

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Scottish Legal Aid Board

Part 1 – Scottish Civil Justice Council

1. The Scottish Legal Aid Board supports the creation of a Scottish Civil Justice Council. It is important that any such body be able to take a broad view of the civil justice system and not be confined, or unduly focused, on the operation of the civil courts. The courts are one part – albeit a hugely significant part – of what might loosely be called our civil justice system, which in the Board's view should also be taken to encompass tribunals, a broad range of other forms of dispute resolution (such as mediation and arbitration) and a variety of information, advice and representation services that support people in resolving their civil justice problems. While the SCJC will have a clear role in formulating rules of court, it is also important that it be established and operate in a way that enables it to keep this wider 'system' under review. It would be helpful for the Bill to contain a definition of the civil justice system to clarify the breadth of the SCJC's role and that it extends beyond the civil courts.

Functions

2. In its response to the Scottish Government's consultation on the creation of a SCJC, the Board supported the proposal that the SCJC should have a policy function, but that this function should be advisory and be seen in the context of the Scottish Government's overarching responsibility for developing and setting civil justice policy. Such an advisory function is reflected in the Bill, but the provisions make a distinction between the role of the SCJC in relation to the Lord President on the one hand and the Scottish Ministers on the other. We are unclear why the SCJC should have a function of advising the former, but a power to advise the latter. The Board consider that the SCJC should have the same role in relation to both i.e. the SCJC should either have the function of advising both the Lord President and Scottish Ministers or the power to advise both. The Board considers that a dual function would be more appropriate.

3. The Board notes that the Bill is silent as regards the SCJC's role in relation to tribunals, except perhaps to the extent that the reference in section 2(3)(d) to other methods of resolving disputes might be interpreted as relating to tribunals. In its response to the consultation, the Board argued that the SCJC should have functions in respect of tribunals. We note also that the Policy Memorandum suggests that the SCJC will at some future point take on those functions in respect of tribunals currently discharged by the Scottish Committee of the Administrative Justice and Tribunal Council. It is proposed that this be done when judicial leadership for tribunals is transferred to the Lord President. While this appears to be a sound proposal in respect of any rule-making function for tribunals, we are unclear why this should preclude the SCJC from taking on a policy advisory function in the interim, or alternatively why this Bill could not include relevant provisions to be commenced a later date. As matters stand, the Act would need to be amended to extend the functions of the SCJC in a way that can be anticipated now.

Membership

4. The Board is concerned that the proposed membership of the SCJC is weighted too heavily towards legally qualified members, either judicial or in practice. Given the broad definition of the civil justice system suggested above, we think it appropriate that more explicit provision be made for ensuring a more proportionate balance between professionals operating within the court system and users of the civil justice system as a whole i.e. not just of the courts. If the SCJC's functions were to extend to tribunals (now or in the future), it would be important to allocate at least one place on the SCJC specifically to a member of the tribunal judiciary and also perhaps a tribunal user representative. We consider that a tribunal representative on the SCJC could make a useful contribution to its work in any event, as lessons from the operation of tribunals could be helpful in the development of policy recommendations or implementation plans for other areas of civil justice, including the courts.

5. We also have some concern about the responsibility for the majority of appointments lying wholly with the Lord President. As we said in our consultation response, we think it appropriate that there should be a number of discretionary places on the SCJC as this will enable the composition of the SCJC to change over time in light of experience and possible changes in the emphasis of its work. However, we suggested that responsibility for making such discretionary appointments should be exercised by the Lord President and Scottish Ministers in consultation with each other, rather than either or both acting unilaterally. The Bill as drafted places this responsibility solely on the Lord President, albeit that he must consult with Ministers before making a consumer or LP appointment. In addition, while it is appropriate for the Lord President to appoint judicial members, we believe that the process of appointment of discretionary members should be open and transparent to enable an appropriate range of individuals to apply. We are not convinced that these principles are adequately assured by the Bill as introduced.

Part 2 – Criminal Legal Assistance

6. This part of the Bill changes the basis of assessment of financial eligibility for assistance by way of representation (ABWOR) and provides for the payment of contributions by those in receipt of most types of criminal legal assistance.

Assessment of financial eligibility

7. The Bill seeks to replace the current fixed income and capital limits for ABWOR with an 'undue hardship' test, thus bringing the assessment of financial eligibility for ABWOR more closely into line with that for criminal legal aid. This means that an applicant's actual outgoings can be taken into account, rather than the fixed and narrow dependents' allowances available at present under the ABWOR test.

8. The Bill also provides for the application of discretion by the Board should a solicitor's assessment of the client's financial circumstances suggest that, even though their disposable income or capital may be above the limits set out in either the Bill or the eligibility scheme to be published by the Board, it would cause them undue hardship to meet the cost of the case. This discretionary power provides an

important degree of flexibility should the specifics of a person's financial circumstances require it. This flexibility is absent in the current arrangements for ABWOR, although it is allowed for in the undue hardship test currently applied by the Board for other forms of criminal legal aid.

9. The current inconsistency in the tests as between ABWOR and summary criminal legal aid means that some applicants may be eligible for summary criminal legal aid, but not for ABWOR. Their only means of obtaining publicly funded assistance is therefore to plead not guilty, even where they would otherwise intend to plead guilty at pleading diet. A similar incentive to plead not guilty exists at present where an accused is eligible for ABWOR with a contribution to pay, but would have no contribution under summary criminal legal aid.

10. A number of other barriers to early pleas were removed in 2008 as part of the summary justice reform programme, leading to an immediate increase in the number of early guilty pleas and fewer late changes of plea. This is clearly beneficial to the taxpayer and the justice system, but also enables the accused to take full advantage of any sentence discount on offer. It is therefore important that this remaining barrier to appropriate early pleas is removed.

11. The alignment of financial eligibility provided for in the Bill - including both the move to an 'undue hardship' test for ABWOR and the introduction of contributions in criminal legal aid – will therefore both directly (through contributions) and indirectly (through changes in pleading behaviour) reduce the cost to the public purse of criminal legal assistance and bring increased efficiency to the wider criminal justice system.

12. Even without these wider benefits, it is right as a matter of principle that those who can afford to pay some or all of their defence costs should be expected to do so. The current system requires legal aid to be made available to some who, while they cannot afford to meet the *whole* cost of their case, have sufficient disposable income and/or capital to enable them to make some financial contribution.

13. The introduction of contributions for legal aid in summary, solemn and appeal cases therefore removes an anomaly, both within criminal legal assistance and between civil and criminal legal assistance. By reducing the cost of criminal legal assistance to the taxpayer, the Bill will help make the legal aid system as a whole more affordable and enable the broad scope and coverage of legal aid in Scotland to be maintained (in contrast to the position in England and Wales where many employment, welfare, family and housing actions are being taken out of scope).

14. The move to an undue hardship test for ABWOR requires changes to the applicable limits. The Bill sets out a lower disposable income limit of £68. As noted in the Policy Memorandum, this amount is slightly higher than the equivalent figure in England and Wales. It is important to recognise that this is a *disposable* income figure i.e. it is the figure arrived at after the deduction of essential outgoings. Our analysis suggests that this figure – the weekly equivalent of the lower income limit for civil legal aid – is on average broadly in line with the existing *non*-disposable income limit of £105. In other words, once outgoings are taken into account, the amount of disposable income available to the average applicant will remain broadly the same.

At the upper end of the income scale, the new disposable upper income limit is expected to extend eligibility to some applicants who would currently qualify for summary criminal legal aid but not for ABWOR. Again, this is because the new arrangements will enable outgoings to be taken into account.

15. Clearly, some applicants will have more unavoidable outgoings – such as housing costs, childcare costs, costs associated with travel to work etc - than others. Those with no outgoings at all might reasonably be regarded as having more flexibility than those whose weekly income is largely accounted for before any additional demands can be met. Were the two existing tests to be aligned in the opposite direction i.e. were the summary criminal legal aid test to move towards fixed limits rather than disposable income, some applicants would be assessed as having more disposable income, meaning either that they would move into or higher up the contributory band, or out of eligibility altogether. This would be most likely to affect those with the highest unavoidable outgoings and therefore the least ability to meet unexpected additional costs. While the change proposed in the Bill will slightly widen eligibility for ABWOR overall, some applicants will be assessed as having less disposable income than under present assessment arrangements while others will be assessed as having more. The latter are likely to be those whose circumstances give them more flexibility to respond to unanticipated additional demands on their resources. It is also worth pointing out that those just above the lower disposable income limit will be asked to pay a contribution in the order of as little as £5 *in total*.

16. The realignment of the tests will also result in some types of benefit income being included in the assessment of total resources for ABWOR where they are currently excluded. The ABWOR test will therefore take into account the same sources of income as that for civil legal aid at present. While it might at first glance seem anomalous that benefits should be counted, this is another consequence of the move to a disposable income calculation. Some additional benefit payments are made to a person in respect of additional costs it is anticipated that they will incur, for example as a result of a disability. This is the case for Disability Living Allowance, which comprises two elements, one associated with care needs and the other on assistance with mobility. Where a person is in receipt of DLA, this will in future be counted as income for ABWOR assessment purposes. However, any care costs, or costs associated with impaired mobility, would qualify as essential outgoings and so would be deducted in calculating disposable income.

17. At present, a person in receipt of DLA will have this disregarded, whether or not the additional income they receive is actually used to meet additional costs associated with their disability. If no such costs are incurred, it seems only fair that these additional resources be taken into account in considering someone's ability to meet some or all of the costs of their defence. Conversely, if a person in receipt of DLA currently incurs costs associated with their disability that exceed the amount they receive in DLA, the assessment for ABWOR cannot take this into account. In other words, the fixed limits assume that they have no additional income on the one hand, but also that they have no additional costs on the other. The undue hardship test would take into account the full costs incurred. In this way, those most disadvantaged financially and otherwise by their disability would arguably be treated more fairly in an assessment based on undue hardship. Conversely, those with additional disregarded benefit income but incurring no additional costs are currently

treated more favourably than those with lower overall incomes or higher disability-related costs.

Collection of contributions

18. The Board, along with the Scottish Government, has had constructive discussions with the Law Society of Scotland in the development of the contribution proposals. One key issue has centred on responsibility for collection of contributions.

19. Defence solicitors currently collect fees from private clients and contributions in advice and assistance and ABWOR cases. Many will already have systems and processes set up to enable them do this efficiently and cost-effectively, particularly perhaps those firms that undertake both civil and criminal work. Solicitors have a direct and often ongoing relationship and contact with clients. Unlike applicants for civil legal aid, who are responsible for completing the financial part of their legal aid application, ABWOR recipients have no direct contact with the Board: all contact is via their solicitor. Similarly, applicants for criminal legal aid will only deal with the Board if financial information is missing or has to be clarified. It is more consistent with the direct relationship between solicitor and client that contributions be paid direct to the solicitor in the small minority (around 18%) of relatively low cost and shorter-running cases where these are assessed as due.

20. This will also create a stronger link for the client between the payment being made and the service being provided to them. In some cases, particularly perhaps those that are low cost and where a higher contribution is assessed, the directness of the link between payment and service may result in the solicitor and client agreeing an alternative – possibly lower – private fee and dispensing with the need for legal aid altogether.

21. Our discussions with the Society also suggested that directly collecting contributions from clients could assist solicitors' cash flow as they would not have to wait until the end of the case to receive payment. The Bill accordingly makes specific provision for solicitors to be able to treat contributions as fees, rather than client funds.

22. We recognise however that it would be harder for solicitors to collect the larger sums due in longer running solemn cases, so it is more appropriate for the Board to do so. In part, this is because it would be reasonable for payment of these larger contributions to be spread over a longer period. The Board already operates regular extended instalment collection procedures in civil cases, where the average contribution levels are higher than the maximum solemn and appeal contributions proposed. It is in these longer running, higher value cases that the Board's collection, monitoring and enforcement processes and systems are of greatest benefit. Such systems are unlikely to be needed and may be disproportionate for day to day collection of the smaller contributions envisaged in summary cases.

23. While the solicitor might be expected to be able to bring some influence to bear over the client – for example by advising the client that they will cease acting should payment not be forthcoming – the Bill also provides solicitors with the ability to request that the Board suspend or terminate a grant of legal aid where the assisted person does not pay their contribution. No equivalent power is provided to

the Board in respect of solemn and appeal cases, meaning that the task faced by the Board in collecting a contribution from an intransigent assisted person is likely to be more difficult on a variety of levels.

24. The Board would be particularly concerned were there to be any distinction in collection responsibilities as between summary criminal legal aid and ABWOR. Under the current proposal, the solicitor will be responsible for collecting the contribution and, as the fee payable will assume collection (as is the case under ABWOR at present), has a direct interest in ensuring that the contribution is collected. If the onus of collection were to shift to the Board for summary criminal legal aid but remain with the solicitor for ABWOR, the latter could become a less attractive form of criminal legal assistance from the solicitor's point of view. Given the shift towards guilty pleas seen when ABWOR payments were increased in 2008, there is a risk that any difference in collection responsibilities could lead to a reversal of those advances. Such a change would therefore run the risk not only of reducing the savings generated by contributions but also of increasing significantly the direct costs to Board and the indirect costs to the wider justice system of an increase in initial not guilty pleas.

Scottish Legal Aid Board
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