

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Legal Aid Board

The Board

1. The Scottish Legal Aid Board (the “Board”) is a non-departmental public body established by the Legal Aid (Scotland) Act 1986. The Board is responsible for the administration of legal aid in Scotland in terms of the Act and has the general function of:

- securing that legal aid and advice and assistance are available in accordance with the Act;
- administering the Scottish Legal Aid Fund (“the Fund”); and
- monitoring the availability and accessibility of legal services in Scotland.

2. As a key partner agency in the justice sector, the Board has been involved in the work undertaken by Scottish Government prior to the drafting of the Criminal Justice (Scotland) Bill (the “Bill”). Additionally, submissions by the Board on a range of financial aspects of the implementation of the bill were included in the Financial Memorandum.

Legal Aid

3. There are several different types of legal aid. The current consideration of the Bill principally engages with legal aid in the context of Scottish criminal law and procedure. There are two forms of legal aid relevant in the context of criminal proceedings although one of these types is sub-divided further into two forms – see paragraph 4 below. All solicitors who provide criminal legal assistance have to be registered with the Board so to do. Most, if not all, such solicitors undertaking criminal work provide both forms of legal aid relevant to the criminal context. Together, the forms of legal aid relevant in the context of criminal law are grouped together under the collective name criminal legal assistance, and in this paper, criminal legal assistance simply means one or other or both forms of legal aid relevant in criminal proceedings.

4. Criminal legal assistance comprises:

I. Criminal Advice & Assistance

(a) General Criminal Advice & Assistance

Legal assistance which covers general work other than representation in a court, such as meetings, correspondence. This currently include work done by solicitors at police stations.

(b) (Criminal) Assistance by Way of Representation (“ABWOR”)

Legal aid for representation for certain specified hearings or types of case before a court or tribunal for which criminal legal aid is not available. Typically this covers proceedings where a plea of guilty is accepted, and other proceedings such as breach of existing court orders

II. Criminal Legal Aid

The main form of legal aid for representation before a court. This form applies where an accused pleads not guilty, whether or not there is then a change of plea. There are different arrangements for summary criminal legal aid and solemn criminal legal aid.

Availability of Advice at Police Stations

5. The Board has a statutory obligation to ensure that suspects detained under s14 of the Criminal Procedure (Scotland) Act have access to a solicitor. For this purpose, the Board operates the 24/7 Solicitor Contact Line (“SCL”) which is a one-stop point of contact for all police stations in Scotland. If the suspect has their own solicitor, the SCL notify the solicitor that advice is needed. If that solicitor is unavailable or the suspect does not have their own solicitor, the SCL solicitor can provide advice by telephone. This ensures that a suspect can receive advice quickly and effectively. If an attendance by a solicitor in person is required, the Board operates a duty solicitor scheme. The solicitors attending can be solicitors from the SCL, the Public Defence Solicitors’ Office or private solicitors.

RESPONSE TO THE CALL FOR EVIDENCE

6. The Board proposes to follow the suggestion of structuring the response in accordance with themes suggested in the call.

A Police Powers and Rights of Suspects

Part 1 Chapter 1 - Arrest

7. The Board recognises that the Bill adds to the provisions applying to persons suspected of involvement in crime, and their rights. It is anticipated that the changes will now lead to an increase in those seeking police station advice, given that arrest will not just apply to suspected crimes punishable by imprisonment as detention does now.

8. With the right to solicitor consultation being extended by Section 36¹, and the right to have a solicitor present at interview (Section 24²) there will be a significant increase in recourse to solicitors. In relation to Section 24 it is not clear that the natural meaning of the phraseology used in the Bill of “having a solicitor present” includes solicitor participation by video. Lord Carloway³ recognises that in many situations a video-based link will be as effective as physical presence. If there is no ability to have solicitor participation by video, this may create significant logistical and cost challenges especially in more rural areas. In that connection, the Bill could facilitate further recourse to video technology, beyond that provided for in the context of courts in Section 86 (and see separate remarks in connection with that section below).

¹ In terms of the Bill the right will become the right of any person in custody to consult with a solicitor. Currently this is restricted to those in custody who are interviewed or to be interviewed.

² In terms of the Bill the right will become the right to presence of a solicitor at interview whether in custody, or voluntarily attending a police station or another place. Currently this is restricted to those in custody.

³ At 6.1.40 of his Review

9. As well as the frequency of solicitor involvement at police stations increasing (per observations at paragraph 8 above), it is also likely that the duration of such involvement will increase in line with the need for the police to give more information⁴. Under the current law only very basic information need be provided. Under the Directive the phrase “all the information on the accusation necessary to enable them to prepare their defence and to safeguard the fairness of the proceedings” is used and this information requirement is likely to increase the scope of information given by the police, and the subsequent consideration by the suspect with their solicitor.

10. The Board, as the body responsible for ensuring that legal advice is available to suspects in police stations, and as administrators of the public funding of legal advice, assistance and representation, anticipates that the general effect of such further provision will be to increase the cost of legal services as a result of increased recourse by suspects to legal advice and assistance. However, these services can be delivered in different ways. We are working with the Scottish Government on how these services could best be delivered. For example, the current model of the SCL and duty solicitor provision could be expanded. Solicitors could be located in busy police stations to provide advice. The current system operates well and is highly regarded by Police Scotland and many solicitors within the legal profession. It ensures that advice is given quickly and effectively to suspects.

11. Much of this work will be covered under arrangements that can be made under the existing regime for criminal Advice & Assistance, which is essentially a time-based charging system. However, increases in frequency and duration of the involvement of solicitors at police stations both drive time-based charges up. Further comment on the changes to legal aid structures are made under our comments on Part 1, Chapter 2.

Part 1 Chapter 2 - Custody

12. Investigative liberation, police liberation and questioning are all areas that will challenge the existing arrangements for criminal legal assistance as well as give rise to increased costs for the Fund, particularly through the increase in solicitor police station work. The Financial Memorandum for the Bill contains estimated figures based on the current legal aid structures, but any projections are open to substantial variation.

13. While the ability to seek a review of a police bail condition to the Sheriff is an entirely new and welcome step, it can be predicted with some certainty that this will occur often in situations involving allegations of domestic violence and the resulting legal work may be significant.

14. The new regime will see an increase in both non-court advice and assistance, and court representation for hearings in relation to the various applications that can be made to court⁵, and for which there is currently no real parallel. It is not just an

⁴ Section 5(3) bases further information requirements on Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings

⁵ E.g. Application to the sheriff to review conditions of release under Section 17 or application to the sheriff for review of conditions of an undertaking under Section 22, etc.

issue, consequently, of scaling-up existing provision and costs. There will be completely new processes, and the possibility that the processes could occur more than once during a case. In turn, there may be significant cost ramifications. There may be a significant benefit from looking at overall restructuring of criminal legal assistance, and further remarks are made below.

15. As far as the legal aid mechanisms to deal with the changes are concerned “bolt-on” solutions, whilst simplest to articulate, may not be the best approach in the long term, and indeed are likely to be costly. Such bolt-on solutions might include providing for additional Advice & Assistance and additional criminal ABWOR (in relation to court hearings). A more considered approach may be for the Scottish Government to consider this as an opportunity for substantial simplification of criminal legal assistance, recognising that in essence the processes for which legal aid needs to be available start with the first involvement with the police at the police station, rather than the current system which although making some provision for preliminary processes, is based on the later service of prosecution papers as the procedural trigger for legal aid, and the subsequent court procedures. This would require primary legislative change.

16. The Board is of the clear view that a range procedures under the current heading/theme of “Custody” are susceptible to increased use of both (a) electronic communications to produce time, resource and cost efficiencies for such processes as would previously have been susceptible to paper-based steps, and (b) to video-technology for processes for which face to face meetings or court attendances might have previously been appropriate.

17. In addition, based on our experience of arranging legal advice and representation under the current system, the 12 hour maximum custody period envisaged by Section 11 may be very challenging in some cases, especially having regard to the geography of Scotland and practical difficulties such as bad weather and the availability of solicitors.

Part 1 Chapters 3 & 4 - Rights of suspects, etc.

18. In relation to police procedures *quoad* children and vulnerable adults, the safeguards need to be robust. Normally face to face interviews would be indicated where a child is involved, but especially in rural situations, it may be that provision for being able to facilitate interview by video would be useful as a failsafe.

19. We note that the safeguard provisions relating to waiver of the right to have a solicitor present at interview (other than those relating to those under 16) appear to be restricted to mental disorder and do not cover the position of poor literacy, other limitations on capacity or the fact that the accused does not speak English at all. We also note that in contrast with the position in England & Wales where a different approach is taken, and Code C of PACE⁶ applies, the suggestion from the Bill⁷ is that it is left, ultimately, to the decision of a police constable whether the person understands, and if they are over 18, whether the person has a mental disorder or

⁶ Police and Criminal Evidence Act 1984 which applies to England & Wales

⁷ Section 25

not. This leaves the matter open to challenge and risks failing to achieve the ECHR test of effective participation. Under Code C of PACE the position is that:

- 1.4 If an officer has any suspicion, or is told in good faith, that a person of any age may be mentally disordered, or otherwise mentally vulnerable, in the absence of clear evidence to the contrary to dispel that suspicion, the person shall be treated as such for the purposes of this Code.
- 1.6 If a person appears to be blind, seriously visually impaired, deaf, unable to read or speak or has difficulty orally because of a speech impediment, they shall be treated as such for the purposes of this Code in the absence or clear evidence to the contrary.

20. The PACE provisions go a significant way to reduce the risk of the vulnerable suspect being interviewed without a solicitor and the Bill may be an opportunity for the position in Scotland to be put on the same footing. While it sets the bar higher for the police, it is more likely to ensure that proper regard is given to vulnerabilities which may not necessarily present easily for assessment by a police constable. It also reduces the risk of difficulty for the suspect or their solicitor where there is information as to mental disorder (or other vulnerability) but the police may not have given appropriate cognisance to it. Adopting the PACE provisions in this area would also reduce the risk of challenges to the admissibility of the interview on the grounds of fairness

B Corroboration, admissibility of statements and related reforms

21. We have no submission to make in respect of this part of the Bill. The Board have provided estimates of what increased costs might look like, wholly based on views from the Crown, as to what increased levels of prosecutions might be. Expenditure in this regard will be directly driven by prosecution policy.

C Court Procedures and Video usage

22. As the Financial Memorandum relates, there will be increased costs of the front end procedure in solemn cases, but these could be at least partially controlled by the use of an inclusive fee (as opposed to time and line fees) for the work. The emphasis on front end work is designed to create efficiencies in terms of whether and how later procedure takes place, and there should be savings in that respect, but these are difficult to predict.

23. The Board considers that the use of electronic communication and video and/or telephone conferencing should be encouraged and that this would be assisted if a statutory footing was given to the option for use of video or telephone conferencing for all hearings or proceedings susceptible thereto, so as to enable and encourage the use of such facilities where ever possible, and to help achieve the attendant cost effectiveness. Section 86 (see below) addresses participation of a detained person in a specified hearing, but the use of video for other participants, beyond those who are detained, merits wider provision in the Bill.

Part 6 Section 86 - Live Television Link

24. The proposed arrangements to introduce an optional pre-hearing to clear the use of video before the substantive hearing threatens to make the system less

efficient rather than more. There are currently court cases involving detained persons being heard via video in Scotland that do not have the formality of such a pre-hearing in place, but nonetheless proceed effectively and efficiently. Additionally, other jurisdictions across Europe use video in an increasing number of cases without the need for such a hearing.

25. There is also good reason to make the provisions for use of the technology more permissive to as to encourage, as well as permit, wider use. In order to ensure that the introduction of new technology brings the foreseen benefits, but at the same time safeguards the accused' rights, a more permissive wording for the (new) Section 288H(1) would be:

“The court may, on application to it by any of the parties to the case or *ex proprio motu*, determine that arrangement be made whereby any due participation, at any diet, hearing or examination of an accused who is a person detained in any place in Scotland is through a live television link from that place, the accused not being brought to the court-room.”

26. The (new) sub-section 228(2) would be retained, but sub-section 288H(3) could be removed as unnecessary.

27. It is also felt that the Bill should go further in the development of the potential for the use of television links and digital technology and the benefits and costs savings this will bring in the longer term. By enabling the use of such technology now, further opportunities can be explored within the justice community, including the legal profession.

28. Further use of video would be the giving of evidence in some diets, particularly more formal or uncontroversial evidence, or evidence which is in short compass. Police evidence particularly could be susceptible to such treatment in a number of situations, and the efficiencies and resource advantages achievable by not having officers attend court are very significant. There are already precedents for the taking evidence from child and vulnerable witnesses as well as some witnesses outside Scotland, and nothing from that experience suggests that more extended use of video is anything other than advantageous. The procedural model given by Section 86 (and the new Section 288H of the 1995 Act) could fairly simply be applied to be available to the court for such hearings or in such circumstances as the court considers appropriate *ex proprio motu* or on application of a party to the case.

29. In relation to further use of digital technology the critical areas are in the permissions to serve and present necessary and important documentation digitally and to ensure that digital signatures are permissible.

D Appeals, Sentencing & Aggravations

30. The Board have no submissions to make in relation to these provisions of the Bill other than to record formally that the provisions of the Bill by increasing efficiencies and sifting out poor appeals should result in a concomitant saving on the Fund.

E Police Negotiating Board for Scotland

31. We have no submissions to make in respect of this part of the Bill

Scottish Legal Aid Board

30 August 2013