

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Faculty of Advocates

PART 2: Introduction of Financial Contributions in Criminal Legal Aid

In April 2012 the Scottish Government published its Consultation Report on the introduction of financial contributions in criminal legal aid and changes to financial eligibility. This Report (as its name suggests) reports on the Consultation Paper published by the Government in March 2011. In doing so, the Consultation Report describes the “three broad proposals” set out in the Consultation Paper. Part 2 of the Bill contains the framework whereby the proposals are translated into law (largely by providing for the promulgation of subordinate legislation by Scottish Ministers and the Scottish Legal Aid Board).

The Faculty responded to the Consultation Paper and, in doing so, provided its views as to the general principles behind the proposals contained within it. Those proposals proved to be largely impervious to the consultation process and accordingly there is little material difference between what was initially proposed and what now appears in the Bill. It follows that the principles underlying the Bill have not changed from those already commented upon. Neither have the Faculty’s views. Rather than simply reiterate arguments that have already been presented, the Faculty respectfully invites the Justice Committee to revisit the Faculty’s response to the earlier document in order to find the reasoning behind the Faculty’s position, which can be summarised as follows:

Proposal 1: Changing the assessment of financial eligibility

In its response to the Consultation Paper, the Faculty indicated its agreement to the proposal that the assessment of financial eligibility for ABWOR, summary and solemn criminal legal aid should be similar. The Faculty remains of that view.

Proposal 2: Introducing contributions in criminal legal aid

In its response to the Consultation Paper, the Faculty indicated that it would support in principle the introduction of financial contributions, but that fairness requires that an individual who is brought to trial and ultimately acquitted should be left, as far as possible, in no worse a position than he was prior to the commencement of proceedings against him. Accordingly, the Faculty could only support the introduction of a system of contributions in circumstances where contributions would be refundable to an acquitted contributor.

The Faculty recognises the financial imperative behind the proposals now included in Part 2 of the Bill. However it remains of the view that the introduction of contributions, without any system for refund in the event of acquittal, is fundamentally unfair. It also adheres to the additional concerns expressed in its earlier response: i.e. (1) that a contributions system (with no prospect of recovery) will act as a strong incentive to plead guilty irrespective of the guilt of the accused, and (2) that it will act as a disincentive to someone facing criminal charges to remain in employment. The Faculty also reiterates its previously expressed concern that the

governing principle of proportionality militates against any system of contributions (whether refundable or non-refundable).

Proposal 3: Collection of contributions

The result of the Government's consultation exercise was clear and unambiguous: i.e. (as per the Consultation Report) "the respondents were clear that they believed the [Scottish Legal Aid] Board should have responsibility for collecting all contributions. There was no support for the other two suggestions." Given the unanimity of opinion, it is hard to recognise the scheme now incorporated into the Bill (which requires solicitors to collect contributions in summary cases) as a "compromise" (as it is characterised by the Government in the Policy Memorandum accompanying the Bill). The Faculty considers that this outcome calls into question the value of the entire consultation process, and demonstrates the extent to which financial necessity has overridden proper consideration as to the potential impact of this Bill upon the fundamental principles of access to justice and the need to ensure that all accused persons have adequate facilities for the conduct of his/her defence to criminal charge(s).

Faculty of Advocates
30 July 2012

**CONSULTATION ON THE INTRODUCTION OF FINANCIAL
CONTRIBUTIONS IN CRIMINAL LEGAL AID AND CHANGES TO
FINANCIAL ELIGIBILITY**

Response by the Faculty of Advocates

Introduction

The consultation is designed to obtain views on general principles [para 1] and we therefore restrict our response to these principles. However, it should be noted that the absence of detailed proposals and any clear evidence base for the proposals makes it very difficult to assess them.

In general terms, whilst we agree with the governing principles set out, we consider that access to justice and enabling an accused person access to adequate facilities for the conduct of his/her defence is the fundamental principle here and any other considerations must give way to secure this principle.

In addition, any system of contributions must be rigorously fair. One of the principles listed is fairness to the accused and the taxpayer. Fairness and respect for our criminal justice system, in our view, requires that there be a procedure for recovery of contributions made by persons acquitted – unless there are circumstances which make it inappropriate.

Finally, we agree with the principle of proportionality but suggest that it will cause problems for any fair contributory system. We suggest proportionality is best met by a system which seeks contributions after conviction.

Fairness requires recovery of contributions

One of the stated governing principles is ‘Fairness to the accused and the taxpayer’. This is a principle that the Faculty supports. Fairness demands respect for the presumption of innocence. Fairness requires that an individual, who is brought to trial and ultimately acquitted, be left, as far as possible, in no worse a position than he was prior to the proceedings commencing. The Faculty would support the introduction of financial contributions but only in circumstances where contributions would be refundable to an acquitted contributor.

Paragraph 53 states that:

- (a) That a recovery system “is not being considered within the scope of this consultation”. This presents a serious problem for the process being undertaken – not least that in our view, in principle, a system of contributions is only fair when it involves a system for recovery. The failure to address recovery at this stage undermines its introduction.
- (b) “A system of contributions could operate without introducing a mechanism for recovery of costs”. The Faculty rejects that proposition.

Fairness surely requires that there must be a mechanism for recovery of contributions in cases where an accused is acquitted. That is the principle behind

recovery in civil proceedings and the consultation paper states that it seeks to introduce parity with civil proceedings [paras. 21-23].

Moreover, recovery is common practice in other developed jurisdictions which, again, the consultation paper acknowledges is relevant [para 24].

Fairness demands that there can be no degrees of acquittal if the presumption of innocence is to remain at the heart of our criminal justice system. The presumption continues throughout the trial until verdict. It is only the members of a jury who judge guilt or innocence. The suggestion at para. [52] that acquittal – whether not proven or not guilty - is not the same as innocence is inconsistent with the rule of law and cannot properly found any policy. The Faculty is of the view that contributions should be refundable in all cases where guilt is not established. In England and Wales, full defence costs are recovered unless the court is of the view that the accused brought suspicion upon themselves: Criminal Procedure Rules 2010, r.76.(5)(a)(ii); noted in *Archbold: Criminal Pleading, Evidence & Practice*, 2011, para. **6-100g**. The Faculty suggests that defence contributions should be recoverable in all cases where an accused is not convicted but the court can limit the amount recoverable if it is felt inappropriate.

Finally, the alleged anomaly whereby non-legally aided funded people are left at a comparative disadvantage [para 52] already exists, in that at present some receive free assistance and others do not. It is not, we suggest, a persuasive reason against recovery within a contribution scheme. Alternatively, if it is considered an issue of principle, then a simplified recovery procedure could be considered allowing all parties to recover costs from a central fund similar to the one that exists in England and Wales.

Example

Consider the example of an Independent Financial Advisor (IFA) who faces charges of fraud in relation to 100 mortgage applications. There are 20,000 case papers. Several expert witnesses need to be instructed (accountants, handwriting experts, etc.). The case takes many hundreds of hours to prepare. Preparation time is 18 months. The trial lasts 6 months. The IFA has disposable income of £1000/week. Over 2 years he contributes £104,000. He is acquitted – the jury accept his defence that he had no involvement in any criminality. He is innocent.

It cannot be fair that such an accused walks away from a 2 year ordeal without a stain on his character yet £104,000 poorer. No taxpayer would wish to be in such a predicament. The example given is perhaps extreme but not uncommon. It illustrates clearly the unfairness of a one-way contribution system. Where is the fairness in asking an acquitted contributor to personally meet a bill of £104,000, £10,000 or even £1000?

Further concerns

a. Potential Disincentive

Under a no-refund system, an innocent accused, such as the IFA above, may take the view that rather than parting with £104,000, which he has no prospect of recovering, he will plead guilty to a much reduced libel to bring matters to a

conclusion - albeit that he is innocent – solely to avoid the financial ramifications. Under a refund system such examples of injustice would not occur.

b. Disincentive to Employment

Under a no-refund system an accused might simply leave work, transfer all assets to a partner and thereby claim that he has no disposable income. The taxpayer would therefore bare the full brunt of the costs. With a refund system in place such a course of action would or could be avoided.

c. Fairness

The use of enhanced powers of recovery makes a refund system all the more necessary in the interests of fairness to the accused and the taxpayer.

d. Prior Consultation

Prior consultation has demonstrated a majority in favour of a process for refund or recovery of contributions – *Advice for All: Public Funded Legal Assistance in Scotland – The Way Forward (Analysis of Written Consultation Responses)*, p.91, Table 31.

e. Scottish System

In paragraph 53, reference is made to the different criminal justice systems existing in Scotland, and England and Wales. This seems to be put forward as an explanation why applicants in Scotland should not be entitled to any refund. This seems somewhat at odds with the explanation given in paragraph 6 for the introduction of financial contributions that *“this will also bring criminal legal aid into line with practice in many other developed jurisdictions”*.

Practical considerations for recovery

The consultation paper also suggests that a reason against it is that refunding contributions would constitute a bureaucratic nightmare. It is difficult to understand the thinking behind this statement. No detail or evidence (such as comparison to other systems) is provided.

Why should it be any more difficult to refund payments than it would be to pay them? Indeed it should be easier as at the time of acquittal it will be known what contributions have been made.

A simple way to avoid much of this *“bureaucratic nightmare”* would of course be to provide that any contributions would be collected at the end of the case once the outcome of the case is known. In the event of an acquittal no contributions would be required.

Moreover with a refund system in place there are further avenues of financial recovery that could be considered. Upon conviction a contributor, as part of the sentencing process, could be ordered by the court to make further contribution to the total defence costs – presuming his ongoing contributions have not met the full defence costs. Further, the court could, in certain situations, order a convicted contributor to make a contribution to prosecution costs. Such recovery schemes exist in England and Wales. Such further recovery offers fairness to the taxpayer and, with a refund scheme in place, could not be said to be unfair to an accused.

Paragraph 53 states that in England and Wales defence contributions are recoverable from the Crown. For the avoidance of doubt Crown means 'out of central funds' or the 'Ministry of Justice', not the Crown Prosecution Service.

Proportionality

The potential range of savings is suggested at between £2.8 and £5 million.

The Faculty is of the view that such savings, whilst welcome, are minimal when set against the total legal aid bill. Further, such savings are dependent on there being collection by solicitors and a no refund system. The Faculty can support neither proposition.

If a refund system were introduced the suggested savings would be eliminated – not only because of the refunds themselves but because of the administrative machinery and its associated costs. Yet as we suggest fairness requires a refund or recovery system where a contribution system is introduced.

Even with no refund scheme in place the cost of the administrative machinery should not be underestimated.

Enforcement would be difficult. For that reason alone contributions would need to be collected centrally with statutory enforcement powers available.

The Faculty, whilst supporting a refundable scheme of contributions, is concerned that the governing principle of proportionality militates against both a refundable and non-refundable scheme.

Proposals for introducing contributions in criminal legal aid

Whilst we accept and recognise the need to reform and refine procedures, with regulations to reflect changing times and circumstances, any proposals for change would require to adequately balance the interests of the taxpayer and the applicant. There are real concerns that some of the proposed changes do not properly achieve that balance, and if implemented may well result in the accused person's full access to justice being heavily compromised in a number of important areas.

Concerns:

(1) *The Risk of Perverse Incentives*

Paragraph 33, which reflects the Governing Principles of any proposed change, states, "*it is essential that there are no perverse incentives which damage the efficient and effective operation of the justice system.*"

Any change therefore, must ensure that the regulations should not bring about perverse incentives (in the form of financial disincentives) which ultimately may save the taxpayer money, but may well threaten the integrity of the justice system by providing an incentive to applicants to take a particular course of action based on purely financial reasons rather than having regard to the proper interests of justice.

Whilst it is acceptable in principle, that graduated contributions be introduced to ABWOR and criminal legal aid, the overall emphasis should be to ensure that any

contributions should be both reasonable and affordable. That being so, it is concerning that a number of the various options suggested, appear to be neither reasonable nor affordable to applicants on low or modest incomes. This last statement applies in particular to the examples given in paragraph 45.

Indeed, the example in paragraph 45 would appear to be at odds with one of the governing principles stated at paragraph 33. The example given could be said to provide the very type of perverse incentive sought to be avoided.

The perverse incentives anticipated in the paper, appear to relate to decisions taken in respect of the case itself, such as whether to plead guilty or not guilty, but there is a real danger that further perverse incentives could arise in areas indirectly linked to the case. For example, as mentioned above, any system must also ensure that there remains a positive incentive for someone with low or modest income to remain in permanent employment.

Having regard to the interests of the taxpayer, an applicant should not have to decide that, in order to ensure proper access to justice, he or she would be better off if they were not in employment. Such a disincentive fails both the justice system and the taxpayer. In the example given, reference is made to disposable income, but no indication or assistance is given as to how such disposable income is to be calculated.

(2) Contribution Amounts

Furthermore, in the example given, a person earning between £100-£120 would be better off financially than someone with a disposable income in excess of £160. The opening statement in paragraph 45 makes no sense. If this was to be applied, someone in the first band would only be contributing 50% of their disposable income but someone in the latter band would be contributing 100% of their disposable income, and as we are dealing with disposable income, a person in Band 1 would be financially better off than someone in Band 4, thereby providing an incentive to work less or not at all. In any system that is introduced, such anomalies must be avoided.

(3) Payment Periods

Paragraph 46 gives different options for payment periods, but these options do not seem to strike the balance between access to justice and the interests of the taxpayer, the balance being heavily weighted in favour of the taxpayer. This is because, whereas it may be appropriate in certain cases for there to be a financial contribution, there is a real risk in the options given, that their application would result, not in the accused on low and modest incomes paying a contribution, but in fact bearing the full financial responsibility for their legal costs.

This is because paying contributions over the lifetime of the case takes no real account of the length of time, that, in particular, a solemn criminal case can take, and that the length of time that a case takes is something outwith the control of the applicant.

Example

A person with a disposable income of £150 per week appears on petition, they fall into Band 3 and therefore their contribution would equate to £120 per week.

- the case clock has started ticking
- the Crown in theory have 12 months to bring the applicant to trial
- for a considerable period the defence can do nothing other than wait for the Crown to serve an indictment.
- in the meantime the accused would be required to contribute up to £120 per week
- in a High Court case the Crown indict for a Preliminary Hearing after 10 months and the Preliminary Hearing is heard one month later, at the moment it is common for the 12 month Time Bar to be extended as a matter of routine because of the difficulty in finding dates for trial
- allowing for continued PH's and a trial diet it is possible for the case to take up to 18 months for completion.
- Taking account of the different options for payment suggested it is possible that in the above example the applicant's contribution could amount to £9360.00 (£120 x 78 weeks)
- Applying the same situation to someone falling into Band 4 and contributing £200 per week this means that their possible contribution would amount to a maximum of £15600.00
- In both scenarios the amount of contribution due would mean that the applicant would in all likelihood be paying the full amount of the case
- It cannot be fair or justifiable to require someone on a low or modest income who has passed the interest of justice test to fund their own legal costs without any hope of a refund even if acquitted.

Rather than paying a financial contribution, the reality would be that someone on a low or modest income would become responsible for his or her full costs.

In effect, by forcing someone to contribute all or most of their disposable income, that provides them with a real incentive not to work for the duration of their case. As such, any scheme would have to ensure that the resultant payment from the applicant would be what the reforms are meant to achieve – a contribution.

This would ensure that it would only be those who could really afford to do so would bear full responsibility for their costs.

The same principles must apply whether the contributions are based on capital or income.

Evidence based approach

There are no details of any evidence or research behind these proposals. This means that much is speculative – for example

- the impact on applicants and the estimates made in paragraph 51.
- the average case cost or average lifetime of a case

No detail or evidence is cited for how 'the average case' has been established. Our experience suggests this is a rare creature.

The Faculty consider that there are so many estimates and assumptions being made here that it would be advisable to conduct proper evidence based research before embarking on any national scheme. In particular, absent any research or pilot schemes, we cannot make a reasonable assessment of whether an income based or capital based or a mixed system is preferable. In any event, no issue of principle properly applies here.

Appeals

There appears to be an assumption that contributions would apply to appeals – the only issues raised are regarding the position of re-assessment of contributions [para 49]. Most appeals in criminal procedure require leave to appeal and involve a point of law only. This will often consist of a material irregularity or failure by the trial judge or the prosecution in the course of the trial proceedings. In principle, one might be expected to only have to contribute to criminal proceedings which are properly and fairly conducted. Consideration should be given as to whether such failures, which are deemed as arguably resulting in a miscarriage of justice by the High Court sift, should cause the appellant to be liable for contributions. Certainly, fairness demands that recovery be provided for.

Proposal 3 – Collection of contributions

Civil contributions are collected by SLAB. If much is made of avoiding anomalies why should the situation be different for Criminal Legal Aid? If contributions are to be made in Criminal Legal Aid cases then the board should also collect these.

This would avoid wasting court time and money caused by solicitors having to cease work when there is a change of circumstances (and awaiting any consequential decisions by SLAB) or by solicitors ceasing to act when the applicant fails to make payment.

Paragraph 57 suggests that if the Board were to collect contributions this would move away from the current process in which solicitors have an existing responsibility to collect contributions under ABWOR. However this is somewhat misleading because at present this relates to the collection of a one off payment the maximum amount of which is £135.00.

Paragraph 64- legal aid should not be terminated in the most serious cases, *i.e.* solemn cases as to do so would simply add to the financial burden of the taxpayer in other areas such as court delays etc.

QUESTIONS

Our response to these questions is limited as they largely do not address matters of principle

1. Yes
Emphasis should be on fairness and access to justice, as rehearsed above.
2. Yes

We would support a unified test applied by the Board

3. Qualified Yes – we only support a system of contributions which allows for recovery or refund on acquittal
4. - 9. Answers dependent upon more evidence and research as rehearsed above.
10. Yes as rehearsed above.