

## **Justice Committee**

### **Scottish Civil Justice Council and Criminal Legal Assistance Bill**

#### **Written submission from the Edinburgh Bar Association**

Part Two of The Scottish Civil Justice Council and Criminal Legal Assistance Bill proposes a radical expansion of the current system of contributions by persons who are in receipt of Criminal Legal Aid in Scotland, the practical effect of which will be that a significant proportion of individuals who currently qualify for Criminal Legal Assistance and do not require to pay a contribution towards their legal costs will now be required to pay a contribution towards their Legal Aid case costs.

As a matter of general principle, The Edinburgh Bar Association is opposed to the requirement of financial contributions from accused persons towards the cost of legal representation. This Association is firmly of the view that Legal Aid should be available for those individuals who deserve it and who have a genuine need for it. The current system of assessment for Criminal Legal Aid applies appropriate eligibility limits above which no Criminal Legal Assistance is available. This Association believes that expanding the scope of contributions to all aspects of the Criminal Legal Aid system will result in vulnerable individuals and persons on low incomes being excluded from it and give rise to more cases being delayed. Further, it is submitted that the proposed system of collection of contributions in summary criminal cases by solicitors will impose an unnecessary administrative burden on a profession which has already had to cope with a number of funding cuts in recent times and is under significant pressure as a result.

The Law Society of Scotland has indicated that it welcomes the policy priorities behind Part 2 of the Bill and has stated that it agrees with the principle that those who can afford to pay a contribution towards the cost of their Legal Aid should be required to do so. In these circumstances the Edinburgh Bar Association's view is that if contributions are to be introduced in relation to Criminal Legal Aid, the following should apply:

1. The Scottish Legal Aid Board should be responsible for the collection of contributions for all types of Criminal Legal Aid.
2. The threshold disposable income level at which a contribution is payable should be considerably higher than the levels currently proposed. Additionally, this should be a genuine "contribution" to the cost of their defence, rather than the client paying the full cost of the case which amounts to funding under another name.
3. Non-passported benefits, such as Disability Living Allowance, should be removed from the disposable income calculation. Certain benefits are assessed as payable by the Government due to an individual's specific personal needs. This would protect vulnerable individuals from either being excluded from the Legal Aid system or having to pay an unaffordable contribution towards the cost of their defence.

The Criminal Bar in Scotland has, in recent years, fully engaged with the programme of Summary Justice Reform (SJR) and has undertaken more intensive work in the initial stages of a summary case in accordance with the SJR's programmes of "frontloading" the system. Additionally, since Devolution, successive Scottish Governments have introduced new legislation at pace, creating dozens of new criminal offences in the process resulting in an increasingly complex and growing body of legislation which requires to be implemented and debated within Scottish Criminal Courts on a daily basis. There now exists a wider range of criminal offences for which individuals can be prosecuted and it is necessary that the citizens of Scotland are afforded the means to defend themselves. Under the proposals introduced by Part 2 of this Bill, a significant number of these individuals will simply be unable to afford to do that.

### **Impact on Vulnerable People**

This Association is of the view that the proposed lower income threshold of £68 is unacceptably low. The Joseph Rowntree Foundation Minimum Income Standards published in 2012 states that a single person now needs to spend £192.59 per week to reach a minimum standard of living. In these circumstances, for the disposable income level to be set at £68 per week will result in people being left with themselves stark choice of either paying the essential costs of living or paying a contribution to the cost of their defence. Even if most benefit types are eventually disregarded from disposable income, the proposals will still affect students, apprentices and those on War Pensions. Setting this threshold at such a low level will simply, in real terms, exclude a number of people from access to justice.

The Scottish Government's strategy underpinning the introduction of the Bill appears to be the "harmonisation" of Civil and Criminal Legal Aid and the drawing of comparisons between the two systems, whilst highlighting perceived anomalies that exist between the two. The fact that the figure of £68 is already the lower income threshold in Civil Legal Aid is just one example of an approach which this Association contends is both unhelpful and misleading.

In truth, the only real similarity between the systems of Civil and Criminal Justice at Sheriff Court level is that both systems operate in the same building and the Sheriffs who hear both types of case are the same, albeit on different days, in different court rooms and under entirely different procedural rules. At the same time that it is implementing this Bill, the Scottish Government is considering the Gill review, which contains proposals to further differentiate the two systems, with measures designed to free up existing Sheriffs to hear more Civil business in the Sheriff Court and introduce a new breed of "Summary Sheriff" who will hear only summary criminal cases. In the Justice of the Peace Court, where the business is all at summary level, the subject matter is purely Criminal.

In Civil Court procedure a Pursuer steps into court willingly, having made a conscious decision to do so. A Defender will make a decision as to whether or not to defend the action, with or without legal advice and will either enter court or step away accordingly. In the Criminal Courts, an accused person has no choice when he is either taken to Court by the police or is ordered to appear – he cannot walk away.

In the Civil arena the Defender faces an individual, corporate body or Government department. However, in the Criminal Courts an accused faces the combined resources of the Police and Prosecution Service with all the resources of the State behind them.

If one is successful in the Civil Courts, success may bring a financial settlement and/or an award of expenses from which legal fees are commonly paid. In the Criminal Courts the best that can be hoped for is an acquittal and a huge sigh of relief, for there is no financial compensation available for the stress, loss of earnings associated with compulsory court attendances (usually more than one) or damage to reputation which are the consequences of being prosecuted, even if acquitted. Nor is there any scope for the recovery of contributions by persons who are acquitted contemplated by these proposals (unlike in England), therefore no award of expenses in favour of an accused person is ever possible in Criminal Procedure.

Civil cases operate different rules of evidence, different standards of proof and vastly different time limits to Criminal cases. Civil case law has little application to Criminal cases and vice versa. Most importantly however, the dire consequences of loss in the Civil courts rarely involve the loss of liberty.

### **Access to Justice**

Under the new proposals a person working a 39 hour week at the minimum wage of £6.19 per hour would take home a wage of roughly £220 per week net of Tax and National Insurance. It is unclear at this time what deductions will be allowable by SLAB, but should an individual be in receipt of a weekly disposable income of less than £180, they will require to pay a large contribution. Anyone with a net weekly disposable income of £160 would in fact pay a contribution equal to the current fixed fee (net of VAT) which is £485. These measures are quite simply a means whereby, in practical terms, the number of people who are eligible to receive Criminal Legal Aid will be reduced and will result in many people who, at present, qualify for full Criminal Legal Aid without a contribution having to pay their entire defence costs.

This Association contends that to describe the shift towards full funding of their legal costs by accused persons that these proposals are designed will produce as the introduction of "contributions" is misleading for many cases. An accused person in receipt of a disposable income of between £160-£222 appearing in a summary criminal case in the Sheriff Court will be due to pay a contribution larger than the whole current fixed fee of £485.

Capital allowances will also be affected. The current savings limit in all criminal cases is presently £1716 whereas it is £7853 for Civil Legal Aid. Under the new proposals, anyone who has built up savings in excess of £750 would be liable to pay a contribution. Savings of £750 will not cover an individuals basic funeral expenses.

This Association believes that the people who will be most affected by these measures are in the margins of our society. If these proposals are enacted in their present form the vulnerable and those on low incomes will be seriously disadvantaged and in some cases prevented from challenging the State and accessing justice for themselves. If the State is to prosecute its citizens then it must afford adequate Legal Aid provision to enable its citizens to access justice. This

Association contends that these proposals seek to convert a system which appears to achieve that into one which will not.

### **The collection of contributions**

Under the current system, contributions are payable by a relatively small proportion of individuals who are eligible to receive Advice and Assistance or ABWOR (Criminal legal Assistance available for initial advice or summary cases not involving pleas of Not Guilty). Since the introduction of fixed fees in 1999, fewer solicitors undertake summary criminal business, and those that do are processing more cases. Following the Summary Justice Reform programme of 2007/2008, summary Sheriff Court cases have become generally more complex and more serious. The legal changes subsequent to the Cadder decision place regular demands on solicitors time outwith office hours whilst increases in running costs have affected solicitors firms in the same way as other businesses. Financial pressures on solicitors firms are significant and solicitors are working hours longer than before.

Following a review of summary criminal business by Sheriff Principal John McInnes, in 2004 The Scottish Legal Aid Board (SLAB) issued a consultation document proposing changes to the system of Criminal Legal Assistance as part of a greater programme of reforms designed to achieve greater efficiency in the summary criminal courts. These changes included a recommendation that criminal legal assistance contributions be removed entirely, recognizing that in most cases, solicitors did not collect them.

Many solicitors take a conscious decision to write contributions off, due principally to a shortage of free time to devote to the practical difficulties associated with attempting to extract monies from a client group who are involved, in some way or another, in the Criminal Justice system. Most firms which undertake Criminal Defence work are small, specialist practices with a low partner to employee ratio. They do not have debt collection systems or complex systems of billing of the sort which would be required to monitor, for example, a 20 week payment plan involving payments of £10 per week. They have no in-house systems of recovery in the event of default and in order to pursue unpaid contributions, solicitors would require to set up their own debt collection systems at additional cost, or engage outside debt collection agencies. Neither system would inspire a greater expectation that monies will be successfully recovered from individuals who are, in all probability, already being pursued for other debts which probably rank higher in the individuals list of priorities, such as court fines.

Further, their pursuit is seen as detrimental to the solicitor-client relationship in which the trust of the client when giving advice and the availability of the client in order to give it is crucial, even more so since SJR where the acceptance of timeous and trusted advice by the accused is often leads to the early resolution of the case.

Indeed, the importance of the solicitor-client relationship to the efficient running of the system is recognised by SLAB, and was key in achieving a marked increase in the early resolution of cases post reform-

“The client’s solicitor of choice will in most cases be likely to have a more detailed knowledge of the client and his circumstances. He will also be more likely to make a

more comprehensive appraisal of the situation, and perhaps advise the most appropriate plea to the client.”

This relationship, which has proved so successful in achieving the aims of SJR thus far, is likely to be damaged if solicitors become representatives of accused persons and their pursuers at the same time.

Of the solicitors who do attempt to recover a contribution, many are unsuccessful for the same reasons that in January 2012, saw unpaid fines in Scotland amount to some £10m with no payments at all having been made in 20,000 cases. Anyone who has experience of the difficulties solicitors face in retrieving the necessary documentation in order to vouch a Legal Aid application will understand the challenges that would be faced in attempting to retrieve a contribution from an individual who may be in employment one week and not the next, who may be moving from address to address, or simply unmotivated to pay, because after agreeing a payment plan, the speedy resolution and disposal of his case means that he no longer has an incentive to ensure that his solicitor is “adequately rewarded for necessary work done”. For these reasons, it is submitted that a large proportion of contributions will prove to be unrecoverable.

### **The effect of nonpayment of contributions on the courts**

It is far from clear, insofar as the documentation available to this Association is concerned, as to what is proposed should happen in the event that an accused person fails to pay the contribution to his solicitor as agreed whilst the case is not yet concluded. The 2012 Consultation Report on the introduction of Financial Contributions in Criminal Legal aid and Changes to Financial Availability states:

“It is unclear what options a solicitor might have when dealing with a client who does not make payments as required. Under the proposals in the Bill, a client assessed as liable to make a contribution will be responsible for making payments over a number of weeks. The original consultation (Scottish Government 2011d, paragraph 64) suggested that it may be possible for solicitors to withdraw their services in less serious cases where there is non-payment as the client “has, in effect, chosen not to have a solicitor”. However, if this were to happen in more serious cases, there would be human rights implications. It is not clear where the dividing line between less and more serious cases might lie. “

It is submitted that further thought must be given to this important issue before solicitors are asked to bear the brunt of an estimated loss, through non-payment, of in excess of £3m (up to 30% non-payment in “only” 18% of cases based on summary criminal, ABWOR and advice and assistance expenditure of £56.4m in year 2010/2011). For specialist Criminal Defence firms involved in a large amount of summary business, this will represent a sizeable proportion of fee income. This Association's view is that an unpaid contribution is a deduction from the fee, and given that SLAB accept that a significant percentage of contributions will go unpaid, this represents a further cut in summary fees under another name and comes hot on the heels of cuts imposed in 2011.

The consultation documents draw many comparisons between the Civil and Criminal systems of justice, but these are unhelpful in assessing the level of disruption which

will ensue in the Criminal Courts once non-payment of contributions becomes an issue, as it undoubtedly will. Cases qualifying for Civil Legal Aid routinely last between 6 months and 5 years. During the period if contributions are being paid (directly to SLAB in Civil Legal Aid cases), and the assisted person defaults in payment, the Legal Aid Certificate is suspended. If, after 28 days payments have not resumed, the Certificate is terminated. Thereafter, if the client wishes to continue to be represented he will require to pay the solicitor privately or clear his arrears with SLAB. If this is too expensive, the client can always abandon the case or decline to defend it if he does not want to represent himself.

The range of options open to a non-Legally Aided accused is rather narrower. In the Criminal Courts if there is a difficulty with Legal Aid a brief postponement may be granted but at the end of the day the case will proceed regardless of the Legal Aid position. The timelines for summary criminal cases are far shorter, the government aiming for an average of 20 weeks and these are shortened further if the accused is in custody (up to 40 days) or his case is subject to a particular pilot project, such as the Domestic Abuse Court in Edinburgh sheriff Court which requires a trial diet to be fixed within 8 weeks of a not guilty plea being tendered. For cases involving a "contribution" of the entire sheriff court fixed fee of 485 (not including VAT), which would be the case for anyone with a weekly disposable income in excess of 160, it is understood that payment should be made over 26 weeks, meaning that 112 plus VAT would be outstanding after the conclusion of the case and the removal of any real compulsion for payment. Solicitors are unlikely to be content to conclude a case with that level of the fee outstanding.

Summary cases where an accused appears from custody and is dealt with there and then commence and conclude on the same day. Because the client is in custody and unable to access any paperwork or his bank account until he is released, solicitors find that it is difficult enough getting accused persons to produce financial verification documents after their case is finished and the threat of custody has diminished, let alone getting them to pay their bill. The likely result will be an increase in continuations without plea at first calling in order to secure the abovementioned documentation and/or contribution whilst the solicitor can, which will lead to a reduction in the number of cases resolved at first calling. The more court diets in a case, the more it costs the system to process.

It must be remembered that in criminal cases there is no prospect of a financial settlement which can be controlled by the solicitor or the recovery of an asset from which to pay the contribution, as there is often in a civil case.

Further, accused persons being prosecuted by the state are not willing participants in the court process, unlike those who chose to pursue or defend civil actions. They are likely to register any resentment they harbour at being brought into court against their will by withholding or delaying payment of the contribution wherever possible. It may even suit them to delay the outcome of their case, for example where a custodial sentence is likely. The context in which contributions are to be recovered in criminal cases is very different from that which underpins civil procedure.

The Consultation Report seeks to allay valid fears of court cases being increasingly delayed due to unpaid Legal Aid contributions by informing that last year most

summary criminal applications were processed within four days and that applications will be processed as quickly as possible. This has in fact little to do with the practical recovery of the contribution itself. Since the contribution element of the fee ranks first, in other words is deductible from the fee first with SLAB paying any balance, solicitors will be entitled to suspend completion of work, including appearing in court on behalf of the accused, until the contribution is paid in full, especially given the high probability of non-payment as recognised by the Report itself. As can be seen from the illustration above, in many cases this may not have taken place prior to the case reaching an advanced stage. There will likely therefore be an increase in motions to postpone leading to delays in cases reaching a conclusion with the resultant consequences for others, including witnesses and prosecutors. This will undoubtedly lead to a rise in individual case costs and will likely cancel out whatever savings are expected to be made by these proposals.

Cases involving serious crimes must be prosecuted speedily, with as little delay as possible. The inevitable rise in party accused will result in delays and disruption for the Courts and for Prosecutors: what will happen to the elderly accused facing a sexual allegation, who has more than £750 in the bank, but come the intermediate diet has failed to pay his contribution? The accused cannot represent himself and the solicitor will withdraw, whilst the legal aid certificate becomes suspended and non-transferrable; and what becomes of the accused facing a drugs charge who has failed to pay his contribution and is left standing in the dock by his lawyer who has been unable to get him to part with it? – do the already overburdened forensic scientists who analysed the drugs require to attend court because the crown cannot enter into a minute of agreement of their evidence with the accused? Will the crown provide him with sensitive witness statements to enable him to prepare his defence? Or CCTV discs? Or expert reports? The burden of solving this problem will fall to Sheriffs and Justices to resolve.

It must also be recognised that the consultation documents seem to assume that there will be no decline in the number of accused applying for legal aid, but it is inevitable, given the levels of “contribution” proposed, that there will be an increase in the number of accused persons who decide to represent themselves from the outset of proceedings and not consult a solicitor at all. This figure is almost negligible in the sheriff court at present, and low in the Justice of the Peace court but is sure to rise.

Sheriffs and Prosecutors know only too well that many accused persons are simply incapable of representing themselves – it is unclear whether there were any contributors to the consultation document who had ever conducted a summary trial with a party accused. Many accused persons come from the most disadvantaged sections of society and it is inaccurate to argue that these individuals would be most likely all be in receipt of passport benefits and therefore not require to pay a contribution.

A 2007 research paper published by Strathclyde University reporting on research commissioned by the Scottish Executive found that:

“the relatively weak social and economic resources of most clients in summary proceedings coupled with the immediate stress and anxiety which the criminal

process brings means that clients tend to be in a particularly poor position to take firm command of their defence...many clients tended to have some difficulty accurately explaining the charges against them (or indeed those amended charges which they chose to plead guilty to). Furthermore, many clients tended to conflate legal culpability with a wider view of moral culpability....Even among more experienced clients who professed initial confidence, when pressed to provide clear explanations, most clients admitted that they had a fairly vague idea of the procedure in their case.”

Thus, many party accused would be unable to prepare or conduct their own defence in the context of themselves increasing complexity of summary criminal cases, which now routinely involve CCTV evidence, expert reports, measures for child/vulnerable witnesses, identification parades, the requirement for intimation of special defences and notices, and complex sentencing options, not to mention the plethora of statutory offences enacted since devolution. At the moment, party are rare and those who represent themselves at trial even more so. Cases involving a party accused require a greater degree of input from the bench so that the accused, who is unlikely to appreciate the finer points of criminal procedure, is treated fairly. This Association predicts that such cases will become more common. The potential for Human Rights arguments due to the reluctance of the prosecution to divulge sensitive material directly to accused persons and the likelihood of miscarriages of justice will increase, both being scenarios which bear a high cost to the public purse and to public confidence alike.

In relation to cases which do not proceed to trial, there is a considerable advantage to the courts and prosecution in having the same solicitor represent an accused person where that person has more than one outstanding case. Plea bargaining across a number of cases can be a relative straightforward process and, at the time of sentence, only one plea in mitigation is required. However, as these clients begin to run up debts to their solicitors of choice, they are likely to turn to other solicitors to represent them in relation to any fresh charges in order to avoid an awkward meeting with the former solicitor which would no doubt involve the giving of an ultimatum requiring payment before representation.

This situation will cause real problems for prosecutors and agents alike as they try to identify which offices hold the accuseds various cases and hold multi-party discussions in an effort to resolve them. It is predicted by this Association that there would be a detrimental effect on the percentage of cases resolved at an early stage, a rate which has seen large improvements since SJR. In addition at the time of sentence, more than one solicitor would require to appear, each giving individual pleas in mitigation in order to justify the appearance fee. This would increase the court time taken up by these cases and defeat the sliding scale currently in place whereby a solicitor can only claim a percentage of the fees where guilty pleas are tendered across a number of summary complaint at the same diet, and would make it difficult to restrict deferred sentence fees across a number of complaints calling at the same diet when more than one solicitor was appearing. The rise in costs would again eat into any savings which had been achieved.

In all of these circumstances, it is submitted that SLAB, a quasi-governmental body removed from the solicitor-client interface is the appropriate body to recover

contributions from accused persons. SLAB already has the mechanisms in place to recover contributions and the experience of recovering them. It has stated its intention to recover contributions in solemn criminal cases and already recovers themselves in Civil Legal Aid. If it is felt that it would be a relatively straightforward matter to collect contributions in summary cases then this Association believes that it would be far more straightforward for SLAB to extend its existing system to recover summary criminal contributions as well than to require individual solicitors to introduce schemes of their own which will lack uniformity.

This Association does not agree with the claim that an individual solicitor's direct relationship with the accused would make collection easier than it would be for SLAB for the reasons stated above. SLAB is already aware that many solicitors do not collect contributions. The truth is that SLAB has a far greater likelihood of being able to collect a sizeable proportion of contributions than individual solicitors and would be able to enlist Government mechanisms to assist it, for example by extending recovery procedures already in place for Proceeds of Crime or introducing measures to enable deduction at source. It is of note that the contributors to the consultation were unanimous in the view that SLAB should collect.

This Association will make representations to the Government through Members of the Legal Aid Negotiating Team of the Law Society but, at this stage, wishes to make it clear that the Association reserves its right to take independent action in the future in relation to any or all of the issues raised in this Response Paper.

Edinburgh Bar Association  
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