

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Supplementary written submission from the Scottish Legal Aid Board

Following our appearance at the Justice Committee on 11 September 2012, we indicated that we would provide copies of the additional information we referred to on the impact of criminal contributions on both solicitors and applicants.

Impact of the weekly disposable income threshold of £68 on applicants for legal aid/ABWOR

Under Scottish Government's proposals, a contribution will be payable if the applicant's weekly disposable income (i.e. after deduction of rent and other essential costs) exceeds £68. This figure is the weekly equivalent of the current annual figure of £3,521 which is used in civil legal aid, above which contributions are payable. In England and Wales, contributions are payable on disposable incomes above an annual figure of £3,398 which equates to £65 per week, slightly lower than the proposed figure for Scotland.

Currently, individuals who are granted ABWOR are due to pay contributions if their income is more than £105 per week. However, this is not their disposable income but rather their income after tax before outgoings such as rent (which cannot be taken into account). The only deductions which are made from this in assessing their eligibility for ABWOR are set allowances for dependants. These are: partner = £40.45 and child = £64.99.

Under the proposed arrangements, applicants for ABWOR who have high outgoings will benefit and may well have no contribution to pay. This is because the proposed arrangements for ABWOR take account of actual outgoings in the same way as will be done for summary criminal legal aid. The new arrangements will also mean that around 2% of people who currently do not qualify for ABWOR will in fact do so under the new system. This will also provide a much more consistent financial eligibility system between criminal ABWOR and summary criminal legal aid than is currently the position.

For criminal legal aid or ABWOR, applicants will be able to tell the Board or their solicitor that they have had a change in circumstances. If their circumstances change for the worse (or even improve) during the case, their eligibility can be reviewed and the contribution re-assessed.

Our analysis has shown that, where a contribution is assessed under the new arrangements for ABWOR and summary criminal legal aid, nearly half of these cases (**44%**) will have a contribution to pay of less than **£142**, which is the *current* maximum contribution in criminal advice and assistance/ABWOR cases.

Real-life examples

Appendix 1 gives examples of real-life applicants for summary criminal legal aid. We have described their financial circumstances and what would happen to them under the new system and what would happen under the current processes for criminal legal aid and ABWOR.

In cases 1 - 6, the applicants qualify for summary criminal legal aid and ABWOR with a contribution under proposed new scheme, but they would not have been eligible for criminal ABWOR had they chosen to plead guilty under the current scheme.

They would be eligible for summary criminal legal aid which uses the undue hardship test, if they pled not guilty. In these six cases, the applicants' only option to get legal aid would be to plead not guilty thereby losing any opportunity for any sentence discounts for earlier pleas, and placing further strains on the justice system.

In case 7, the applicant would be eligible under the proposed system for summary criminal legal aid and ABWOR with a contribution of £25.35 or 24.38. Under the current system they would also have been eligible for summary criminal legal aid and ABWOR - with a higher contribution of £126.

In cases 8 & 9, the applicants would be eligible with no contribution under the proposed system for summary criminal legal aid and ABWOR. Under the current system, they would have been eligible for summary criminal legal aid and ABWOR - with contributions of £56 and £63 respectively.

How much will applicants' contributions be?

Our estimates have shown that the range of the contributions assessed for summary criminal legal aid and ABWOR are likely to be:

- Under £50 – 21.2% of all applicants with a contribution
- Under £100 – 41.1% of all applicants with a contribution
- Under £142* - 44.0% of all applicants with a contribution
- Under £200 – 54.3% of all applicants with a contribution
- Under £300 – 65.4% of all applicants with a contribution
- Under £400 – 73.3% of all applicants with a contribution
- Under £500 – 80.4% of all applicants with a contribution
- £500 or more – 19.6% of all applicants with a contribution

*£142 is the current maximum contribution in criminal advice and assistance/ABWOR cases. Therefore, **44%** of applicants who are assessed with a contribution would have a contribution at or less than the current maximum criminal advice and assistance/ABWOR contribution which solicitors decide to collect or not.

It is important to note that the assessed contributions would be *maximum* contributions payable. The *actual* contribution paid will be restricted to the *actual* cost of the case. The contribution will be different depending on the court the case is raised in. The cost of a case is not only the solicitor's fee. VAT and outlays are also paid. The average costs of cases in 2010-11:

- Summary cases: Justice of the Peace Court = £404, Sheriff Court = £697
- Solemn cases: Sheriff Court = £2061, High Court = £18,429.

An example was given to the Committee by the Law Society of an individual on minimum wage of £196.02 with no outgoings having a contribution of £800.20 under ABWOR or £847.80 under summary criminal legal aid. This would be the maximum contribution and the actual amount paid would be restricted to the cost of the case. As we mentioned at the Committee, in our experience it would be highly unusual for clients to have no household outgoings. Even a young adult still living at home will be likely to be paying board payments to their parents and have other loan repayments, which are both expenditure items which can be taken into account in the undue hardship test. Someone with disposable income of £196 would currently be eligible with a contribution of £2,200 were they to apply for civil legal aid.

The collection of contributions

Many solicitors will already have systems in place for collecting client contributions. Solicitors are currently responsible for collecting contributions of up to £135 (or £142 for police station interviews) under criminal advice and assistance and criminal ABWOR cases and there is a mixture in practise over whether these are collected or not. In addition, most solicitors will also have private fee paying clients so will have fee payment arrangements and debt recovery procedures already in place for these clients.

Potential impact on 4 real firms

We conducted some further analysis on four medium sized firms (3/4 solicitors) in Glasgow, Aberdeen, Edinburgh and Lanarkshire. The details are shown at **Appendix 2**. Over the year December 2010 to November 2011, these firms dealt with between **396** and **1,731** criminal legal aid cases and had earnings from criminal legal aid in this period between **£305,000** and **£1.1 million**.

Our analysis showed that under the proposed new procedures, the firms would have between **29** and **167** cases with contributions to collect, and the total value of the contribution payments as a percentage of their overall criminal earnings in the period range between **2.6%** and **6%**. This indicates that the impact on the solicitors in collecting these relatively small amounts of contribution payments ought to be very small.

Impact on the Board

The Scottish Government recognised that it may be harder for solicitors to collect the larger sums due in longer running solemn cases and that it would be more appropriate for the Board to handle the risk on these cases. In the Bill's Financial Memorandum we estimated that there would be somewhere in the region of **1,800 solemn** cases for the Board to collect contributions. We expect that the extra resources required to do this can be absorbed within the Board's running costs.

However, should the Board be required to collect contributions in all criminal cases, as proposed by some commentators, then significantly more staff would be required

to collect the total estimated contribution cases of around **18,500** per year. This has been estimated at 16 extra collection officers, a team leader and a deputy team leader. The total extra cost of the staff, both in terms of salaries and employer's costs, would be around **£600,000** per annum. These resources could not be absorbed within the Board's current running costs which have already been substantially reduced at a rate greater than the Legal Aid Fund. The Board's Administrative budget was frozen at the 2007/08 level for four years, before being reduced, in 2011-2012 by £1.1m. The Scottish Government's spending plans for the period 2012-2013 to 2014-2015 set out further reductions in the Board's administration budget over the next three years, totalling £1.3m. This challenge is heightened by inflationary pressure, additional responsibilities (notably around changes to the children's hearings system) and by the need to utilise staff resource to deliver on our commitment to a wide range of developments associated with delivery of legal aid savings.

Unrepresented accused

Fears were expressed at the Committee that the introduction of client contributions would lead to an increase in the number of unrepresented accused at court. We have seen no evidence to suggest that this happens in jurisdictions where contributions were introduced. In England and Wales where contributions in Crown Court cases were introduced in 2010, this did not lead to such an increase.

- In 2009, 0.7% of cases were unrepresented in Crown Court cases.
- In 2011, a year after the introduction of contributions the figure was also 0.7%.

However, what did change was the number of cases where clients were privately funding their own defence.

- In 2009, 3.6% were privately funded, compared to 13% in 2011.
- For the period January to June 2012, 0.7% of cases were unrepresented and 14.7% of cases were privately funded.

Applicants appearing from custody and urgent situations

Justice Committee members expressed some concerns about the ability of the Board and solicitors to assess eligibility for criminal applications in custody cases. Solicitors already assess financial eligibility for criminal ABWOR in custody cases and determine what levels of contributions are required under the current financial test. We will produce clear guidelines for solicitors to use when applying the new financial test for eligibility and contributions and as ever, staff will be available to deal with any queries or provide any further guidance needed to solicitors by telephone. Eligibility calculators will be available online, for easy access from iPads, mobile devices or PCs.

Board staff will continue to assess financial eligibility for summary and solemn criminal applications. We will continue to maintain our quick decisions times. Our current average processing times are 1.1 days for summary applications, and 1.0 days for solemn applications. We will also continue to prioritise cases which are received within 4 weeks of the next court appearance.

We also have the facility to make legal aid available in situations of special urgency under Regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996. This allows us to make limited legal aid available, even where we have not been fully satisfied on all the eligibility criteria to allow urgent work to be carried out, including appearances at court hearings.

Scottish Legal Aid Board
14 September 2012

Appendix 1

The Scottish Legal Aid Board

Details of the likely impact of the Undue Hardship test on a sample of applicants for criminal legal aid

These cases are based on real life examples where applications for summary criminal legal aid were granted by the Board following the tendering of a not guilty plea. In these cases, the proposed undue hardship financial test was applied, taking into account the applicant's incoming and essential household outgoings to determine eligibility. The examples will overstate levels of contributions because we do not currently require full details of all outgoings to show they are eligible for summary criminal legal aid under the current regulations.

In cases 1 - 6, the applicants qualify for summary criminal legal aid and ABWOR with a contribution under proposed new scheme, but they would not have been eligible for criminal ABWOR had they chosen to plead guilty under the current scheme. To qualify for criminal ABWOR, disposable income must be below £245. However, standard allowances for any dependants can only be subtracted from net weekly income to determine disposable income. No account can be taken of any essential household outgoings such as rent/mortgage payments, council tax, maintenance or childcare payments or any loan payments.

In case 7, the applicant would have been eligible under the proposed system for summary criminal legal aid and ABWOR with a contribution. Under the current system they would also have been eligible for summary criminal legal aid and ABWOR (with a contribution).

In cases 8 & 9, the applicants would be eligible with no contribution under the proposed system for summary criminal legal aid and ABWOR. Under the current system, they would have been eligible for summary criminal legal aid and ABWOR (with a contribution).

Case 1: Security guard charged with Road Traffic (Sc) Act offence (Sheriff court)

Earns £255.12 per week.

Outgoings of £174.79 including: rent, council tax, car loan, car insurance, debt repayment.

No dependants.

Assessed disposable income of £80.33.

Under proposed system for ABWOR and summary criminal legal aid: **ELIGIBLE WITH CONTRIBUTION** of £32.06 for summary criminal legal aid or £30.83 for ABWOR.

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under the current criminal legal aid system: they would have been eligible for legal aid.

Case 2: Gas engineer charged with assault and Criminal Justice Licensing (Sc) Act offence (Sheriff court)

Earns £350 per week.

Outgoings of £225 including: rent and a loan.

No dependants.

Assessed disposable income: £125.

Under proposed system: **ELIGIBLE WITH CONTRIBUTION** of £213.20 for summary criminal legal aid (not guilty plea) or £192.50 for ABWOR (guilty plea).

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: they were granted legal aid.

Case 3: Assistant Manager charged with assault and breach of the peace (Sheriff Court)

Earns £453 per week.

Outgoings of £291, including: mortgage, council tax, car loan and CSA payments.

No dependants.

Assessed disposable income: £162.05.

Under proposed system: **ELIGIBLE WITH CONTRIBUTION** of £494.52 for summary criminal legal aid (not guilty plea) or £460.50 for ABWOR (guilty plea)

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: they were eligible after review when extra outgoings were taken into account.

Case 4: Dump truck driver charged with dangerous driving (Sheriff court)

Earns £482 per week.

Outgoings of £260: mortgage, council tax (plus arrears), loan, house insurance and car insurance.

One dependent child.

Assessed disposable income: £160.

Under proposed system: **ELIGIBLE WITH CONTRIBUTION** of £470 for summary criminal legal aid (just less than 3 weeks disposable income, or 11% of the disposable income over the 26 week assessment period) or £437 for ABWOR (guilty plea)

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: currently qualifies for summary criminal legal aid.

Case 5: NHS worker charged with assault (Sheriff court)

Earns £547 per week, plus £28 industrial injuries payment.

Outgoings of £272 including mortgage, council tax, loans and insurance payments.

Two dependent children.

Initially refused, but Board agreed to take additional outgoings into account on review, so qualified with disposable income of £177 per week.

Under proposed system: **ELIGIBLE WITH CONTRIBUTION** of £651 for summary criminal legal aid (14% of the disposable income over the 26 week assessment period) or £611 for ABWOR (guilty plea)

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: currently qualifies for summary criminal legal aid.

Case 6: Cleaner charged with drink driving (Stipendiary magistrates' court)

Earns £321 per week.

Outgoings of £231: rent, council tax, car loan, car insurance. No dependents.

Assessed disposable income of £90,

Under proposed system: **ELIGIBLE WITH CONTRIBUTION** of £56 for summary criminal legal aid (3% of the disposable income over the 20 week assessment period) or £44 for ABWOR (guilty plea)

Under current ABWOR system, if pleading guilty: they would not have been eligible.

Under current summary criminal legal aid system: currently qualifies for summary criminal legal aid.

Case 7: Painter charged with assault (Sheriff court)

Earns £290 per week.

Outgoings of £150 for rent.

Allowance deducted for one dependent child.

Assessed disposable income of £78.

Under proposed system for ABWOR and summary criminal legal aid: **ELIGIBLE WITH CONTRIBUTION** of £25.35 summary criminal legal aid or £24.38 for ABWOR.

Under current ABWOR system, if pleading guilty: they would pay a contribution of £126.

Under the current criminal legal aid system: they would have been eligible.

Case 8: Cleaner charged with Criminal Justice Licensing (Sc) Act offence and vandalism (Sheriff court)

Earns £189.67 per week.

Outgoings of £130 per week, including: rent, loan, maintenance.

Allowance deducted for partner.

Assessed disposable income: £59.67.

Under proposed system: **ELIGIBLE WITH NO CONTRIBUTION.**

Under current ABWOR system, if pleading guilty: they would pay a contribution of £56.

Under current criminal legal aid system: they would have been eligible for legal aid.

Case 9: Receptionist charged with assault (Sheriff court)

Earns £203 per week.

Outgoings of £109 per week, including: rent, council tax and loan.

Allowance deducted for partner.

Assessed disposable income: £55.42.

Under proposed system: **ELIGIBLE WITH NO CONTRIBUTION.**

Under current ABWOR system, if pleading guilty: they would pay a contribution of £63.

Under the current criminal legal aid system: they would have been eligible.

Appendix 2

The Scottish Legal Aid Board

Details of the likely impact on four medium sized firms (3/4 solicitors)

We have estimated the likely impact on a small number of case study firms, of applying the proposed eligibility and contributions regime to their legally aided summary criminal business over a recent 12 month period.

We did this by applying the proposed scheme for eligibility and contributions to the recorded information on income and outgoings for their summary clients. This may slightly overstate the number of clients who are estimated to have a contribution and the size of these contributions. This is because under the current system, detailed outgoings are not required to be stated if an applicant's income is below the income eligibility threshold for summary criminal legal aid. We have also controlled for the current different eligibility arrangements for ABWOR.

The total amounts earned in solicitors fees for criminal legal assistance for these firms was £2.1m. The total estimated value of contributions under the new system for summary criminal legal aid and ABWOR is estimated to be £90,572 for 322 contributions (4.3%). It should be noted that around 7% of ABWOR clients have a contribution under the current system.

Glasgow: firm earned £320k from a total of 396 cases criminal legal assistance cases

- 256 summary grants; 93% assessed with no contribution.
- 84 ABWOR grants; 86% assessed with no contribution.
- Total cases with contributions for firm to collect: 29.
- Cases with contributions to collect as % of cases paid in period: 7.3%
- Total maximum value of contributions assessed = £8381.
- Value of maximum total contributions assessed as % of firm's criminal earnings in period: 2.6%

Aberdeen: firm earned £440k from 661 criminal legal assistance cases

- 264 summary grants; 80% assessed with no contribution.
- 246 ABWOR grants; 85% assessed with no contribution.
- Total cases with contributions for firm to collect: 90.
- Cases with contributions to collect as % of cases paid in period: 13.6%
- Total maximum value of contributions assessed = £26,312.

- Value of maximum total contributions assessed as % of firm's criminal earnings in period: 6%

Edinburgh: firm earned £305k from 461 criminal legal assistance cases

- 143 summary grants; 85% assessed with no contribution.
- 108 ABWOR grants; 86% assessed with no contribution.
- Total cases with contributions for firm to collect: 36.
- Cases with contributions to collect as % of cases paid in period: 7.8%
- Total maximum value of contributions assessed = £7598.
- Value of maximum total contributions assessed as % of firm's criminal earnings in period: 2.5%

Lanarkshire: firm earned £1.1m from 1731 criminal legal assistance cases

- 739 summary grants; 87% assessed with no contribution.
- 577 ABWOR grants; 88% assessed with no contribution.
- Total cases with contributions for firm to collect: 167.
- Cases with contributions to collect as % of cases paid in period: 9.6%
- Total maximum value of contributions assessed = £48,281.
- Value of maximum total contributions assessed as % of firm's criminal earnings in period: 4.2%