

Justice Committee

Scottish Civil Justice Council and Criminal Legal Assistance Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland (“the Society”) aims to lead and support a successful and respected Scottish legal profession.

Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

To help us do this, we use our various Society committees which are made up of solicitors and non-solicitors and ensure we benefit from knowledge and expertise from both within and outwith the solicitor profession.

The Society welcomes the opportunity to comment upon the general principles of the Scottish Civil Justice Council and Criminal Legal Assistance Bill.

Comments on Part 1 of the Bill

At present the functions proposed for the Civil Justice Council under Section 2 of the Bill are dealt with by the Sheriff Court Rules Council and the Court of Session Rules Council. Presently, there are 10 solicitor members sitting on these two Rules Councils, 5 on each.

The overarching Council that is proposed is commended as being eminently sensible. The Council will require to be adequately resourced in order to fulfil the broad range of responsibilities proposed in the Bill. In particular the Council should be able to call on the experience of a broad range of individuals who have experience of work in both the Sheriff Court and the Court of Session. The solicitor profession has developed specialisations in the last twenty years in response to increased complexity and detail in the law, evidence and procedure. In particular different considerations apply to those working in different areas such as Family Law, Personal Injury Work, Debt Recovery and Commercial cases.

The Society is concerned that the Bill proposes only two solicitor members in the composition of the Council. The Society’s Civil Justice Committee consider this to be inadequate to cover the variety of cases dealt with by the Civil Courts.

There has been no cogent reason put forward for the reduction of the solicitor membership to two. Solicitors are the largest group of regular court users and appear daily in Sheriff Courts throughout Scotland. Their experience of the courts and procedures is wider and deeper than any other group of participants.

We accept that too many members on the Council could dilute its efficiency, however the Council needs a sufficient breadth of solicitor experience and expertise to

maintain credibility with the profession.

In order to contribute to the Council's deliberations about the different sectors of civil work, the Society is of the view that the Civil Justice Council should contain at least six solicitor members.

This, we consider, provides the right balance between streamlining the Council and retaining the necessary breadth of expertise needed to contribute in a positive and meaningful way.

The Society also suggests that the Council could consult with relevant stakeholders on the content for its annual plan. The Society would welcome the opportunity to contribute to the Council's annual plan.

General Comments on Part 2 of the Bill

The Society welcomes the policy priorities behind Part 2 of the Bill and fully 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. However, we believe that Sections 19 and 20 require revision to ensure that access to justice is preserved and that the Scottish Legal Aid Board ("SLAB") is solely responsible for collecting criminal legal aid contributions.

We have two areas of serious concern in relation to Part 2 of the Bill:

- 1) **Access to Justice** – the Scottish Government should take steps to ensure that the proposed system of contributions does not include those who cannot afford to pay those contributions, and
- 2) **Collection of Contributions** – the collection of contributions for summary criminal legal aid should be undertaken by SLAB and not by solicitors or their firms.

Specific Comments on Part 2 of the Bill

1) Access to Justice

Section 19: Clients' contributions for criminal assistance by way of representation, and Section 20: Contributions for criminal legal aid

Disposable Income Threshold

Section 19 of the Bill inserts new section 11A into the 1986 Act and section 20 of the Bill inserts new section 25AC into the 1986 Act. Section 11A(1)(b)(i) specifies that, for criminal assistance by way of representation ("ABWOR"), the threshold for disposable income at or above which a contribution is payable is £68 per week. Section 25AC(2)(b)(i) specifies that, for criminal legal aid, the threshold for disposable income at or above which a contribution is payable is £68 per week.

We do not believe that it is realistic to expect anybody who has a disposable income of only £68 per week to be required to pay towards their legal costs.

An assumption seems to have been made that the amount of "disposable income" will be available for a (in most cases unforeseen) legal defence.

We believe that by setting the threshold at such a low level, SLAB risks requiring a payment from people who cannot afford it. The threshold of £68 is the current lower income threshold in civil legal aid but, in our view, there should be recognition that criminal court proceedings are different from most civil court proceedings in that they are at the instance of the Crown, do not involve financial awards and can result in extremely serious consequences such as custodial sentences. The threshold also needs to take into account the impact of the changed economic climate. The term “disposable income” is defined in the 1986 Act as a person’s income after making such deductions and allowances as regulations may prescribe.¹ Paragraph 54 of the Policy Memorandum provides examples of unavoidable expenses such as rent, child care and mortgage payments which will be subtracted from eligible income. Bare essentials such as household repairs, transport costs, food and clothing are not included in the examples of unavoidable expenses. We believe that the disposable income threshold figure of £68 is intended to cover these bare essentials. However, the report by the Joseph Rowntree Foundation “Minimum Income Standards” published in July 2012 states that a single person now needs to spend £192.59 a week (excluding rent and childcare) to reach a minimum standard of living.² We believe that an accused person with a disposable income of only £68 per week will have to make a decision between paying essential costs or paying the contribution to his or her defence. Being placed in such a dilemma could compromise his or her rights to a fair trial under Article 6 ECHR.

We believe that rather than setting the threshold so low and running the risk of excluding some accused persons from access to justice, it should be set at a higher level ensuring that those people who are required to pay a contribution are likely to be able to afford to do so.

Contribution Levels

Although there are no contribution levels on the face of the Bill, paragraphs 60 and 61 of the Policy Memorandum provide a guide as to how the contributions payable might be assessed. We have serious concerns about the proposed contribution amounts.

Some of the levels of contributions payable have the potential of being greater than the defence costs. In these circumstances, it is suggested in the Policy Memorandum that the client will have to pay the cost of the defence case rather than the assessed contribution (paragraph 60). The term “contribution” is misleading, given that the size of the contribution required by some may in fact be equal to the full costs of their defence. In other words, the practical effect of the contribution system will be to exclude some accused individuals from any legal aid whatsoever and therefore, potentially, from access to justice.

We have a concern that the system will create perverse incentives for clients who feel that they cannot afford to pay the contribution which has been assessed. For example, with reference to the table at paragraph 61 of the Policy Memorandum, an accused with a disposable income of between £160 and £222 and who is due to appear in a summary case in the Sheriff Court will have an assessed contribution

¹ Section 42(1) of the Legal Aid (Scotland) Act 1986.

² Please see the full report at <http://www.jrf.org.uk/sites/files/jrf/minimum-income-standards-2012-summary.pdf>.

greater than the fixed fee sum of £485. If the client pleads guilty he or she will have to pay the fixed fee of £485 which is less than the assessed contribution amount. However, if the accused person pleads not guilty, the case is likely to become more expensive and he or she will therefore have to pay the full contribution amount which could be as much as £1118.³ This could lead to a perverse incentive which could undermine the just disposal of the case as clients might be inclined to plead guilty simply to avoid paying the assessed contribution amount.

For example a client who is on minimum wage with no outgoings will have a net weekly disposable income of £196.02.⁴ Under the current legal aid system he or she will be eligible for legal aid with nil contribution. Under the proposed system, for a summary Sheriff Court case, he or she would have an assessed contribution of £800.20 under ABWOR or £847.80 under summary criminal legal aid. He or she will either have to plead guilty and pay the fixed fee of £485 or plead not guilty and potentially have a lengthy trial which could result in him or her paying the full £847.80 which is approximately the equivalent of his or her full month's wages after tax.

We believe that a fairer system would involve the client paying the same amount regardless of the costs of the case. Also, the amount payable should be a genuine "contribution" by the client to the costs of their defence case rather than the client potentially paying the full costs of the case.

The Need for an Impact Analysis

Without a full impact analysis of various possible contribution levels and contribution systems measured against a range of sample accused persons the system cannot be considered to be complete. The Society does not have the resources to undertake such an impact assessment, and is therefore not in a position to make any suggestions as to possible contribution levels. We strongly suggest that the enactment of this Bill be delayed until this work has been properly carried out.

Non-Passported Benefits

Non-passported benefits are currently taken into account in determining financial eligibility for criminal legal aid⁵ but not for determining financial eligibility or contribution eligibility for ABWOR.⁶

Paragraph 54 of the Policy Memorandum states that non-passported benefits will be taken into account in disposable income calculations and paragraph 49 makes clear that the financial eligibility tests will be aligned across ABWOR, summary criminal and solemn criminal legal aid.

The proposed system will involve benefits such as disability living allowance and war pensions being treated as income for the purposes of determining financial eligibility

³ Please see paragraph 61 of the Policy Memorandum which provides a table of contribution levels.

⁴ Based on National Minimum Wage Rates that apply from 1 October 2012 - £6.19 per hour.

⁵ Please see SLAB mailshot April 2011:

http://www.slab.org.uk/common/documents/profession/mailshots/2011/Keycard_etc_mailshot_March_30th_FINAL.pdf.

⁶ For a list of the non-passported benefits disregarded in disposable income calculations for ABWOR and advice and assistance please see SLAB Keycard 2012 at

<http://www.slab.org.uk/common/documents/profession/documents/KeyCard2012Final.pdf>.

and also for the purposes of determining whether disposable income is at or is above the threshold for which a contribution might be payable. The Society is concerned at the potential for vulnerable clients becoming excluded from the legal aid system or finding themselves having to pay an unaffordable contribution towards the cost of their defence out of their benefit payments.

For example, a client who is due to appear in the Sheriff Court might be in receipt of a war pension, pension credits and a disability living allowance giving him or her an income of £135 with no outgoings. Currently, under the Sheriff Court ABWOR system, because non-passported benefits are disregarded for the purposes of disposable income calculation, he or she has a nil contribution. However, under the proposed system he or she would have to pay £252.50 which is almost double his or her weekly income.

We suggest that certain non-passported benefits are disregarded for the purposes of income calculation and we would welcome a dialogue with SLAB and the Scottish Government with a view to ensuring that such clients are not left unrepresented or left having to pay an unaffordable contribution.

Unforeseen Consequences

The ECHR ensures that the Government has a responsibility to those accused of crime without the funds to pay for a necessary defence. With the Summary Justice Reforms in 2007-2008, many cases were removed from the legal aid system entirely. As a result, cases which are taken to court are now more serious and increasingly likely to result in custodial sentences. Therefore, proper legal representation is more important now than ever before.

The Bill could give rise to an increase in unrepresented accused in summary criminal proceedings. As stated above, we do not believe that the level of disposable income from which contributions will be paid is reasonable. This is of considerable concern given the serious nature of criminal prosecutions. Unless the disposable income threshold is revised, it seems likely that contributions will be set at a higher level than many can afford, which could result in some clients having no option but to represent themselves in summary cases. This problem is likely to be exacerbated if SLAB is only permitted to pay the non-contributory element of the fee to solicitors in summary cases (paragraph 154 of the Financial Memorandum).

The Need for a Pilot

The Government should pilot the contributions system so that the numbers of unrepresented accused can be carefully monitored before this Bill is enacted. This will provide an indication as to whether the disposable income threshold has been set too low, whether the levels of contribution have been set too high and whether these figures might require revision.

2) The Collection of Contributions

Section 20 Contributions for criminal legal aid

Section 20 of the Bill inserts section 25AC into the 1986 Act. At section 25AC subsection (4) it states that:

- “(a) in a case where criminal legal aid is being provided
- (i) in relation to solemn proceedings, proceedings relating to an appeal or proceedings relating to the Supreme Court,
 - (ii) by a solicitor employed by the Board by virtue of sections 26 and 27 or, as the case may be, section 28A, or
 - (iii) by counsel instructed by such a solicitor,
- It is for the Board to collect any contribution payable by A under subsection (3), and
- (b) in any other case it is for the solicitor to collect any contribution payable by A under subsection (3) “. (Our emphasis added)**

The Society firmly believes that this section should be amended so that the collection of contributions for both solemn and summary criminal legal aid should be undertaken by SLAB. We believe that the proposed mixed collection system will be impractical, unworkable and unsustainable.

Financial Burden on Solicitor Businesses

We believe that solicitors will experience difficulties in attempting to collect summary contributions. It is clear from examining the collection rates of the Scottish Court Service that at 11 April 2012 only 31% of Fiscal Direct Penalties registered in 2011/12 had been fully paid.⁷ If this holds true for legal aid contributions there will be serious difficulties for solicitors.

The original Scottish Government consultation paper states that “Savings are calculated on the basis of 70-90% collection rates”. As highlighted above and given the proposed levels of contributions set out in paragraph 61 of the Policy Memorandum this estimate seems high. However, even if this estimate is correct it will still expose solicitors to non-payment in around 10-30% of summary cases involving a contribution. We believe that it is not appropriate for the Scottish Government to expect the solicitor profession to represent accused persons in cases without proper remuneration.

The Bill must be seen in the context of recent cuts in criminal legal aid and the decline in expenditure in criminal legal assistance in recent years. Andrew Otterburn and John Pollock, authors of the Society’s annual “Cost of Time”⁸ survey have reported in an article in the Journal of the Law Society of Scotland that “life has continued to be extremely difficult for smaller firms and in particular those that undertake legal aid”.⁹ The Society believes that sole and rural practitioners will be badly affected by this potential reduction in income.

Clear and Consistent Collection Approach Required

SLAB should be the only central collection body for legal aid contributions. This will ensure that there is a clear and consistent system for the public, solicitors and other

⁷ (For the period 1 April 2011 to 31 December 2011). Please see Scottish Court Service, Quarterly Fines Report No. 12 – Quarter 3 2011/12

⁸ Please see the Cost of Time survey at <http://www.lawscot.org.uk/members/member-services/publications>;

⁹ Please see article at <http://www.journalonline.co.uk/Magazine/57-2/1010805.aspx> and the Society’s subsequent press statement at http://www.lawscot.org.uk/news/press-releases/2012/february/news_130212_cost_of_time

justice system stakeholders. The system proposed will require that the accused persons pay contributions to SLAB in solemn cases but that they pay contributions to solicitors in summary cases. Even with clear guidance notes we firmly believe that a shared collection model risks bewildering clients, the public and other justice stakeholders. This will undermine the contributions system itself.

Other jurisdictions have the benefits of centralised collection systems and do not require solicitors to carry out collection. In England and Wales, for instance, the responsibility for collection resides with the Legal Services Commission, though the collection and enforcement of Contribution Orders has been outsourced to a third party, Rossendales Ltd.¹⁰ Contributions are also collected centrally in Ontario Province in Canada.¹¹ Centralised collection therefore can work and we should learn from these legal systems and not adopt the approach in the Bill.

Mixed Model of Collection is Not a Shared Burden

With particular reference to paragraph 77 of the Policy Memorandum, the team does not share the view that the splitting of the responsibility for collecting contributions between solicitors and SLAB spreads the burden of collection. From a practical perspective, the burden is of a different nature for solicitors than it is for SLAB. There are clearly different consequences for SLAB and solicitors in being unable to collect contributions from clients. The consequences for solicitors will have a direct impact on the income of solicitor firms as well as potentially increasing their financial and regulatory business risks. The consequences for SLAB are clearly different and we do not agree that these risks are shared.

Advice and Assistance and ABWOR

Paragraph 76 of the Policy Memorandum states that solicitors currently collect contributions for ABWOR and that this will not change. However, the contribution levels for ABWOR will change. These changes will have an impact on existing collection procedures. At the moment, although solicitors collect contributions for ABWOR, the amounts involved are generally very low.¹²

However, the proposed changes in contribution levels at paragraph 61 of the Policy Memorandum mean that these amounts will significantly increase and, as already noted, the contribution level could be the full cost of the defence. There is also likely to be a substantial increase in the number of cases which will require an ABWOR contribution. These additional risk factors could impair adversely on many solicitor practices.

SLAB already has necessary systems in place

SLAB currently collects contributions in civil legal aid cases and, as such, already has the apparatus and collection procedures required to carry out large-scale collection of contributions. Indeed, according to SLAB's Board Minute of 12 December 2011, SLAB has a normal monthly collection rate of 95% in civil legal aid

¹⁰ Please see Legal Service Commission Legal Aid Manual at:

http://www.legalservices.gov.uk/docs/cds_main/criminal_legal_aid_manual_feb_2012_1.pdf

¹¹ For example, please see Ontario legal system -

<http://www.legalaid.on.ca/en/getting/clientcontributions.asp>

¹² For current contribution levels in ABWOR and A&A please see the SLAB Keycard 2012 at <http://www.slab.org.uk/common/documents/profession/documents/KeyCard2012Final.pdf>

cases.¹³ This shows that SLAB is effective and efficient at collecting contributions from civil legal aid recipients.

The collection of legal aid contributions has been integral to SLAB's function. SLAB's website states that its work includes "deciding if people have to pay towards the cost of legal assistance, then collecting these amounts". The proposal that solicitors collect summary criminal legal aid contributions direct from clients will involve:

- (a) Additional costs to solicitors in acquiring adequate computer and collection systems,
- (b) Risk to solicitors in attempting to recover unpaid contributions and
- (c) Increased business burdens for solicitors.

Practical Issues

There are a number of practical problems which are likely to be caused by the introduction of a shared collection model.

For example:

- (a) In relation to situations where the grant of legal aid is transferred to another solicitor it is not clear how a solicitor will collect his portion of the contribution from the outgoing solicitor if the client has already paid the contribution and
- (b) Solicitors will be entitled to write off non-payment of contributions as they see fit. However, there could be professional practice issues if solicitors represent clients without collecting contributions as this could be deemed to be a financial inducement under the Code of Conduct for Criminal Work.¹⁴

We welcome further discussion with the Scottish Government and SLAB to discuss methods of reducing the risks that these practical problems cause but none of these practical problems would exist at all if the Bill was amended to require SLAB to collect summary contributions.

Additional Administrative Work without Payment

Solicitors will not be paid for work done to collect contributions. There are already areas of routine practice for which solicitors are not paid, including the verification of a client's eligibility for publicly funded legal advice, and the Society does not believe that the collection of contributions in criminal legal aid cases should become another such area.

Conclusion

We appreciate that these are challenging times. We acknowledge the seriousness of the economic background and the rationale behind economics in public expenditure. We are anxious to ensure that legal aid is not unduly limited because of the economic situation.

¹³ Please see SLAB Board Minute of 12 December 2011 at: http://www.slab.org.uk/export/sites/default/common/documents/about_us/board_members_senior_staff/boardmeetings/2011minutes/APPROVED_Board_minute_12_December_2011_-_web.pdf

¹⁴ Please see the Code of Conduct for Criminal Work at <http://www.lawscot.org.uk/rules-and-guidance/section-f/division-a-criminal-work/guidance/the-code-of-conduct-for-criminal-work>

We see in our daily practice some of the other negative consequences of the problems in the economy and we are of the view that the legal aid system is essential to ensuring that the justice system is accessible to those who cannot afford to pay for legal advice or representation. We believe that access to justice through legal aid must be preserved as much as possible in the current financial climate.

Law Society of Scotland
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