

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from Dr Cyrus Tata, Director of Centre for Law, Crime & Justice and Reader in Law, Strathclyde University Law School

Statement of expertise in the area

Over the last twenty years I have conducted research into criminal legal assistance in Scotland, as well as other nations, and its relationship with other dynamics in the system. This includes four separate substantial field-based studies¹ and I have written widely on the policy and practice issues arising from that research. In addition, I have conducted several studies into allied areas of the justice system including: plea decision-making, sentencing, pre-sentence reports, executive release from custody.

I have been asked by the Justice Committee to give oral and written evidence focusing mainly on Part 2 of the Bill. The Bill and its accompanying give rise to some concerns.

1. A matter of ‘alignment’ or a distinct change of principle?

Should it become mandatory for a person who is prosecuted and who maintains his/her innocence to have to pay for the cost of professional legal assistance? The Bill proposes that not only should people who decide to plead guilty (‘ABWOR’) be required to pay, but also those who maintain their innocence. The proposal to change the law in this way is being presented as a matter of ‘alignment’. However, it is also crosses a line of principle.

A. The Bill relies on a false ‘them and us’ dichotomy

A logic underlying the extension of payments in cases where a citizen does not accept the allegation against her is that it has be ‘balanced against’ the interests of the general public as payers of indirect and direct taxation. This has been described as primary ‘governing principle’:

“Fairness to the accused and the taxpayer – *the interests of the taxpayer and the accused must be balanced* to provide value for money and access to justice. Applicants who are able to pay a contribution should do so ...” (emphasis added)².

On closer inspection, the claim of ‘balance’ between two distinct and opposing interests is, however, somewhat insidious. It implies that a person who does not accept an accusation against her is somehow not a ‘taxpayer’.³

¹ These are: 1. the comparison of spending between different European nations (including Scotland), and their practices; 2. the independent and controlled study of the Public Defence Solicitor’s Office; 3. the independent study of the impact of the introduction of Fixed Payments (or Fixed Fees) into Summary Legal Aid; 4. the study evaluating the reforms to summary legal aid (especially ‘front-loading’) and the introduction of the disclosure of prosecution evidence.

² Scottish Government (2011) Consultation para 33 on ‘Governing Principles’)

B. Why should the individual citizen who denies guilt (and possibly acquitted) be held responsible for the cost of legal assistance?

Justifications put forwarded for the extension of the principle of payment invite us to believe that paying towards the cost of legal assistance where a citizen states she is not guilty is analogous to contributions towards ABWOR where the person has already pled guilty? In ABWOR cases, one can make a plausible argument that the person has accepted his/her guilt and should take responsibility for the behaviour by paying towards the cost of legal assistance. S/he is required to take responsibility for the criminal actions s/he has chosen. However, the principle is surely distinct where a citizen maintains his/her innocence and is prosecuted through a trial, and is even acquitted. It is difficult to see how that citizen should be deemed to have responsibility for having been: arrested/detained, charged, bailed or remanded for weeks in custody, prosecuted through trial and then possibly acquitted, (not to mention the collateral personal consequences such as family breakdown, loss of income/employment and social stigma), to then show s/he is taking some financial responsibility for their choices. From the logic of the Bill one could be forgiven for imagining that it is the individual citizen who chooses to charge and prosecute herself, remand herself in custody, and chooses to try herself in court.

The only way in which this argument can make any sense is if one presumes that everyone prosecuted is guilty and that if a person denies s/he is so guilty, (and is even acquitted by a court of law), should nevertheless bear responsibility for the cost of defence.

2. No refund even if you are acquitted: can two wrongs make a right?

Under this Bill, if you are acquitted there will be no refund for the cost you had to pay to defend yourself. Where a person has been charged, possibly remanded in prison, prosecuted and tried, but is then acquitted by the court it is proposed that s/he should not receive any refund for the cost of legal assistance. This may come as something of a nasty surprise to a citizen who has already endured the harrowing experience of being an accused person. The Policy Memorandum attempts to justify this position, (which is contra-distinction to that south of the border), by suggesting that a refund from public money to such a person would be unfair to those, (extremely rare and usually extremely wealthy), privately-paying individuals. (Policy Memo para 73).⁴ It may well be that it feels unfair to, say, a millionaire who is able to pay privately and is acquitted but does not to get a refund from his lawyer. But to apply the same unfairness to every other citizen as act of fairness to the millionaire suggests rather odd priorities. It seems tantamount to saying 'two wrongs make a right' .

³ This is particularly disappointing when in instances discussing persons convicted of criminal offences the current Justice Secretary has argued against for a more inclusive approach for instance: "They are us"

⁴ The Policy Memorandum claims that one of the reason for denying a citizen any refund of legal assistance where the citizen was acquitted is that "it is felt to be fair to those who can afford to pay a contribution to their legal assistance costs do so" (para 73)

3. Should Criminal Legal Assistance be brought into line with Civil Legal Aid?

It has been frequently stated by proponents of the Bill that legal assistance in criminal cases is 'out of line' with the standards of civil cases. While accepting the major problems facing many civil legal aid clients, there is the central distinguishing principle between civil and criminal cases – namely state coercion. While the outcomes of civil cases can and do have huge consequences for individuals and communities, the citizen cannot be denied his/her liberty as s/he can be when the state brings forward a criminal accusation. The stakes are simply much higher and fundamentally distinct.

4. Problems of operation

Level of financial payment ('contribution')

Like others who have given evidence I am concerned about the threshold and its impact on certain populations. There may well be problems of indirect discrimination (eg especially disabled groups and women) and also the impact on families.

Contribution creep?

Currently it is estimated that nearly 1 in 5 will be required to pay towards the cost of legal help. With the figure being set in legislation it is possible inflation will mean that more people will have to pay. It is unclear how the Bill ensure that there will not in the future be ever-more people being required to pay ever-higher fees.

Increase in unrepresented individuals

There appears to be a quiet recognition that where, on the basis of the evidence alone, a person would plead not guilty the introduction of payments will lead to an increase in guilty pleas.⁵ Unless one holds to a presumption of guilt, this should be troubling.

Furthermore, it is acknowledged that there may also be an increase in unrepresented cases. It seems likely that solicitors will, as SLAB officials have already acknowledged, have to make a commercial judgement as to whether the client is sufficiently financially valuable to take the financial 'hit' of non-payment. This means that certain clients (e.g. non-regular clients) felt not to be of financial value may be unable to get legal assistance.

Impact on the quality of defence work

It would unsurprising if Solicitors end up spending more time collecting payments and less time in contact with clients. This is likely to slow cases down as there will be less time to discuss the case and persuade the client that a guilty plea is in his/her interests.

⁵ "If financial contributions were introduced for summary criminal legal aid, it is possible that some applicants, faced with having to pay a contribution following a plea of not guilty, may make a decision on how to plead based on financial considerations rather than the strength of the case against them." (Scottish Government (2011) Consultation)

Will the Bill really save the money envisaged?

The logic behind the Bill appears to make little or no account of adaptive behaviour (e.g. unrepresented cases and delays in getting contributions). The hope seems to be that it will encourage an increase in guilty pleas, though it may just as easily end up slowing the justice process down. Unrepresented cases will be a headache for the courts.

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