Legislative and secondary materials

19. Up to date versions of current law which are available electronically free of charge ought to be available to members of the public. At the moment, UK legislation, including Welsh law, on the legislation.gov.uk website hosted by the National Archives is not always up to date. Ensuring both primary and secondary legislation is up to date on the legislation.gov.uk website needs to be a priority.
20. We sent a response in support of Part 1 of the draft Legislation (Wales) Bill during the Welsh Government's recent consultation as we believe codifying Welsh law by subject matter will make it easier for members of the public and small businesses to understand. However, members of the public, small businesses, and lawyers will, in addition, need explanatory material to accompany legislative material.
21. We accept that the purpose of Codes will be to find all applicable law in one place. It would not be the best place to engage in 'how to use' legislation discussions particularly as Law Wales already exists as a forum for such discussion. However, we would like to see brief reference to cross cutting legislation, such as the Well-being of Future Generations (Wales) Act 2015, in explanatory memoranda to Codes themselves so that members of the public will be at least alerted to the need, on occasion, to read Codes in conjunction with other legislation.
22. Similarly, we support the idea of including primary and secondary legislation, as well as soft law, within Codes but are concerned that members of the public are not always aware of the hierarchy of legal norms. We would like to see some brief explanation of hierarchy of legal norms in explanatory memoranda to all Codes with cross reference to more detailed explanation on the Law Wales website.
23. We note that the Scottish Government has assisted the Child Poverty Action Group (CPAG) produce two texts: *Benefits for Students in Scotland* and *Children's Handbook Scotland*, via CPAG's online service on a complimentary basis. We commend this practice by the Scottish Government. It is an example of quickly producing much needed impactful work in a cost-effective way, and investigative work should take place to see if this approach could be emulated in Wales.
24. We also commend the Legal Action Group for producing a text dedicated to the subject of homelessness in Wales.⁴ We submit that assistance will need to be given to the Legal Action Group, which has charitable status, in order to translate the text into the Welsh language. We would like to see the Welsh Government discuss with the Legal Action Group the subject of whether or not more such texts in the area of social welfare law could be produced on specifically Welsh law matters with a view to making them freely available on the Law Wales website in line with the practice of the Scottish Government.

⁴ Andrew Arden, Justin Bates and Toby Vanhegan, *Homelessness and Allocations (Welsh Edition)* (Legal Action Group, 2018)

25. Making this text freely available is particularly important due to the paucity of legal aid housing lawyers in large parts of Wales. The following areas of Wales have only one legal aid housing lawyer: South West Wales, Central Wales, and North West Wales.⁵

Demographic time bomb

26. Research undertaken by the Law Society of England and Wales shows that unless there is medium to long-term planning criminal duty solicitors will disappear from large parts of Wales in 5 – 10 years' time.⁶ In Mid and West Wales, the percentage of solicitors over the age of 50 is 61 – 70%. Although provision currently exists we feel that planning should take place now to prepare for a demographic time bomb in the provision to prevent the numbers of criminal duty solicitors falling off a cliff edge.

Immigration advice

27. The Immigration and Asylum Act 1999, as amended, defines 'immigration advice' (section 82) as advice relating to a particular individual given in connection with one or more 'relevant matters' by a person who knows that he is giving such advice.

28. Although the Office of the Immigration Services Commissioner (OISC) has said that 'relevant matters' does not include advice providers whose activities are restricted to signposting and or the provision of general information it is submitted that more detailed guidance is needed on these points.⁷ As the provision of immigration services or advice is a criminal offence, unless the advice giving organisation is regulated by OISC, lack of detail probably has a chilling effect on advice givers who could provide low level signposting and general information. If more detail was available as to the Commissioner's expectations as to referral arrangements between non-regulated and OISC regulated providers, and greater indication as to what is meant by general information, then more public legal education work could be undertaken.

Debt advice

29. On the 1st April 2014, the regulation of consumer credit activity moved from the Office of Fair Trading (OFT) to the Financial Conduct Authority (FCA) and the OFT group licencing regime was abolished. LawWorks did not hold its own group licence prior to 31 March 2014 so could not rely on grandfathering provisions for not-for-profit debt counselling bodies, which are set out in article 60 of SI 2013/1881. Consequently, LawWorks had to advise all its registered clinics not otherwise

⁵ Map created by the Law Society in CARTO < https://the-law-society.carto.com/viz/c6627b22-0add-11e6-b5f6-0e5db1731f59/public_map> accessed on 28 June 2018

⁶ Map created by the Law Society in CARTO < <https://the-law-society.carto.com/builder/85de6858-77ba-4568-b225-41ffeed3b6df/embed>> accessed on 28 June 2018

⁷ Office of the Immigration Services Commissioner, *Guidance on Competence* (2016)

covered by FCA limited permission authorisation, such as Swansea Law Clinic, to stop advising in all areas of consumer credit and debt from the 1 April 2014.

30. LawWorks made a number of submissions to the FCA illustrating the impact of these changes on *pro bono* services and requested that a waiver be granted to cover *pro bono* consumer credit and debt advice. The FCA replied that there was no scope for them to grant a waiver from authorisation requirements.⁸
31. It is submitted that there should be a bespoke arrangement for not for profit *pro bono* clinics registered with LawWorks in Wales to provide debt counselling advice without being required to obtain limited authorisation from the FCA. There may be a case for doing this specifically in Wales as conditions may shortly differ from England. At the time of writing, the Welsh Government has recently launched a consultation into abolishing imprisonment for non-payment of Council Tax.⁹ This would lower the risks in debt counselling advice as there would be no possibility of loss of liberty for negligent advice.

Health Justice Partnerships

32. Health Justice Partnerships are collaborations between legal and health professionals in which access to free legal advice is provided in health settings. They aim to address legal needs that create and exacerbate mental and physical health problems, such as poverty, poor housing and insecure employment.
33. The types of model can vary. We operate a partnership with Maggie's Swansea at Singleton Hospital. It is submitted that in order to take a preventative approach to avoid future health problems additional work be done by the Welsh Government to promote such partnerships. In particular, awareness raising amongst GPs of legal issues will increase chances of them referring to legal advice agencies.

Litigants in person and the power of the letterhead

34. We have piloted an assistance-only service at Swansea Civil Justice Centre where courts and tribunals are co-located. It is submitted that these types of support service can only be a complement to and cannot be a substitute for other initial advice services.
35. We are aware of cases which should have settled sooner and where litigants in person have been making the right arguments from the outset but, for some reason,

⁸ Regulation of Consumer Debt Advice (LawWorks, 1 February 2018) < <https://www.lawworks.org.uk/solicitors-and-volunteers/resources/regulation-consumer-credit-debt-advice>> accessed on 28 June 2018

⁹ 'Removal of sanction of imprisonment for non-payment of Council Tax' (Welsh Government, 11 June 2018) < <https://beta.gov.wales/removal-sanction-imprisonment-non-payment-council-tax>> accessed on 28 June 2018

have not been heeded until a solicitor or advice agency has made the same arguments on letterhead paper.

Swansea Law Clinic
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