



## **Citizens Advice Scotland Written Evidence Independent Strategic Review of Legal Aid 2017**

### **About the CAB service in Scotland**

1. Citizens Advice Scotland (CAS), our 61 member Citizen Advice Bureaux (CAB), the Citizen Advice consumer helpline, and the Extra Help Unit, form Scotland's largest independent advice network. Advice provided by the service is free, independent, confidential, impartial, and available to everyone. The ultimate goal of the Scottish Citizens Advice network is to empower individuals to be able to have their legal rights respected. This is a goal that is very much in line with the wider aspirations of legal aid – seeking a fairer society where individuals are empowered to protect their rights.
2. In 2015/16 the Scottish Citizens Advice network helped over 310,000 clients with more than one million advice issues. With support from the network, clients had financial gains of over £120 million. Our Scottish self-help website received over four million unique page views, providing information on rights and helping people solve their problems.
3. Citizens Advice Scotland welcomes the opportunity to submit evidence to help inform the considerations of the Independent Strategic Review of Legal Aid. The Scottish Citizens Advice network plays a vital role in empowering Citizens to understand and enforce their legal rights.

### **What do people seek advice for?**

4. The Scottish Citizens Advice network provides advice holistically across a broad-range of areas which affect people's daily lives. These areas of advice include benefits, work, debt, housing, consumer, family, and immigration. Legal aid plays a vital role in improving access to justice for many people in Scotland, however from a CAB perspective the availability of legal aid often does not align with the most frequent or serious issues they see clients presenting at bureaux with.

CABs top level advice codes 2015/16<sup>1</sup>

Advice Code	Annual 2015-16 All
Benefits, Tax Credits and National Insurance	352,485
Debt	206,369
Employment	65,664
Housing	55,334
Financial products and services	39,892
Legal	38,430
Tax	28,834
Utilities and communications	25,562
Relationship	23,845
Consumer Goods and Services	20,210
NHS Concern or Complaint	17,002
Health and community care	14,015
Travel, transport and holidays	12,945
Immigration, Asylum and Nationality	6,319
Education	3,731
<b>Total</b>	<b>910,637</b>

5. Legal aid is currently more or less unavailable for benefits claims, and it is only available in very limited circumstances for assistance with tribunals, including the Employment Tribunal. Benefits and employment are year on year two of the top three areas where clients seek advice. This is perhaps unsurprising considering the serious level of detriment to people if they find themselves unable to access or enforce their rights in these contexts.
  
6. For example, if people are unable to effectively and timeously challenge a benefit decision, or if they are unfairly dismissed from work, they can quickly find themselves in crisis without access to any income. As one CAB welfare adviser commented about the mandatory reconsideration process for Employment and Support Allowance (ESA) claims:

*“The main impact is loss of income. If a claim for ESA is subject to Mandatory Reconsideration then claimants lose out on potential components on an ongoing basis. It is alright to say that if the decision is overturned then the claimant receives a backdated payment of benefit, however the claimant has had to survive without it in the meantime.”*

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<sup>1</sup> These figures are for the top level advice codes. They give a good overview of the biggest areas of advice, however they are not a full picture of all the advice given. This is because some clients will receive multiple pieces of separate advice recorded under a single top level advice code.

7. During 2014/15, advice relating to food banks was provided on over 7,400 occasions by CABs in Scotland.<sup>2</sup> This was an increase of 47% on the previous year. At least 1 in every 42 enquiries in 2014/15 featured advice regarding food banks.
8. This reality is not being highlighted to suggest that benefit claimants requiring support should necessarily be seeking advice from legal aid solicitors, however the legal rights afforded to people under areas of law such as social security legislation can have the most significant impact on people's lives. If legal aid is to pursue the aim of contributing to a fairer and more just society, then such fundamental civil rights must be fully protected for those who may require specialist advice and/or representation to protect their rights.

### **Current CAB approach to legal aid**

9. There is no standard Scotland wide approach taken by CABs in supporting clients who may be able to access legal aid services. The options available to CABs supporting such clients can often be limited by factors such as the legal services available in their surrounding area.
10. CAS has worked alongside the Scottish Legal Aid Board (SLAB) over a number of years to consider and develop ways of addressing some of the imbalances between client needs and what services are available to meet those needs. The development of the first Civil Legal Assistance Office (CLAO) stemmed from an adjunct to an Inverness CAB, originally seeking to fill any identified gaps in legal aid provision in the area. Since that time, CLAOs have evolved and geographically expanded, and where CABs have a Civil Legal Assistance Office in their area they will refer clients when this is deemed appropriate. Similarly where law centres exist in the area, CABs will have a working relationship with these centres and both agencies will make cross-referrals to one another.
11. CLAOs and law centres however are often themselves limited in what they can offer to clients as they are restricted by their capacity, the availability of solicitors with the required expertise in a particular area of dispute, and on whether the potential client meets the strict rules around eligibility for legal aid.
12. The main providers of civil legal aid out with CLAOs and law centres therefore are solicitors in private practice. This model means that the legal services available to people in need are largely dictated by the willingness of private practices to offer those services. In certain areas, such as family and relationship matters, this is potentially of limited concern. In many other areas of civil and administrative justice however, this can result in clients having

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<sup>2</sup>Living at the sharp end <http://www.cas.org.uk/publications/living-sharp-end>

great difficulty, or indeed being unable to, access the legal services they require.

13. CABs play a key-role in supporting such clients. Across Scotland a number of CABs have experienced specialist advisers who offer casework and lay-representation to clients in civil and administrative justice matters. CABs will help clients to prepare and submit claims, responses, grievances, mandatory reconsiderations, appeals and more in areas such as the social security and employment tribunals. They will help upskill these clients to self-represent where this is appropriate, and where their resources allow for it and there is a need CABs will offer lay-representation.
14. The ability of CABs to offer clients such services however is being put under consistently more pressure, as they try to meet the high demands for such services while their core funding is often under threat or indeed being cut.

A West of Scotland CAB reported in both March and April 2017 that:

**“due to a lack of funding and cuts by the Local Authority, we are having to curtail the amount of representation at [social security] appeals that we can offer. This is a disenfranchisement of the people of [our locality].”**

One client sought help to appeal a decision not to award him Employment and Support Allowance (ESA). The appeal deadline was in three days. The client has long-standing, chronic addiction issues which he has lived with since being a young person having experienced multiple traumatic bereavements. He can only leave his home if someone is with him to support him, because of his anxiety and paranoia.

The CAB helped the client complete and submit his appeal form, but could not offer him representation, despite it being highly unlikely that he would be able to find representation from other sources such as a solicitor.

15. CABs ability to fill these gaps in legal aid provision is often therefore largely reliant on the funding of particular projects, such as the SLAB funded In-Court Advice projects (ICAs).<sup>3</sup> ICAs provide support to people threatened with homelessness and facing eviction or repossession actions. They also often support clients who would not be able to otherwise access legal aid due to the financial viability of instructing a solicitor – namely actions under simple

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[http://www.slab.org.uk/export/sites/default/common/documents/advice\\_sector/documents/Economic\\_Downturn\\_Programme\\_all\\_projects\\_final.pdf](http://www.slab.org.uk/export/sites/default/common/documents/advice_sector/documents/Economic_Downturn_Programme_all_projects_final.pdf)

procedure, summary cause, and formerly small claims rules in the Sheriff Courts.

16. Alternatively CAB clients are reliant on the goodwill of pro-bono services that have developed on an ad-hoc basis across Scotland to try and meet the gaps in legal services provision and improve access to justice.
17. One of the pro-bono schemes developed is the Free Legal Services Unit (FLSU) run by the Faculty of Advocates.<sup>4</sup> The FLSU is a facility which enables volunteer advocates (both qualified and trainees) to provide certain free legal services to clients who have been referred to them through an approved charitable advice agency.<sup>5</sup> For clients to be accepted by the FLSU they must not be able to afford the services they are seeking, and they must not be able to obtain public funding through legal aid. The FLSU will also consider the merits of the case, and whether they could assist in three days of work or less. If the case is accepted by the unit, clients can receive assistance which ranges from advice through to full representation.
18. This pro-bono service is commendable and invaluable to the clients who receive assistance; however the FLSU is not a full answer to the issues with access to justice under the current model of legal aid. Understandably, given the service is pro-bono, the FLSU generally cannot accept cases requiring over three days work. The FLSU also requires the referring agency to take up a role tantamount to an instructing solicitor. A referral can therefore often require continued specialist casework from the referral agency, and not all CABs will have the capacity to offer this.
19. The level of assistance that can be provided by alternative pro-bono services across Scotland varies significantly, dependent on factors such as the amount of time solicitors and law students are able and willing to provide in addition to full time jobs or studies. Certain CABs run a rota with local solicitors who agree to commit to one evening every month or two months on a rotational basis. Certain CAB clients with more complex or unusual legal issues will be identified by the CAB and offered a single short appointment for initial advice with the pro-bono solicitor on rota. The various Scottish University Law Clinics also play a role in the pro-bono landscape, and where appropriate CABs will look to refer certain clients there. The services the clinics can offer again vary depending on factors such as the complexity of the case and their

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<sup>4</sup> The FLSU incorporates the scheme formerly known as the Free Representation Unit or FRU.

<http://www.advocates.org.uk/instructing-advocates/free-legal-services-unit/free-legal-services-unit-homepage/about-us>

<sup>5</sup> For a list of the currently approved agencies see <http://www.advocates.org.uk/instructing-advocates/free-legal-services-unit/free-legal-services-unit-homepage/accredited-advice-agencies>

capacity at different periods of the year while volunteer legal students are sitting exams or out with term times.

### **Difficulties establishing access to and eligibility for legal aid**

20. Over the last 5 years, CABs have provided on average 2,706 pieces of advice a year to clients on the two issues of access to legal aid (finding a practitioner) and on qualifying for legal aid (merits and means tests). For a full breakdown of the advice statistics relating directly to legal aid for the last five years, please see Annex A.
21. There are a number of clients who require information and advice in order to be able to determine whether they might be able to access the legal support they need. CABs have also reported of instances where solicitors have either themselves been unclear on the eligibility tests, or have not had time to properly take clients through these.

In December 2016 an East of Scotland CAB reports of a client who was advised by a local solicitor that she would not qualify for Legal Aid because her income is too large. She is a full time student, a single mother of two children and in receipt of Tax Credits, a student grant, a student loan, and a childcare grant.

When CAB properly used the eligibility checker, the solicitor had incorrectly included her student loan in her income. The client had no spare disposable income after her fixed costs of rent, travel, and childcare were taken account of. She was likely to financially qualify for legal aid.

In July 2016 a North of Scotland CAB reports of a client who came to CAB on the advice of her solicitor to seek help with completing her application form for Legal Aid. The CAB indicated that this was an example of solicitors passing on a responsibility that their clients would reasonably expect the solicitors to help with, and this in turn was putting more pressure on the CAB.

The CAB advised the client on the rules relating to her car which was on hire purchase, and whether it would qualify as capital. They thereafter helped the client to complete the form.

22. Even when people are able to establish that they are eligible for legal aid, they can still then need to try and find a solicitor able and willing to take on their case. This can present a significant barrier to accessing justice.

In December 2016 a rural South of Scotland CAB reports that:

**“...there is only one solicitor in our local area who does both legal aid and matrimonial law. [Our] client needs a divorce lawyer but his wife has already retained this sole solicitor, so he is struggling to find affordable advice.”**

The client had already tried to contact SLAB for details of any other solicitors offering relevant services, but they had been unable to find him a lawyer.

23. Due to there being less choice of private practices offering legal aid in rural areas, a person can find themselves having a postcode lottery of whether they will be able to access the legal services they require. While this is of great concern, the difficulty of finding a solicitor is not a problem limited to only rural areas.

In January 2016 an urban East of Scotland CAB reports of a client who had been awarded legal aid and had a pending hearing in the Employment Tribunal the following month. Her original legal aid solicitor moved to a different area of Scotland and the client could not find another solicitor able to continue the case for her. One or two lawyers had indicated that the case was beyond their area of expertise. The client had also contacted CLAO however they did not have anyone able to do employment cases.

#### Limitation to the CAB perspective

24. The data CAS receives from CABs will not necessarily highlight the full extent of the issues experienced by our clients when trying to access legal aid under the current model. For example, circumstances might arise where a CAB provides initial information and advice to a client, and agrees with the client that they require a level of legal advice which the CAB is unable to directly offer them at that time. If there is a CLAO in their area the CAB would refer the client there, as well as potentially providing the client with a list of legal aid solicitors in the area.
25. If that client does not return to the bureau, one would hope that they have successfully contacted CLAO, been assessed and confirmed as eligible for legal aid, and that a suitable and willing solicitor has been found to take on the case. That may not however be the case. The client may have been assessed as not meeting an element of the eligibility criteria. Or they may have met the eligibility criteria but been unable to find a solicitor able and willing to take on their case. Some of these clients might return to their

bureau in an attempt to see if there is anything else to be done, however it is suspected that a number of clients will not.

### **Case Study One – Preventing Homelessness**

26. CAS conducted an e-consultation with Scottish CABs between 19 August 2016 and 6 September 2016. Seventeen CAB members fully completed the survey, with another four partially completing it. The majority of responses came from specialist housing advisers. A limited number of responses came from Legal Advice and Money Advice project workers, as well as from bureau management who have oversight of their bureau's approach to tackling homelessness matters.
27. Responses were received from a representational cross-section of Scotland, with interests represented from the Highlands and Islands, Central-belt and Borders, as well as from urban and rural areas.<sup>6</sup>

#### Signposting and Referring

28. Over 70% of those who responded to the e-consultation stated that they would refer a client presenting as homeless to specialist housing advice. This was defined as an adviser or service, internal or external to their bureau, specialising in giving housing advice. It therefore did not have to be professional legal advice from a solicitor or advocate.
29. When asked more specifically what type of circumstances they might refer a client on to a professional legal advice service, it was in more limited circumstances and depended on the circumstances and complexities of the client's case, and whether or not there were specialists available and working within the bureau. Some potentially appropriate situations to do so were when clients were facing imminent Court action and may need representation which the bureau could not offer, or when Judicial Review may need to be considered or progressed.

#### Perceived barriers to professional legal services

30. From the e-consultation respondents, two thirds of those who had experience of referring clients to legal services felt that their clients had faced some difficulties in accessing or using those services. Where there was a service, or in certain areas a network of services (such as homelessness prevention organisations, ICAs and CLAOs), generally the bureaux describe positive mutual working relationships to the benefit of their clients.

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<sup>6</sup> See Annex 2 for further details of the methodology of the e-consultation



31. It was highlighted that on certain occasions there has been a difficulty with referring homelessness related cases onto professional legal advice. This has been due to the relevant referral procedures not being flexible enough to take into account emergency situations which are inappropriate to be handled via normal referral / appointment booking timescales. It was felt that continued and improved training of both CAB and other service staff to establish an escalated referral procedure was highly beneficial when a client presented in a moment of crisis requiring reactive support.
32. A number of e-consultation responses also corroborated the issue highlighted already in this report, by commenting that in their experiences people in rural areas found it more difficult to access legal aid. If it was a smaller community it was felt there were fewer legal professionals with the relevant homelessness legal speciality, or even none at all. This then meant clients were required to travel to the next nearest larger city if they wanted to try and access services. Other responses highlighted a perception that solicitors in their area were at times reluctant to take on homelessness cases, however generally respondents felt the bureau were often best placed to deal with most housing matters for people in their area. Finally, one response felt that the language used by some professional legal services was not always accessible to certain clients in the same way CABs interactions with clients could be.

### **Case Study Two – Employment disputes**

33. Scotland's trade union membership in 2014 was estimated to be 30.4% of employees.<sup>7</sup> When something goes wrong in the workplace and an employee's rights are not adhered to, almost 70% of Scotland's work force are therefore not protected directly by a trade union. Such employees will often have to therefore face their employer alone as an individual.
34. To hear about the experiences of CAB clients facing employment disputes which go to the Employment Tribunal (ET), CAS held an employment adviser focus group on 16th September 2016 with eight advisers. These advisers represented a cross-section of specialist and general advisers from across Scotland who advise clients on employment issues and provide lay-representation in the Employment Tribunal. The advisers brought a breadth of on the ground experience from years of supporting, advising and

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<sup>7</sup> The Department of Business, Energy, and Industrial Strategy (BEIS) Trade Union Membership data (2014), available to download from: <https://data.gov.uk/dataset/trade-union-membership/resource/65a823e1-ff53-4e22-a167-1bad92a0bfbf>. Table 1.2b shows the most recent known figures on trade union membership in Scotland. CAS is unaware of any significant change to the general levels of trade union membership in Scotland since 2014.

representing people in Scotland through their employment disputes. We also asked former clients to tell us about their experiences of going through the ET from a short paper based questionnaire.<sup>8</sup>

35. All CABs offer general employment advice – this is typically done through appointments and drop in sessions at bureaux and outreach locations, where advisers meet with clients face to face. Advice is also provided by telephone and e-mail in certain circumstances. Often, for simpler employment disputes, generalist advisers are able to fully support clients to deal with their issues. There are however circumstances when employment disputes are complex and require specialist advice, casework, and representation.
36. When bureau clients require a higher level of support with an employment dispute, a number of bureaux have a specialist employment adviser or team who work to support the bureau's generalist advisers and clients. These specialists can provide advanced training to generalist advisers on employment issues seen in their area, and they can be a source of second-tier support – often carrying out case checking and reviews of their bureau's employment enquiries. Other generalist advisers can also refer clients onto their specialist colleague when the issues involved in a client's inquiry are particularly complex (for example in a multifaceted discrimination case), or where casework or representation may be required (for example when the ET seems likely).
37. Where such advice structures are in place, the model works well to the benefit of wronged workers seeking justice. One CAB client supported by his local bureau which had an employment specialist available told us:
- “After I went to Citizens Advice, I had more control over the situation and that gave me confidence to think more clearly and make informed decisions.”*
- Another client stated: *“without Citizens Advice I would never have been able to carry on with my dispute.”*
38. The advisers in attendance at the focus group all described the reality that it was becoming increasingly difficult for their CAB to support their clients in the employment context due to pressures on their services. The scope of employment services offered by CABs is in part dependent on the funding and availability of specialist advisers, and there is currently no national equivalent

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<sup>8</sup> See Annex 2 for further details of the focus group and client questionnaire

39. At the CAS adviser focus group a number of advisers reported that due to the high demand on their services, and their current capacities limited by their funding, they were only able to provide lay-representation to clients in the ET in exceptional circumstances.

Karen's<sup>10</sup> employment dispute was multifaceted and complex and included harassment, discrimination, and pay disputes. Her local CAB helped initially, however due to the nature of the dispute it became clear that Karen required specialist comprehensive support. She was unable to find a solicitor willing to take on the case, so Karen had to travel over 15 miles to see an employment specialist at a different bureau. The specialist adviser helped Karen raise the matter at the ET, however lay-representation could not be offered due to the client falling out-with the bureau's geographical area, and the demand already on the service's specialist from local clients.

Thankfully in Karen's case, the employer settled the dispute immediately prior to the evidential hearing. The lack of access to lay-representation did not therefore affect Karen's prospects of success, however if the employer had not settled the case it may have done so.

40. Once again, the need for such legal support in the context of Employment services can be especially important in rural areas. In more rural areas, the alternative options for taking advice may be more limited and the costs of travelling to receive any support will be higher than accessing services in an urban area with an ET and wider options for legal services.

### **Cross border**

41. One final area which may require consideration is around the provision of legal aid for cross border issues. In November 2016 a CAB reported the following:

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<sup>9</sup> ACAS plays an important role nationally to support workers resolve their employment disputes. The ACAS services, and ACAS Early Conciliation procedure, are not however able to fill the gap in services where clients require casework to prepare their case papers for a Tribunal, or indeed for representation at a Tribunal.

<sup>10</sup> Karen is not the client's real name

A South of Scotland CAB reports of a client living in Scotland. The client's son lives with his grandmother in Wales. The grandmother has a residence order from the Welsh Courts giving her parental rights and responsibilities for the child, and stating the child is to live with her. Social Work in Wales have agreed with the client that her child should now return to live with her, however they say the client must first apply to Court to have the residence order revoked. The client does not know how to do so. She cannot get legal aid for this in Scotland as the case is in Wales. She cannot get legal aid in Wales as she stays in Scotland. She cannot afford to hire a solicitor privately.

## Conclusion

42. From a CAB perspective, the largest areas where we see our clients suffering significant detriment are often in the areas where legal aid is least available. These areas relate predominantly to areas of civil and administrative justice, and can often be identified as moments of crisis caused by a lack or loss of income.
43. The purpose of the presented perspective in this paper is not to suggest that a new legal aid model should try to direct all people experiencing issues such as those with their social security benefits to go to a legal aid solicitor. Such an approach would obviously not be cost effective nor appropriate in many instances.
44. This response does however seek to highlight the importance of services offered by CABs and projects such as ICAs in many of these areas. While these services are somewhat separate to the traditional model of legal aid provision, they all work towards the same end – improving access to justice for those who need it most.
45. This must be fully recognised and prioritised in future models of legal aid, and consideration should be given to how legal aid funding can best ensure these services are given a stable longer-term foundation across the breadth of Scotland to help create a fairer more just society for all.

Legal Aid CAB Advice Statistics 2012/13 to 2016/17

ANNEX A

	2016/17		2015/16		2014/15		2013/14		2012/13
<b>Legal aid</b>	<b>2,570</b>	6%	<b>2,436</b>	-15%	<b>2,865</b>	11%	<b>2,573</b>	15%	<b>2,244</b>
Access (finding a practitioner)	1,486	7%	1,390	-15%	1,638	19%	1,374	25%	1,099
Qualifying (merits + means tests)	1,294	9%	1,187	-24%	1,566	11%	1,414	31%	1,080
Quality of service / administration	121	-12%	138	-38%	223	56%	143	88%	76
Repayments	167	-22%	215	-29%	303	65%	184	44%	128
Other	540	22%	443	-27%	603	45%	416	7%	387
<b>Total sub-headings</b>	<b>3,608</b>	7%	<b>3,373</b>	-22%	<b>4,333</b>	23%	<b>3,531</b>	27%	<b>2,770</b>

\*Due to relatively small numbers there appears to be fairly significant increases and decreases in advice provision each year, however over the last 5 years the fluctuations have been within relatively consistent parameters.

\*\* The CAB data around legal aid is limited in that while we know in 2016/17 clients were given 3,608 pieces of advice on 2,570 occasions, we do not currently have the ability to go behind these statistics to further determine which areas of law the advice related to.

## **ANNEX B**

### CAB e-consultation around legal advice for homelessness issues

CAS advertised nationally on our intranet to bureau members, as well as a paper memo being sent to each bureau in Scotland. Responses were collected between 19 August 2016 - 6 September 2016, with seventeen CAB members fully completing the survey, and a further four partially completed the survey. The majority of responses came from specialist housing advisers. A limited number of other responses came from alternative perspectives, including Legal Advice and Money Advice project workers, as well as from bureau management who have oversight of their CAB's approach to tackling homelessness.

Responses were received from a representational cross-section of Scotland, with interests represented from the Highlands and Islands, Central-belt, and Borders, as well as from urban and rural areas.

### CAB Employment Tribunal adviser focus group

CAS held an employment adviser focus group on 16th September 2016 with eight advisers from eight locations across Scotland: Aberdeen, Dundee, Edinburgh, Falkirk, Haddington, Inverness, Badenoch & Strathspey, Musselburgh, and West Lothian.

CAS advertised nationally on our intranet to bureau members, asking those with experience of supporting clients through the Employment Tribunal to apply to attend the focus group, submitting a short summary of their relevant experience to help select attendees. All eight applicants were invited to attend on the basis of their experience.

Four attendees were staff members employed specifically to run employment services in their area and managing a team of advisers in employment matters. Two were volunteer specialist employment advisers, and two were highly experienced volunteer generalist advisers who support clients with employment disputes. All attendees had experience of supporting clients through the ET, and were able to bring a breadth of on the ground experience from years of supporting, advising and representing people in Scotland through their employment disputes.

### CAB Employment Tribunal client questionnaire

CAS produced a basic paper-based questionnaire which was provided to the focus group attendees to share with their former clients and invite them to share their experiences with CAS if they wished to do so.

The questionnaire asked open questions about their experiences of trying to find support, and progress through their claim with the ET.

Six clients wished to share their experiences with CAS, and these responses helped to add a perspective from clients' real lived experiences of requiring employment support services to resolve a dispute.