

SPICe Briefing

Scottish Civil Justice Council and Criminal Legal Assistance Bill

7 June 2012

12/36

Abigail Bremner

The Scottish Civil Justice Council and Criminal Legal Assistance Bill was introduced by Kenny MacAskill MSP on 2 May 2012. It seeks to establish a Scottish Civil Justice Council with responsibility for formulating policy, and drafting court procedure rules, in relation to civil justice matters. It also seeks to require some accused people to make financial contributions to the cost of their legal aid bill. In doing so, it creates a new financial eligibility test which will apply to criminal legal assistance in the form of Assistance By Way of Representation (in criminal cases dealt with under summary procedure) and Criminal Legal Aid.



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EXECUTIVE SUMMARY

The Scottish Civil Justice Council and Criminal Legal Assistance Bill was introduced by Kenny MacAskill MSP on 2 May 2012. It contains provisions to establish a Scottish Civil Justice Council and to introduce financial contributions for some accused people receiving criminal legal assistance.

Scottish Civil Justice Council

The “Gill Review” (Scottish Civil Courts Review) made wide-ranging recommendations to improve the effectiveness and efficiency of Scotland’s civil justice system. These included a recommendation to create a Scottish Civil Justice Council with an on-going remit to keep the civil justice system under review. It was envisaged that this Council would replace the existing Sheriff Court and Court of Session Rules Councils, which currently perform the task of drafting court procedure rules for adoption by the judges of the Court of Session.

The Bill proposes that the Scottish Civil Justice Council will have a remit both to develop policy and to draft court procedure rules. Its initial workload will be dominated by the implementation of the Gill Review. It will have an on-going role in keeping the civil justice system up-to-date and may take on additional responsibilities in relation to administrative justice and tribunals.

The Council will have between 14 and 20 members, drawn from the judiciary, legal profession, civil service and court user groups. In particular, the Lord President (the head of the judiciary in Scotland) will be able to appoint up to six members with experience relevant to the current work of the Council. The Council will be able to establish committees and appoint additional people to sit on them. The Bill enables certain Council members to be paid for their work. However, it is envisaged that, in practice, members will be paid expenses only.

Contributions to the cost of criminal legal assistance

The Bill makes changes to the way summary criminal Assistance By Way of Representation (ABWOR) and Criminal Legal Aid operate. It introduces a new financial eligibility test – based on consideration of whether the accused can meet the costs of their defence without “undue hardship” to themselves or their dependants – which will apply across summary criminal ABWOR and Criminal Legal Aid.

The Bill empowers Scottish Ministers to bring forward a scheme detailing the financial contribution an accused may be required to make to their legal aid bill. It is envisaged that this will require contributions from income and capital (where relevant) over a number of weeks, with the exact amount dependent on the way the accused pleads and the seriousness of the charges they are facing. Solicitors will be responsible for collecting contributions from accused people in cases heard under summary procedure, with the Scottish Legal Aid Board taking on this responsibility in relation to cases heard under solemn procedure and appeals. The Bill makes no provision for contributions to be refunded where an accused is acquitted.

INTRODUCTION

The Scottish Civil Justice Council and Criminal Legal Assistance Bill (hereafter “the Bill”) was introduced in the Scottish Parliament by Kenny MacAskill MSP on 2 May 2012. It contains provisions to establish a Scottish Civil Justice Council and to introduce financial contributions for some accused people receiving criminal legal assistance.

MAKING JUSTICE WORK PROGRAMME

“[Making Justice Work](#)” is an overarching Scottish Government programme bringing together various justice-related projects. It aims to ensure that justice in Scotland is fair, efficient and accessible. To do this, it brings together agencies working across the justice spectrum – such as the police, the Crown Office and Procurator Fiscal Service, the Scottish Legal Aid Board, the judiciary and the Scottish Court Service – in recognition of the fact that the interests of each of these organisations are interlinked. For example, cancelled court hearings lead to increased costs not just for the Scottish Court Service but for the police, the Crown Office and the Scottish Legal Aid Board. It is therefore in everybody’s interest to contribute to improvements to the current system.

There are five overarching themes (each comprising a number of different projects). Implementation of the Gill Review (discussed below) is covered under several strands. The themes are as follows:

- **delivering efficient and effective court structures** – creating a proportionate court structure (covering both civil and criminal cases) to ensure that cases are heard in the most appropriate court given their complexity and value
- **improving court procedures** – modernising court procedures and introducing effective case management (where judges set the processes and timescales under which a case will be progressed) to provide for efficient use of court time
- **widening access to justice** – this covers, among other things, providing support and advice to citizens to deal with legal problems and creating alternative dispute resolution mechanisms
- **co-ordinating IT and management information** – improving administrative processes and ensuring relevant information is available across justice agencies
- **establishing a Scottish Tribunals Service** by merging the administrations of a number of existing tribunals

The Scottish Government expects the changes made by the Bill, in relation to legal aid and to the civil justice system, to fit into this overall framework for service improvement. The creation of a Scottish Civil Justice Council is the first step to delivering a number of reforms as it will have the function of up-dating the court procedure rules which underpin the reform process. The introduction of financial contributions in criminal legal assistance will save money so that legal aid in other areas does not need to be scaled back.

SCOTTISH CIVIL JUSTICE COUNCIL

THE CIVIL JUSTICE SYSTEM

Introduction

The civil justice system is used to enforce legal rights and obligations between people and/or organisations. Examples of the issues dealt with under the civil law include contract, divorce, inheritance and personal injury. The courts which deal with civil matters raised in Scotland are the sheriff courts (sitting in their civil capacity), the Court of Session and the UK Supreme Court.

Oversight

The Lord President is the traditional head of the judiciary in Scotland (he is known as the Lord Justice General when heading up the criminal courts). This role was placed on a statutory footing by the Judiciary and Courts (Scotland) Act 2008. Under the 2008 Act, the Lord President is given responsibility for securing the efficient disposal of court business, making arrangements for the welfare, training and guidance of judicial office holders, and investigating complaints against the judiciary. The 2008 Act also requires that holders of certain political offices (such as Scottish Ministers and MSPs) respect the independence of the judiciary.

The Scottish Court Service (SCS) provides the staff, buildings and equipment required for the administration of court business in Scotland. The 2008 Act constituted the SCS as an independent statutory body where previously it had been an executive agency of the Scottish Government. The Lord President, also by virtue of the 2008 Act, is the chair of the SCS, although day to day management is carried out by a chief executive. The SCS provides administrative support to the Sheriff Court and Court of Session Rules Councils.

Civil court procedure

All courts have procedures through which the business they deal with is ordered. The Court of Session has the formal role of making and changing civil court rules in Scotland. Changes or additions to the rules governing business in the sheriff courts can be proposed by the Sheriff Court Rules Council. Similarly, rules for the Court of Session can be proposed by the Court of Session Rules Council. The Court of Session is also able to make rules on its own initiative.

Civil rules are formally made through Acts of Sederunt (a form of delegated legislation). Rules are usually drafted by the Lord President's Private Office on behalf of the rules councils. They are then submitted to the Court of Session for embodiment as an Act of Sederunt. The Court of Session may approve rules (with amendments if desired) or reject them.

Although laid before the Scottish Parliament, Acts of Sederunt are not generally subject to parliamentary approval. This is because the Court of Session has the power to regulate civil court proceedings without such oversight. However, legislation may require that an Act of Sederunt is subject to approval or annulment by the Scottish Parliament. Therefore, the process to be followed will depend on the particular statutory provision under which the Act of Sederunt is being brought forward.

Sheriff Court Rules Council

The Sheriff Court Rules Council is made up of two sheriffs principal, three sheriffs, one advocate, five solicitors, two full-time sheriff clerks, two people with expertise in the workings of the civil courts, consumer issues and the interests of litigants and one further person (usually a civil servant from the Scottish Government's Justice Directorate). Members are appointed by the Lord President, with the exception of the consumer representatives (who are appointed by the Lord President in consultation with Scottish Ministers) and the additional person (who is appointed by Scottish Ministers alone).

The Council is charged with keeping "under review the procedure and practice followed in civil proceedings in the sheriff court"¹ It may draft rules and submit them to the Court of Session. The Court of Session may also create rules for the sheriff courts on its own initiative but must consult the Sheriff Court Rules Council before approving them and must take account of any representations it receives from the Council.

Court of Session Rules Council

The Court of Session Rules Council is made up of the Lord President, two other Court of Session judges (appointed by the Lord President), five members of the Faculty of Advocates (appointed by the Faculty) and five solicitors (appointed by the Council of the Law Society of Scotland). The Council's membership does not extend to anyone representing the interests of those outside the courts and legal profession. Nor does it contain anyone representing the interests of Scottish Ministers, although it is customary for a civil servant from the Scottish Government's Justice Directorate to be invited to attend.

As with the Sheriff Court Rules Council, the Court of Session Rules Council can draft rules and submit them to the Court of Session. The Court of Session may also make rules of its own accord, without reference to the Council.

THE GILL REVIEW

The Scottish Civil Courts Review (or "Gill Review") was initiated in 2007 by the then Scottish Executive under the leadership of Lord Gill. Its remit was to "review the provision of civil justice by the courts in Scotland, including their structure, jurisdiction, procedures and working methods (...)" with a view to improving access to justice in a manner which was effective, efficient and proportionate.

During its deliberations, the Gill Review consulted widely with interested parties. It issued a specific [consultation](#) (Scottish Civil Courts Review 2007) early in the process which sought views on the key issues in relation to reform. This received over 200 responses.

The [final report](#) of the Gill Review was published in 2009. It made a raft of recommendations which deal in detail with the principles, structures and procedures which it argues should underpin the delivery of civil justice in Scotland. The review report covers two volumes. Very generally, its recommendations for civil justice can be summarised as follows:

- increased powers for judges to fix the manner and timescales in which a case will be dealt with by the court ("case management" powers)

¹ Section 34(2) of the Sheriff Courts (Scotland) Act 1971.

- increased specialisation of judges at all levels, including the creation of a specialist personal injury court
- increased use of IT – such as telephone conference calls and electronic submissions – to improve the efficiency of the courts
- the introduction of a third tier of judges to deal with simple and low value claims. The procedure to be followed by these courts would be “inquisitorial”² and there would be the option to settle disputes using a free mediation service. Cases would be redistributed across the three court tiers on the basis of their complexity and value
- increased support for party litigants (those who represent themselves in court rather than using the services of a lawyer) through simpler court rules, better on-line information, in-court advice services and provision for “lay representation”³
- modernisation of court procedure to allow, for example, for multi-party (or “class”) actions or better access to judicial review proceedings

The Scottish Government has published a [response](#) (2010) to the report which, broadly speaking, accepted Lord Gill’s proposals. Key differences are in the specifics of how a third tier court might operate and, given financial constraints, how services to support access to justice could be developed.

The Gill Review specifically recommended that a Scottish Civil Justice Council be created. Having considered the arguments for and against a new, unified rules council which would also take forward civil justice reform (see chapter 15), the Review concluded that Scotland would benefit from a civil justice council which has an overview of the work of both the Court of Session and the sheriff courts. The Gill Review envisaged a Scottish Civil Justice Council with a wide remit. It proposed that the Council would perform the following tasks:

- keeping under review the provision of civil justice by the courts in Scotland
- monitoring the implementation of the Gill Review recommendations
- keeping abreast of developments in other jurisdictions and considering proposals for further reform
- giving advice on Scottish Government proposals which impact on civil justice
- commissioning research
- drafting new rules for adoption as Acts of Sederunt
- modernising current court rules and harmonising the approaches of the sheriff courts and Court of Session where possible

² Inquisitorial procedures empower the judge to take an active role in getting to the truth of the matter by questioning witnesses and calling for certain evidence to be led. This contrasts with the general “adversarial” approach of court procedure in Scotland where it is up to the parties to decide what evidence to lead and what questions to ask.

³ Lay representation refers to allowing someone who is not a lawyer to present a case in court for a third party. Lay representatives can be semi-professionals in their field but are more usually friends of the party or representatives of voluntary or advice organisations which the party has consulted.

The Review recognised that the Council would have to be properly resourced to undertake this work and suggested that the SCS should have to job of providing a suitable secretariat (for which additional resources would be needed).

BUDGET ISSUES

The SCS is facing large reductions in both operating and capital budgets over the coming years. The Scottish Government's [Draft Budget 2012-13](#) (2011a) provides for a decrease in expenditure over the three year spending review period, with a total real terms fall of 19.5% (McCallum and Bremner 2011). As a result, a number of cost-saving measures are being pursued by various justice agencies, including action to tackle the number of court hearings which are cancelled or adjourned and consultation on rationalising court buildings.

It is unclear how the budget situation may impact on the introduction of reforms suggested in the Gill Review. While those reforms are expected to reduce costs in the long term, there may be short-term start-up costs in relation to new structures and processes. In its response to the Gill Review (2010), the Scottish Government stated (paragraph 31):

“the reforms recommended by Lord Gill must be viewed in the context of the current pressures on public spending which will constrain the scope for additional investment, and at the very least will require that reforms are managed carefully and phased in over a period of years.”

Scottish Ministers are currently [consulting](#) on an increase in court fees (2012). It is proposed that fees will increase at above the rate of inflation in each of the next three years in order to bring the pricing structure closer to full-cost recovery. The consultation suggests that the increase in costs recovered (above inflation) over the next three years will be invested in civil court improvements – including a new IT system and the delivery of the reforms envisaged in the Gill Review. The additional costs of a Scottish Civil Justice Council will be included in this.

A SCOTTISH CIVIL JUSTICE COUNCIL – THE LEGISLATIVE PROPOSALS

INTRODUCTION

The Bill proposes that the Sheriff Court Rules Council and the Court of Session Rules Council are replaced by a single Scottish Civil Justice Council. The Council will have responsibility for developing policy in relation to civil justice issues as well as proposing new civil court rules to be submitted to the Court of Session.

PREVIOUS CONSULTATION

The Scottish Government has consulted on its proposals in its “[Consultation on the Creation of a Scottish Civil Justice Council](#)” (2011b). Responses were received from a variety of professional and third sector organisations involved in civil justice. An analysis of responses is expected to be published by the Scottish Government. However, at the time of writing, this had not yet happened.

REMIT OF THE SCOTTISH CIVIL JUSTICE COUNCIL

Under the Bill's proposals, the Council will have a wide remit to keep the civil justice system under review. It will have broader powers than the Sheriff Court and Court of Session Rules Councils which it replaces. The specific functions of the Council (section 2 of the Bill) will be as follows:

- to keep the civil justice system under review
- to review civil practice and procedure in the Court of Session and the sheriff court
- to prepare draft civil procedure rules and submit them to the Court of Session
- to advise and make recommendations to the Lord President on the development of the civil justice system
- to provide such advice in relation to the civil justice system as the Lord President may request

In carrying out its functions, the Council is to have regard to a number of principles (also outlined in section 2 of the Bill). These are:

- that the civil justice system should be fair, accessible and efficient
- that rules relating to practice and procedure should be as clear and easy to understand as possible
- that practice and procedure should, where appropriate, be similar in all civil courts; and
- that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted

According to the Scottish Government (Policy Memorandum, paragraph 11), these principles echo the principles laid out in the Gill Review as key to delivering a high quality civil justice system.

The Council is empowered both to formulate policy and to propose new court rules for consideration by the Court of Session. This is different from the system in England and Wales, where the policy-making and rule-drafting functions are given to separate bodies. The Scottish Government states that, in its view, a single body is better suited to the smaller size of the Scottish jurisdiction and also to the task of implementing a major package of reforms (Policy Memorandum, paragraph 23).

The role of the Civil Justice Council (the body responsible for the development of civil justice policy in England) was [reviewed](#) in 2008 (Ministry of Justice). The report concluded that a body at arms' length from government chaired by a senior member of the judiciary was the right way to discharge this policy function. The report also made a number of recommendations to improve the way the Civil Justice Council (CJC) went about its work. Key among these was the need for openness and transparency so that all relevant interests could feed into the CJC's processes, including the need for formal consultation on policy proposals.

The report also highlighted a tension between pursuing CJC members' personal interests and maintaining a strategic overview. It noted that it was important for members to see themselves as serving the public interest, and the priorities of the CJC, rather than representing sectorial interests. It was also important that the CJC guarded against accusations of "lobbying" for

particular solutions. This could be helped by being inclusive and taking an evidence-based approach to policy development.

Those responding to the Scottish Government's consultation (2011b) generally welcomed the creation of a new, unified Scottish Civil Justice Council with a policy and rules-drafting remit. Perceived advantages included harmonising rules and practice across the court system (Association of Personal Injuries Lawyers 2011), the ability to bring a wide range of interests together to draft suitable rules (Association of British Insurers 2011) and the ability to take a strategic, rather than technical, view (Senators of the College of Justice 2011).

However, there was some concern about the practical difficulties of dealing with such a wide-ranging remit. The Sheriff Court Rules Council (2011) noted that the time and effort required to carry out the work of both current rules councils while also dealing with a policy remit should not be underestimated. It also noted that it may not be appropriate for active members of the judiciary to take on a policy-making role.

Some consultees raised concerns about the accessibility of current court rules. In its [response](#) (2011 paragraphs 25 to 34), Consumer Focus Scotland outlined concerns that court rules as they are presently made⁴ are too formal and complex to be accessible to non-lawyer court users. It recommended that a new rules council take on the role both of drafting and of approving rules, and that a "plain English" approach be adopted. It also emphasised the importance of consulting on draft rules proposals before they are approved and recommended that the non-lawyer members of the rules council should have a key role in signing off rules.

MEMBERSHIP OF THE SCOTTISH CIVIL JUSTICE COUNCIL

Section 6 of the Bill outlines the membership of the Council. It is to have not more than 20 and not less than 14 members. They are as follows:

- the Lord President (who may delegate to the Lord Justice Clerk)
- the chief executive of the Scottish Court Service (who may delegate to a member of her staff)
- the principal officer of the Scottish Legal Aid Board (who may delegate to a member of his staff)
- one member appointed by Scottish Ministers (who must be a member of Scottish Government staff)
- at least four judges, including a minimum of one Court of Session judge and one sheriff
- at least two practising advocates
- at least two practising solicitors
- at least two consumer representative members
- up to six other people whom the Lord President considers to be suitable

⁴ The current procedures for making court rules is discussed above.

It is envisaged (Policy Memorandum, paragraph 15) that the six additional members who may be appointed by the Lord President (known as “LP members”) will enable the Council to utilise specific expertise while giving it the flexibility to deal with changing work priorities over time.

The Bill proposes that either the Lord President, or a Court of Session judge member nominated by the Lord President, will chair the Council. The deputy chair is to be elected by the members of the Council but must be a judicial member. Members appointed by the Lord President (ie. excluding those who are members by virtue of their office and the Scottish Ministers’ appointee) will hold office for three years, unless they become disqualified, and may be reappointed for further periods. The Council is able to establish committees and may appoint any person who is not already a Council member to attend.

Section 10 allows expenses and remuneration to be paid to Council and committee members (staff of the Scottish Government, SLAB staff and judges are able to receive expenses but not remuneration). However, the Policy Memorandum states (paragraph 19) that it is expected that members will normally be unpaid.

During consultation, some organisations (see Consumer Focus Scotland 2011 and Citizens Advice Scotland 2011) called for the Council to have a broad membership, including a significant number of members from outwith the legal profession. Consumer Focus Scotland stated that a non-lawyer member should chair the Council. It was suggested that such measures might result in court rules which are more accessible to court users without a legal background. Other respondents argued for the need for representation from other interest groups, for example the Scottish Law Commission to ensure co-ordination between its work and the work of the Council (Association of Personal Injury Lawyers 2011), or those with an interest in tribunals if the Council were to take on a remit in relation to administrative justice (Senators of the College of Justice 2011).

Section 7 requires that the Lord President publishes a statement outlining how members of the Council will be appointed (excluding those members who attend by virtue of their office and the Scottish Ministers’ appointee). This may be used to provide greater transparency as to how candidates are selected and assessed as suitable for the posts. However, it falls short of what was called for by some consultees. Citizens Advice Scotland (2011) and Consumer Focus Scotland (2011) called for appointments to be by the [Public Appointments Commissioner](#) (operating under the auspices of the [Commission for Ethical Standards in Public Life in Scotland](#)). It should be noted that the Commissioner currently deals only with appointments made by Scottish Ministers, whereas relevant appointments to the Scottish Civil Justice Council would be made by the Lord President.

OTHER ISSUES

Continuous improvement

In its consultation on the issue (2011b), the Scottish Government discussed the possibility of the Scottish Civil Justice Council having the role of enabling ongoing adaptation and improvement of the civil justice system. The Scottish Government refers to its role as “fostering a culture of continuous improvement” (paragraph 23). However, the Bill does not outline how – beyond the general functions given to the Council in section 2 of the Bill – it will perform this task.

In its response to the Scottish Government’s consultation, Consumer Focus Scotland (2011) considered how a Scottish Civil Justice Council might effectively engage with court users to provide the sort of feedback required to allow continuous improvement. It recommended wide and early consultation on issues the Council was considering, including with groups and

individuals outside the legal profession. It suggested that the Council develop a consumer engagement strategy and recommended that specific reference was made in legislation to the requirement to engage with individual court users.

The review of the CJC in England (Ministry of Justice 2008) emphasised the importance of developing a forward work plan in a manner which was open, transparent and systematic. It argued that this would help set clear priorities and prevent stakeholders feeling disenfranchised (as some appeared to be due to the opaque nature of the planning process in place at the time). The review recommended that the CJC produce a three year work programme, similar to those produced by the Law Commission and the Scottish Law Commission. This should be developed on the basis of priorities identified by CJC and committee members, consultation with external stakeholders, research, including into court-user views, and specific gap analysis techniques.

Administrative justice

The Scottish Government's consultation also proposed that the Scottish Civil Justice Council might take on a role in considering issues of administrative justice⁵, including the functioning of tribunals. The UK Government has announced plans to abolish the [Administrative Justice and Tribunals Council](#) (the body with responsibility for overseeing the development of administrative justice in the UK), including its Scottish Committee (HC Deb 2010). This decision has been challenged in a number of forums, most recently by the [Public Administration Select Committee](#) (2012). However, at the time of writing, the UK Government remains committed to such a course of action. The Scottish Government put forward the view (2011b) that the Council would be well placed to take over some of the work of the Scottish Committee of the Administrative Justice and Tribunals Council to ensure that no gap in oversight ensued.

The Bill makes no provision for the Council to have an administrative justice remit. According to the Policy Memorandum (paragraphs 29 and 30), consultees generally supported the idea that the Council should have a remit over administrative justice issues. However, the future structure of the tribunal system in Scotland is the subject of ongoing consultation (see below). The Scottish Government has therefore proposed that the Council should take on functions in relation to administrative justice when judicial leadership of tribunals transfers to the Lord President under the proposed reforms. It is not clear exactly what the Council's future remit in relation to administrative justice might be.

The Scottish Government (2012a) is currently [consulting](#) on plans to reform the structure underpinning the tribunal system. The consultation envisages a new, unified structure for tribunals, which will be capable of absorbing a number of existing Scottish tribunals. Administration will be provided by the [Scottish Tribunals Service](#) (which already provides support to several tribunals operating in Scotland). It also leaves open the possibility that tribunals under the control of the UK Government could be included at some point in the future (subject to UK Government consultation and action on this matter). Under the proposals, the Lord President will take on the role of judicial leadership for tribunals. Legislation will be needed to implement these reforms: however, the Scottish Government has not yet announced a timescale for legislative action.

⁵ The website of the Administrative Justice and Tribunals Council defines administrative justice as follows: "Government regulates various aspects of our everyday lives, making decisions in relation to individual people. 'Administrative justice' includes the procedures for making such decisions, the law that regulates decision-making, and the systems (such as the various tribunals and ombudsmen) that enable people to challenge these decisions."

LEGAL AID

THE CRIMINAL JUSTICE SYSTEM

Structure

The criminal justice system in Scotland encompasses the work of justice of the peace courts⁶, sheriff courts sitting in their criminal capacity and the High Court of Justiciary. Justice of the peace courts were previously known as district courts and were under the administrative control of local authorities. As part of the process of summary justice reform discussed below, their administration was brought within the remit of the Scottish Court Service (the body responsible for the staffing and administrative support of the other courts operating in Scotland).

There are two forms of court procedure used to prosecute crimes in Scotland's courts: summary and solemn procedure. Summary procedure is used for less serious crimes. It is used in justice of the peace courts and sheriff courts. Justice of the peace courts can impose a prison sentence of up to 60 days and a fine of up to £2,500. Sheriff courts (when operating under their summary jurisdiction) can impose a prison sentence of up to one year and a fine of up to £10,000⁷.

Solemn procedure is used for more serious offences including, but not limited to, murder, rape and serious assault. Cases dealt with under solemn procedure can be heard in the sheriff courts or the High Court of Justiciary. A jury sits with the judge, if the case goes to trial, in such cases. When operating under solemn jurisdiction, sheriff courts can impose a prison sentence of up to five years and an unlimited fine⁸. As well as an unlimited fine, the High Court can sentence offenders to life in prison.

The vast majority of offences are prosecuted under summary procedure, with figures from the Crown Office and Procurator Fiscal Service highlighting that 95% of cases going to court between April and September 2011 were dealt with this way. In addition, 92% of the cases going to court in the same period did not progress to a trial. Note also that a number of criminal charges are dealt with without recourse to the courts, through methods such as police warnings, fiscal fines or on-the-spot fines. 42,555 cases were dealt with this way between April and September 2011 compared with 50,124 cases going to court.

Further information about the criminal courts in Scotland is available in the SPICe briefing "[The Scottish Criminal Justice System: The Criminal Courts](#)" (McCallum 2011).

Summary criminal justice reform

A process of summary justice reform started in 2001 with the creation of the Summary Justice Review Committee. Its report – the "[Summary Justice Review Committee: Report to Ministers](#)" was published in 2004. Although not all its recommendations were accepted, the report formed the basis of a major and ongoing initiative to make summary criminal justice more fair, effective and efficient. More information is available in the SPICe briefing "[Summary Criminal Justice Reform](#)" (McCallum 2009).

⁶ In Glasgow, qualified solicitors known as "stipendiary magistrates" also sit in the justice of the peace court. They have the same sentencing power as sheriffs hearing summary cases.

⁷ Where an offence is set out in statute, the legislation can provide for greater prison sentence or fine under the relevant procedure than the limits noted here.

⁸ As above.

The legislative aspects of reform were taken forward in the Criminal Proceedings etc. (Reform) (Scotland) Act 2007. This had several strands including: increasing the sentencing powers of summary criminal courts; expanding alternatives to prosecution; improving fine collection; and replacing district courts with justice of the peace courts. A number of non-legislative initiatives were also taken forward to improve communication between justice agencies and to streamline court processes and procedures. This work continues under the Scottish Government's "Making Justice Work" programme discussed above.

One of the significant issues which summary criminal justice reform sought to tackle was the number of "late" guilty pleas – ie. the number of guilty pleas which were tendered after the first "diet" (or hearing) in relation to a charge. The earlier a guilty plea is tendered, the fewer resources have to be devoted to the case by the criminal justice system. In terms of cost and efficiency, it therefore makes sense to encourage appropriate guilty pleas as early as possible in the process. In its recent review of Scotland's criminal justice system (2011), Audit Scotland estimated that "late" guilty pleas cost the system £47 million per year.

The legal aid system has a role to play in this process. For example, standard payments under Assistance By Way of Representation and summary Criminal Legal Aid have already been harmonised to try and ensure that there is no incentive to solicitors to encourage a not guilty plea to earn more money. Part of the purpose of the current Bill is to address concerns that an incentive to plead not guilty may still exist for accused persons because they may receive full summary Criminal Legal Aid when, if they plead guilty, they may have to make a financial contribution under Assistance By Way of Representation.

THE RIGHT TO A FAIR TRIAL

The right to a fair trial is a legal tradition in Scots Law. It is also a requirement of the Human Rights Act 1998 and the European Convention on Human Rights. Article 6 of the Convention outlines the right to a fair trial. It states:

"Everyone charged with a criminal offence has the following minimum rights:

(. . .)

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"

Criminal legal assistance is the method by which those in Scotland who would not otherwise be in a position to afford it are able to access legal advice and representation. It is important not only to those who wish to defend themselves against accusations of criminal conduct but also to those who plead guilty as they can also benefit from legal help in stating their case (eg. highlighting to the court any factors which might lead to a more lenient sentence).

THE CURRENT SCHEME FOR CRIMINAL LEGAL ASSISTANCE

Introduction

Legal aid provides financial assistance to those on low and moderate incomes to enable them to access legal advice. The term "criminal legal assistance" is used in this briefing to refer to all types of legal aid available for criminal matters. The term "Criminal Legal Aid" is used to refer to a specific form of legal aid available in prescribed circumstances. The SPICe briefing "[Legal Aid](#)" (Bremner 2011) looks at Scotland's system for legal aid provision in more detail.

Framework

Under the Legal Aid (Scotland) Act 1986, the Scottish Legal Aid Board (SLAB) has responsibility for administering the legal aid budget. SLAB grants or refuses applications for certain types of legal aid as well as assessing accounts from lawyers and making payments. Over the years, SLAB has been given additional powers which give it a more strategic role in relation to legal aid. For example, it is able to directly employ solicitors to provide services to members of the public, and does so in relation to both criminal and civil matters. This gives SLAB some direct control over service provision on top of its role in paying for legal services.

Criminal legal assistance

Criminal legal assistance is currently provided through a number of different schemes. The framework for each is laid out in the 1986 Act. However, the extent to which requirements are laid out in primary legislation, contained in subordinate legislation or left to the discretion of SLAB varies. SLAB produces the "[Scottish Legal Assistance Handbooks](#)", which detail the factors which influence its decisions in relation to legal aid.

Criminal legal assistance has the following strands:

- **Automatic Criminal Legal Aid** is available without the application of any eligibility criteria in a limited number of situations where there is a significant risk that the interests of the accused will be prejudiced, for example, because of the serious nature of the charges against them or their inability to instruct a defence
- the **Duty Solicitor** is available to act in certain circumstances where Automatic Legal Aid is available. Note that free representation from the court duty solicitor is only available to those who appear directly from police custody (or on an undertaking to appear in summary cases)
- **Advice and Assistance** is available to provide advice, although not representation in court, in relation to any aspect of Scots law. Applicants must pass a financial eligibility test
- **Assistance By Way of Representation** is a form of Advice and Assistance. It allows solicitors to represent their clients in certain forums, including where a client pleads guilty in a summary criminal case. To receive Assistance By Way of Representation in a summary case, an accused person has to pass an "interests of justice"⁹ test as well as a financial eligibility test
- **summary Criminal Legal Aid** is available to those who plead not guilty in a summary case. It pays for both advice and representation in court. In order to receive summary Criminal Legal Aid, an applicant must pass an "interests of justice test"¹⁰ as well as a financial eligibility test
- **solemn Criminal Legal Aid** is available to those who face charges under solemn procedure. It pays for both advice and representation in court. To receive solemn Criminal Legal Aid, an applicant must pass a financial eligibility test only

⁹ The "interests of justice" test for Assistance by Way of Representation requires consideration to be given to whether the sentence is likely to lead to loss of liberty or livelihood; whether the case is going to be complex to present in court; or whether the accused is able to understand the proceedings.

¹⁰ The "interests of justice" test for summary Criminal Legal Aid requires that consideration is given to the factors listed above and, in addition, whether it is in the interests of someone else that the accused is represented; whether the accused has a non-frivolous defence; or whether the accused has been remanded in custody pending trial.

- **Criminal Legal Aid for appeals** is available where an accused appeals an aspect of the court's final verdict. An applicant must pass a financial eligibility test and, where there is no requirement to apply to the court for leave to appeal, an "interests of justice"¹¹ test

The present Bill deals specifically with Assistance By Way of Representation (in relation to summary criminal matters) and Criminal Legal Aid.

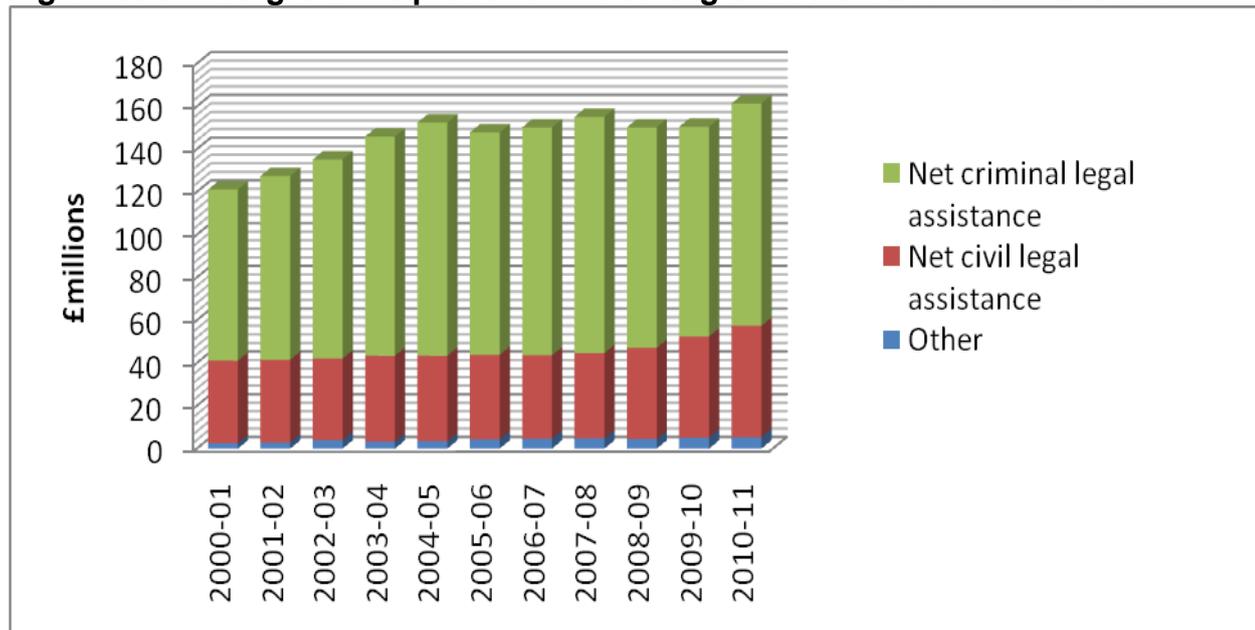
As well as paying solicitors in private practice, SLAB directly employs solicitors in the [Public Defence Solicitors' Office](#). Its services cover the whole of Scotland. Only those who qualify for legal aid can use the Public Defence Solicitors' Office.

THE LEGAL AID BUDGET

Like other Scottish Government budget lines, the legal aid budget is under pressure. The Scottish Government's [Draft Budget 2012-13](#) (2011a) provides for a decrease in expenditure over the three year spending review period, with a total real terms fall of 14.2% (McCallum and Bremner 2011). However, expenditure on legal aid is "demand-led". The Scottish Government (through SLAB) is legally obliged to make payments in relation to all claims which meet the statutory requirements. Thus, the Government can seek to regulate costs by changes to the eligibility rules, but the actual cost in any year depends on demand and is not within the direct control of either the Scottish Government or SLAB.

Figure 1 below shows total net expenditure on legal aid over the last decade. Net expenditure is the total cost to the legal aid fund minus any income generated (for example financial contributions made by recipients to the cost of Civil Legal Aid). It does not include SLAB's administration costs.

Figure 1: Total legal aid expenditure on the legal aid fund 2000/01 to 2010/11



Source: SLAB 2006, 2010 and 2011

The total net expenditure in 2010-11, at £161.4m, was higher than at any other point during the past 10 years. Expenditure on civil legal assistance in 2010-11 was also at its highest level (£52.1m). Expenditure on criminal legal assistance was £104.0m. This was higher than the preceding year, although still lower than the peak of £110.5m in 2007-08.

¹¹ The legislation does not lay down any specific factors to be considered when looking at the "interests of justice" test for criminal appeals. All the matters listed above may be relevant.

The Scottish Government has already put in place several cost-saving measures in relation to legal aid. These include changes to the way Civil Legal Aid operates as well as cuts to certain fees for solicitors and set rates for advocates. It is estimated these will save between £15 million and £16 million per year.

In its publication “[A Sustainable Future for Legal Aid](#)” (2011c), the Scottish Government outlines further proposals to reduce costs to the legal aid budget. By implementing these cost-saving measures, the Scottish Government believes it can avoid making significant cuts to the financial eligibility criteria or the types of cases for which legal aid is available. The measures are summarised in table 1 below.

Table 1: Estimated Cost-Savings to the Legal Aid Budget by 2014-15

Proposal	Estimated saving by 2014-15 £m
Legal aid fund	
Introducing financial contributions to the cost of Criminal Legal Aid for those who are assessed as being able to afford to make them	combined saving of 4.5 to 5.0
Increasing the period used for assessing contributions for Advice and Assistance (to provide a more accurate picture of income)	
Revising guidance on the reasonableness of funding Advice and Assistance (considering cost to legal aid fund versus client benefit)	
Improving systems for checking whether an applicant has other means of funding legal action (eg. insurance)	
Implementing recommendations from SLAB’s current (including mental health, court reporters) and future best value reviews	2.0 to 3.0
Implementing block contracting arrangements (as an alternative to solicitors being paid for individual cases) for Criminal Legal Aid work	3.0
Making additional changes to fees paid to advocates	2.1
Changing the way unusual cases are handled (including reductions to fees paid to solicitors where an advocate is also being instructed)	1.6
Increasing the use of video conferencing to reduce the need for solicitors providing legal aid to travel	1.2
Total	14.4 to 15.9
Administration costs	
Realising savings in administration costs (eg. through an expansion of online systems for processing legal aid applications and accounts)	1.2
Total	1.2

Source: Scottish Government 2011c

Further information about the implications of the 2011 spending review for the legal aid budget is available in the SPICe briefing “[Draft Budget 2012-13: Justice](#)” (McCallum and Bremner 2011).

The Justice Committee looked at the legal aid budget as part of its scrutiny of the Draft Budget 2012-13. The Committee took evidence from interested parties, including the Law Society of Scotland, the Scottish Legal Aid Board and the Faculty of Advocates. It concluded (Scottish Parliament Finance Committee 2011, Annex J, paragraph 57):

“The Committee welcomes partnership working between justice bodies to tackle the constraints on their budgets, which appears to be complemented by the Scottish Government’s ‘Making Justice Work’ programme and proposals for legal aid reform. **The Committee will wish to monitor whether this joint working succeeds in delivering the necessary cost reduction without compromising standards (...)**”

CRIMINAL LEGAL AID – THE LEGISLATIVE PROPOSALS

INTRODUCTION

The Scottish Government proposes to introduce financial contributions from recipients of Criminal Legal Aid. The current system (see above) requires that, where an applicant meets the undue hardship test (and an “interests of justice” test in the case of summary Criminal Legal Aid), the full cost of their defence is met from the public purse. The Bill will also introduce a new financial eligibility test, based on undue hardship, which will apply to certain types of criminal Assistance By Way of Representation (ABWOR) and Criminal Legal Aid.

Criminal ABWOR is currently available in a number of forums, as laid out in in the Advice and Assistance (ABWOR) (Scotland) Regulations 2003. However, the Scottish Government’s policy intention is that the new undue hardship test will be applied only to ABWOR for guilty pleas in summary criminal cases, at least in the first instance. In the rest of this briefing, the phrase “summary criminal ABWOR” is used to refer to such situations.

PREVIOUS CONSULTATION

The Scottish Government consulted on broad proposals in relation to introducing contributions for Criminal Legal Aid in its publication “[Consultation on the Introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility](#)” (2011d). In the consultation, it was noted that financial contributions are not a new concept. Those receiving criminal legal assistance under the Advice and Assistance and ABWOR schemes may already be required to make a contribution to the cost of their defence where they are assessed as able to do so. It also highlighted that contributions are required in other jurisdictions, such as England and Wales and the Netherlands. An [analysis of responses](#) to the consultation has also been published (Scottish Government 2012b).

SUMMARY OF CHANGES MADE BY THE BILL

The table below summarises the changes to the current schemes of criminal legal assistance made by the Bill.

Table 2: Summary of Changes to Criminal Legal Assistance made by the Bill

Type of Legal Aid	Current Situation	Changes made by the Bill
<p>Criminal Advice and Assistance</p> <p>Criminal Advice and Assistance provides advice from a solicitor – but not representation in court – in relation to any aspect of Scots criminal law.</p>	<ul style="list-style-type: none"> • Advice and Assistance is subject to a financial eligibility test. • Solicitors assess eligibility for, and collect any financial contribution in relation to, Advice and Assistance. 	<p>In the specific situation where Advice and Assistance is available for advice from a solicitor prior to and during police questioning, the Bill empowers ministers to make regulations disapplying the requirement to pay a financial contribution.</p>
<p>Criminal Assistance By Way of Representation (ABWOR)</p> <p>Criminal ABWOR is part of the Advice and Assistance scheme. However, it enables solicitors to represent clients in certain forums, including where they plead guilty to a summary criminal charge.</p>	<ul style="list-style-type: none"> • Criminal ABWOR is subject to a financial eligibility test and, in relation to guilty pleas to a summary criminal charge, an “interests of justice” test as well. • Solicitors assess eligibility for, and collect and financial contribution in relation to, criminal ABWOR 	<p>The Bill removes criminal ABWOR from the rules governing Advice and Assistance and aligns it with Criminal Legal Aid. Although the powers in the Bill are wider, it is intended to limit the changes to criminal ABWOR where a guilty plea is made to a summary criminal charge.</p> <p>There will be a new financial eligibility test for summary criminal ABWOR, based on “undue hardship” (see below). The “interests of justice” test will remain the same.</p> <p>Solicitors will continue to assess eligibility and collect contributions although it will be possible, in limited circumstances, to apply directly to SLAB.</p>
<p>Criminal Legal Aid</p> <p>Criminal Legal Aid allows representation from a solicitor for those who plead not guilty to summary criminal charges, to those who face solemn criminal charges or to those who appeal a verdict.</p>	<ul style="list-style-type: none"> • In summary cases, Criminal Legal Aid is subject to a financial eligibility test and an “interests of justice” test. In solemn cases, there is a financial eligibility test only • In appeal cases, there is a financial eligibility test and, where leave to appeal from the court is not required, an “interests of justice” test • The financial eligibility test is based on “undue hardship” • SLAB is responsible for assessing eligibility for Criminal Legal Aid 	<p>The Bill introduces a new “undue hardship” test, under which an accused is assessed to determine whether they will have to make a financial contribution to their legal aid bill. The “interests of justice” tests will remain the same.</p> <p>SLAB will remain responsible for assessing eligibility. However, solicitors will be required to collect any contributions due under summary Criminal Legal Aid. SLAB will collect contributions for solemn Criminal Legal Aid and appeals.</p>

ADVICE AND ASSISTANCE

Section 17 of the Bill gives Scottish Ministers a regulation-making power. It applies to “Cadder” cases¹² – cases where solicitors are called on to give advice to clients before or during police questioning. The provisions enable Scottish Ministers to remove the requirement for a client in these circumstances to make a financial contribution to Advice and Assistance (where they are assessed as requiring to do so).

In its response to the Scottish Government consultation, the [Law Society of Scotland](#) (2011) highlighted problems with the current position. Solicitors can face difficulty establishing with any accuracy what the correct financial contribution should be. Advice is usually provided over the telephone and, even where there is face-to-face contact, a client in police custody is unlikely to have relevant paperwork available to show the level of income or savings they have. In addition, any contribution assessed cannot be paid at the time. If payment is not made at a later date, solicitors may struggle to demonstrate that it is due as no “terms of engagement” letter (which forms the contract between a solicitor and their client) will have been issued where advice was given over the telephone.

ALIGNMENT OF ABWOR AND CRIMINAL LEGAL AID

The Bill proposes to change the financial eligibility tests for summary criminal ABWOR, as well as summary and solemn Criminal Legal Aid. The “interests of justice” tests¹³ currently in place for ABWOR (in summary cases), summary Criminal Legal Aid and appeals will remain the same, as will any other requirements in relation to the specific forms of legal aid. The effect of the proposals will be to remove summary criminal ABWOR from the statutory financial eligibility test covering civil and criminal Advice and Assistance and other types of ABWOR and to align it with a new statutory test, based on “undue hardship”, which will cover summary criminal ABWOR and Criminal Legal Aid.

Summary criminal ABWOR is currently available, subject to meeting the eligibility criteria, to those who plead guilty in summary cases. Criminal Legal Aid is available, again subject to eligibility criteria, to those who plead not guilty in summary cases or who face solemn criminal charges (regardless of how they plead). By introducing the same financial eligibility test for these forms of criminal legal assistance, the Scottish Government hopes to remove any incentive an accused may have to plead not guilty to summary criminal charges in order to benefit from more generous legal aid provision¹⁴.

Respondents to the consultation were in favour of a similar test across these three forms of criminal legal assistance, with “undue hardship” being the preferred form of test. This was seen as simplifying the current system.

THE NEW “UNDUE HARDSHIP” TEST

The current financial eligibility test which applies to summary and solemn Criminal Legal Aid is known as an “undue hardship” test. It requires SLAB to consider whether the expenses of the case can be met without undue hardship to the accused or their dependants. SLAB has developed a series of rules – including, for example, deductions from income in respect of

¹² In the case of *Cadder v. HMA* [2010] UKSC 43, the court held that it was a breach of a suspect’s human rights (the right to a fair trial) to be questioned by police without the opportunity to consult with a lawyer.

¹³ See footnotes 10 and 11 for information about the requirements set out in the “interests of justice” tests.

¹⁴ An accused may currently be required to pay a contribution towards ABWOR, whereas those in a similar financial position are not required to contribute at all to their defence under Summary Criminal Legal Aid.

dependants – which it uses to determine whether the undue hardship test has been met. The current undue hardship test is an “all or nothing” test. If the accused’s income is below the threshold, the full cost of their defence is met from the public purse. If it is above the threshold, the accused must foot the bill themselves.

The Bill proposals introduce a new undue hardship test, which will apply to applicants for summary criminal ABWOR and Criminal Legal Aid. The new test will require financial contributions towards their legal aid bill from accused people assessed as needing to make them. The basic income considerations appear in section 19 for criminal ABWOR and section 20 for Criminal Legal Aid. However, the detail of the scheme will be set out in regulations to be made by Scottish Ministers under section 22.

One respondent to the consultation (Scottish Government 2012b) was in favour (in principle, rather than in practice) of the introduction of contributions. Out of the remaining nine, four objected and five did not express a direct opinion. The Scottish Government decided to proceed with the introduction of contributions on the basis that the current situation, where contributions are payable in Civil but not Criminal Legal Aid, is unfair. In addition, the Scottish Government states that the savings envisaged by introducing contributions have to be delivered. It is argued that the only alternatives would be to cut fees to solicitors or to reduce the number of people eligible to receive legal aid (2012b, paragraphs 13 and 14).

Sections 19 and 20 require that an accused with a **disposable** income of, or exceeding, £68 per week¹⁵ or capital of at least £750¹⁶ is required to make a contribution to their legal aid bill. However, no contribution from income will be required from those in receipt of the key means tested social security benefits – income-based jobseeker’s allowance, income support and income-related employment and support allowance – regardless of whether their income exceeds the £68 threshold. Nevertheless, where their capital exceeds £750, a contribution from capital will be required.

The Policy Memorandum gives further details of how Scottish Ministers may decide to assess the level of contribution payable (see paragraphs 54 to 67, especially the tables at paragraphs 60 and 61). However, the full details will not be known until a scheme of assistance and draft regulations are published under section 22.

It is intended that SLAB will be able to exercise some discretion in granting criminal legal assistance where undue hardship would otherwise be created by circumstances not foreseen in the regulations. An example might be where someone has significant costs related to a disability above and beyond any provision made in the regulations. SLAB can exercise this discretion itself in relation to awards of Criminal Legal Aid (as SLAB will be responsible for assessing applications). For summary criminal ABWOR, where solicitors will usually be responsible for assessing entitlement, section 18¹⁷ sets out a two stage application process whereby an accused who cannot get a solicitor to grant summary criminal ABWOR will be able to apply directly to SLAB.

Section 18 also requires SLAB to publish a “scheme of eligibility” in relation to summary criminal ABWOR. It is expected that this will provide additional guidance in relation to how the “undue hardship” test should be applied.

¹⁵ It is suggested in the Policy Memorandum that regulations will provide that this figure is net of deductions for dependants and for necessary expenditure such as rent or mortgage (as is currently the case).

¹⁶ There are currently more generous limits in place for those who are 60 or over, and it is expected that this will continue to be the case.

¹⁷ Via section 9A(1)(a) and (b), and 9A(3) inserted into the Legal Aid (Scotland) Act 1986.

The test in relation to income

The Policy Memorandum outlines a suggested scheme for financial contributions. As noted above, the details of how a scheme will actually operate will not be known until the Scottish Government publishes regulations under section 22. Under the example proposals in the Policy Memorandum, disposable income between £68 and £222 will be banded, with a percentage (increasing as income increases) required to be contributed towards legal aid. So, for example, someone with a disposable income of £110 per week may be expected to contribute 20% of their income between £68 and £100, and 40% of their income between £100 and £110 (giving a contribution of £10.40 per week). It is also suggested that different percentage scales will be used for cases under different procedures – so a contribution for a justice of the peace case will be calculated differently from a contribution in a summary sheriff court case.

Someone with disposable income in excess of £222 per week will not receive criminal legal assistance at all unless there are factors relating to their case which would create undue hardship if they were required to meet the costs themselves (such as the need for expert witnesses which would make it unusually expensive). This is the same test as is currently applied to those with disposable income above £222.

In addition, the Policy Memorandum suggests that contributions will be sought for a set number of weeks depending on the nature of the case. This means that there is no direct link between the cost of the particular case and the level of contribution an accused may be expected to make (although contributions will be sought for longer in more serious cases – see below). Instead, the contribution is likely to be at a set level depending on the seriousness of the charges and the way the accused pleads. Nevertheless, where the accused has paid more in contributions than the case actually costs, they will be entitled to a refund (Policy Memorandum, paragraph 60).

For example, it is suggested that an accused who pleads guilty in a justice of the peace court case (and is legally represented under summary criminal ABWOR) might be expected to make contributions for eight weeks, whereas someone facing trial under solemn procedure might make contributions for 52 weeks. This reflects the varying seriousness and complexity of criminal proceedings (and also the legal defence costs). Using the notional examples given in the Policy Memorandum (see paragraph 61 and table 2), this suggests a potential maximum contribution of £626 for someone pleading guilty in a justice of the peace court, ranging to £1,518 for someone facing solemn charges.

The test in relation to capital

It is unclear how contributions from capital will be assessed. Currently, all capital above the threshold is considered to be available to pay the cost of legal aid. However, the Policy Memorandum (paragraph 64) suggests that a graduated payment depending on the level of capital available is likely – so that only a percentage of capital above the threshold would be paid towards the legal aid bill.

Comparisons to current financial eligibility tests

At the moment, someone with a weekly disposable income of £222 or less will receive full Criminal Legal Aid (assuming they meet the requirements in relation to capital). Someone with disposable income above this figure will, in most circumstances, be expected to meet the whole costs of the case themselves. Someone with a weekly disposable income of £245 or less can

receive ABWOR (where they qualify in relation to capital), with those with incomes of between £105 and £245 being required to make a contribution.

The Scottish Government intends that the Bill will generate savings by requiring contributions from certain accused people who would previously not have needed to make a contribution (or, in the case of summary criminal ABWOR, may have been required to make a smaller contribution). However, the proposals will also render a small number of accused people ineligible for criminal legal assistance when previously they would have qualified. The way in which potential savings are generated is discussed in more detail in paragraphs 151 to 163 of the Financial Memorandum.

The eligibility threshold is set at the same level as currently for both summary and solemn Criminal Legal Aid, but those with incomes below the threshold may now be expected to pay contributions towards their legal aid bill. The eligibility threshold for summary criminal ABWOR will be reduced, with contributions expected from those with lower incomes than was previously the case.

The capital threshold will also be reduced across these three types of criminal legal assistance – from £1,716 to £750. However, it is likely that only a percentage of capital above the threshold will be payable – potentially reducing contribution levels in comparison to the current scheme for some. The capital threshold is not generous in comparison to other benchmarks. For example, claimants of income support are able to hold capital of up to £6,000 before it affects their entitlement. The capital threshold for Civil Legal Aid is £7,853 (although, on average, civil cases cost more to conduct than criminal cases, exposing civil legal assistance applicants to greater potential expenditure).

The Policy Memorandum (paragraph 54) suggests that the financial resources of both the accused and any partner will be taken into consideration when calculating financial eligibility¹⁸. This is currently the case in relation to ABWOR. However, for Criminal Legal Aid, the resources of a partner are only considered to the extent of determining whether necessary household costs should be shared between the accused and their partner or deducted from the accused's income alone. The change might, therefore, have an adverse impact on any partner or dependants of the accused, as well as the accused's eligibility for criminal legal assistance. In their [response](#) to the Scottish Government's consultation, Families Outside (2011) noted that requiring contributions could have an impact on an accused's family (particularly if family capital resources were to be included in the assessment) when the family members bear no responsibility for the alleged crime.

RESPONSIBILITY FOR COLLECTING CONTRIBUTIONS

At present, solicitors are responsible for assessing eligibility for, and collecting contributions in relation to, ABWOR. SLAB assesses eligibility for Criminal Legal Aid (and there are currently no contributions to collect). Under the Civil Legal Aid scheme, SLAB both assesses eligibility and collects contributions so that, once an applicant is accepted onto Civil Legal Aid, SLAB is responsible for paying the solicitor's bill (to the extent allowable under legal aid regulations).

Under the proposals contained in the Bill, the solicitor will remain responsible for assessing eligibility for and collection contributions to summary criminal ABWOR. SLAB will continue to assess eligibility for Criminal Legal Aid and will take on the new responsibility of assessing the contributions payable by the accused. However, solicitors will be responsible for collecting

¹⁸ Where a partner has a contrary interest in the case (eg. they are a co-accused or appear as a Crown witness), their resources will not be considered. In addition, allowances are subtracted from capital for any dependants of the accused.

contributions in summary Criminal Legal Aid cases, with SLAB taking on responsibility for collecting contributions in relation to solemn and appeal Criminal Legal Aid cases.

Solicitors will be able to treat any contributions from clients as fees¹⁹. This means that they will be able to bank them immediately rather than holding them in a client account. The Law Society of Scotland (Scottish Government 2012b, paragraph 12) argued that this would help with cash flow for solicitors.

Consultees (Scottish Government 2012b) believed that SLAB should be responsible for collecting contributions for all forms of criminal legal assistance. The [Law Society of Scotland](#) (2011) in particular raised a number of concerns in relation to placing the burden of collection on the solicitor. For example, the Society noted that the consultation (Scottish Government 2011d) envisaged non-payment rates of between 10% and 30% which would expose solicitors to substantial additional risk. It also noted that SLAB has procedures in place for collecting civil contributions and that a number of other jurisdictions, including England and Wales, have made provision for central collection when introducing criminal contributions.

The Scottish Government's position (2012b) is that splitting responsibility for collection, as outlined in the Bill, shares the risk, with SLAB taking responsibility for the most expensive cases. It also noted that solicitors have a direct relationship with their client, which can make the collection of contributions easier. Finally, the original consultation noted that requiring solicitors to collect contributions for summary criminal ABWOR and SLAB to collect contributions for summary Criminal Legal Aid could create a perverse incentive for solicitors to encourage clients to plead not guilty as they would be relieved of their collection responsibility.

Practical implications

Summary cases represent the vast majority of criminal work (95% of cases, see above). This means that solicitors will be responsible for collecting any contributions due over a large part of their case load. As highlighted above, the Scottish Government consultation (2011d) suggested that non-payment rates might be between 10% and 30%. Under the proposals, solicitors will bear the costs of such non-payment in summary criminal ABWOR and summary Criminal Legal Aid cases. However, figures provided by SLAB (Policy Memorandum, paragraph 66 and table 3) suggest that only around 18% of clients will be assessed as requiring to pay a contribution – thus limiting solicitors' exposure.

Solicitors will be able to receive full payment from SLAB in relation to solemn cases. This will include payment of any fees for expert witnesses or advocates which have been required for the case (and which have been sanctioned by SLAB)²⁰. It is likely that most of the cases requiring expert witnesses or advocates will be solemn cases – although it is also possible for such resources to be needed in summary cases.

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.

¹⁹ See section 19(3) inserting section 11A(4) into the Legal Aid (Scotland) Act 1986 and section 20 inserting section 25AC(5) into the 1986 Act

²⁰ Instructing solicitors are required to pay these fees as a matter of professional practice.

It is also unclear how the application process for summary Criminal Legal Aid will operate as SLAB will be responsible for awarding legal aid and assessing contributions while solicitors will be responsible for collecting contributions. In order to advise a client properly, a solicitor is likely to need to be able to tell them at their first meeting how much they might need to contribute towards their bill.

Concerns about the introduction of contributions causing delays in the justice system have been highlighted by the Scottish Court Service and the Crown Office and Procurator Fiscal Service (Scottish Government 2012b, paragraph 12). This may occur where it is unclear whether an accused person has been awarded criminal legal assistance (although this may happen already in relation to Criminal Legal Aid) or where a solicitor has withdrawn their services due to non-payment by the accused. In both situations, a judge may choose to postpone a hearing in order that the situation can be clarified.

THE TREATMENT OF CONTRIBUTIONS WHERE THE ACCUSED IS ACQUITTED

The Bill makes no provision for the repayment of contributions towards criminal legal assistance where an accused is acquitted. The Scottish Government noted (2012b) that to provide a refund of contributions to those who received legal aid would put them in a better position than those who paid privately for their defence. In England and Wales, those who are acquitted can recover their costs from the Crown regardless of whether they paid privately or received legal aid funding (although the costs which can be recovered have been capped at legal aid rates).

Those who responded to the consultation (Scottish Government 2012b) believed that it should be possible to recover contributions on acquittal. The [Faculty of Advocates](#) (2011) voiced the strongest opposition to a system which did not allow recovery, arguing that this would create perverse incentives to plead guilty to reduce the cost of the case, or to give up work in order to receive social security benefits and access legal aid.

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