

SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL

REVISED EXPLANATORY NOTES

CONTENTS

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Scottish Civil Justice Council and Criminal Legal Assistance Bill (introduced in the Scottish Parliament on 2 May 2012) as amended at Stage 2. Text has been added or amended as necessary to reflect amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL – AN OVERVIEW

4. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as priorities:

- the establishment of a Scottish Civil Justice Council to replace the Sheriff Court Rules Council and the Court of Session Rules Council. It will also have a new, wider, role to advise and make recommendations on improving the civil justice system in Scotland.
- introducing financial contributions in criminal legal aid thereby ensuring that those who are able to pay towards the cost of their defence do so. The Bill will also make changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.

CRIMINAL LEGAL ASSISTANCE – OVERVIEW

5. In order to further assist the reader and to help inform debate on part 2 of the Bill in particular, an overview is provided below of the current criminal legal assistance scheme in Scotland, including in which circumstances, and how, financial contributions are required, and how part 2 of the Bill proposes to change this.

6. Publicly funded legal assistance in Scotland is potentially available for virtually all types of criminal cases, as it is for virtually all types of civil disputes. Eligibility for both civil and criminal legal assistance is controlled by tests set out in the Scottish legal assistance legislation. There are various forms of criminal legal assistance provision currently available, appropriate for different situations and cases. These forms of criminal legal assistance as they currently operate are described below.

Advice and Assistance

7. The advice and assistance (A&A) scheme allows a client to receive publicly funded preliminary advice and assistance from a solicitor on a criminal matter. It does not provide for representation of the client by the solicitor. The solicitor is responsible for determining whether the client is eligible for A&A, the test for which is financial and is set out in section 8 of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). The client may have to pay a contribution towards the cost of the advice and assistance. Again, it is up to the solicitor to determine the level of the contribution and to collect it from the client. The levels of contributions are prescribed in Regulations, the most recent of which are the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011.

8. In order to allow the solicitor to calculate any contribution due, or in fact to assess whether an individual is eligible for A&A, the solicitor uses guidance from the Scottish Legal Aid Board (“the Board”), called a keycard which is published on the website of the Board.¹

9. Where A&A is provided at a police station, A&A will be given without reference to the financial limits set out in section 8 of the 1986 Act, although a contribution may still be due.

10. The Bill makes no changes to the A&A scheme as it is described here. However, section 17 of the Bill allows Scottish Ministers to bring forward regulations to remove the requirement to pay a contribution to the costs of A&A when it is provided in certain circumstances, such as at a police station.

Assistance by Way of Representation

11. Assistance by Way of Representation (ABWOR) is an extension of the A&A scheme, which is used when the solicitor is required to take any step on behalf of their client in instituting, conducting or defending certain proceedings. In criminal cases ABWOR is most commonly used where a client is pleading guilty. Again, in respect of ABWOR it is the solicitor

¹ www.slab.org.uk

who applies the eligibility test (which is financial) and it is the solicitor who calculates and collects any contribution which may be due from the client.

12. In certain proceedings, the eligibility test may be both based on the financial means of the client and whether it is in the interests of justice that ABWOR be granted, and the solicitor must determine this.

Summary Criminal Legal Aid

13. Summary criminal legal aid is used following a plea of not guilty in custody and cited cases. Summary criminal legal aid is used for less serious criminal offences, such as road traffic matters, breach of the peace and some assaults, which are prosecuted in the district or sheriff courts. Unlike for A&A and ABWOR, it is the Board which assesses applications for summary criminal legal aid for eligibility. The Board assesses both whether paying the full costs of the case would cause undue hardship to the applicant and whether it is in the interests of justice to make legal aid available.

14. In deciding what would be undue hardship in a case, the Board looks at an applicant's and their dependants' unique circumstances. The Board publishes full guidance on its website on how it carries out the "undue hardship" test.²

15. When assessing whether it is in the interests of justice to make summary criminal legal aid available the Board is required to consider a number of factors, including:

- the likelihood of a sentence which would deprive the applicant of liberty or livelihood,
- any complexities involved in the case,
- the ability of the applicant to understand the proceedings,
- the possible interests of third parties, and
- whether the applicant has a defence to the charge.

16. At present, if an applicant has been found eligible to receive summary criminal legal aid then he/she is not required to pay any contribution to the costs of the case even if he/she could afford to do so.

Solemn Criminal Legal Aid

17. The responsibility for granting solemn criminal legal aid in most cases transferred from the courts to the Board on 25 November 2010. The test the Board applies to determine whether an applicant is financially eligible for solemn criminal legal aid is the same undue hardship test as is used in part for summary criminal legal aid. For solemn criminal legal aid, however, the Board does not determine what would be in the interests of justice.

²<http://www.slab.org.uk/profession/handbook/Criminal%20handbook%20master%20copy/wwhelp/wwhimpl/js/html/wwhelp.htm#href=Part%20III%20Carrying%20out%20criminal%20legal%20assistance/III%2012%20Summary%20-%20financial%20eligibility.html>

18. At present, if a client has been found eligible to receive solemn criminal legal aid then he/she is not required to pay any contribution to the costs of the case even if he/she could afford to do so.

Court Grants of Legal Aid

19. The courts still retain the power to grant legal aid in the following circumstances:

- Under section 23(1)(b) of the 1986 Act, in summary cases, where following conviction a first custodial sentence is being considered,
- Under section 30(1) of the 1986 Act in contempt of court cases.

20. No contributions to the costs of legal aid are currently payable in these cases and the Bill makes no proposals to change this.

Automatic Criminal Legal Aid

21. Criminal legal aid is automatically available to an accused person in certain situations. It is available without application and without enquiry as to the accused's financial means. The situations in which automatic criminal legal aid is available are set out in section 22 of the 1986 Act. In summary, they are:

- Representation at an identification parade;
- Certain proceedings under solemn or summary procedure where the accused has been taken into custody;
- Cases involving insanity, including an examination of facts;
- Sexual offences;
- Trials in absence (in solemn and summary cases) and
- Cases where on appeal the High Court has granted authority for a new prosecution for the same or similar offence.

22. Contributions are not currently due where an accused is in receipt of automatic criminal legal aid and the Bill makes no changes in this respect.

Criminal appeals

23. Most appeals go through a "sift" process, which is a court procedure to identify cases where it is considered there is merit to proceed to a full appeal hearing. Legal aid may be available for appeal cases. The Board only assesses these applications by looking at the financial means of the applicant and whether undue hardship would be caused. The Board is not required to consider whether the interests of justice mean that the applicant should receive the legal aid. If legal aid had been granted for the case at first instance, the undue hardship test of the applicant's financial means is not required to determine the application for legal aid for the appeal.

24. For other appeals such as petitions to the *nobile officium*, or applications for special leave to appeal to the Supreme Court, the Board requires to apply both the undue hardship test as regards the applicant's financial means and the interests of justice test to these applications.

Introducing financial contributions in criminal legal aid

25. As described above, currently recipients of criminal legal aid are not required to pay a contribution towards the cost of their case even if they could afford to do so. The Bill will amend this by introducing the requirement, with some exceptions, to pay a contribution in summary and solemn criminal legal aid first instance cases and in criminal appeals. This will ensure that there is as much consistency as is practicable across all of the various forms of criminal legal assistance, with contributions being required for A&A, ABWOR and criminal legal aid.

Changes to financial eligibility

26. In order to take forward further the principle of consistency described above, the Bill also aligns the eligibility test of the applicant's financial means across the various forms of criminal legal assistance. At present, the eligibility test for criminal legal aid is the undue hardship test described above. The eligibility test for ABWOR on the other hand is based on the guidance as set out in the Board's keycard. These different tests mean that some people would be eligible for one type of criminal legal assistance and would not be eligible for the other. The Bill will change this, by moving to a single undue hardship test for all types of criminal legal assistance (in which the financial means of the applicant must be considered).

COMMENTARY ON SECTIONS

Part 1 - Scottish Civil Justice Council

Section 2 – Functions of the Council

27. This section sets out what the functions of the Council are. In carrying out its functions the Council must have regard to the principles set out in subsection (3) and any guidance issued by the Lord President.

28. Whereas the functions in subsections (1)(b) and (c) relate to the rules of civil procedure, (continuing the broad remit of the existing rules councils) three of the functions (1)(a), (d) and (e) specifically relate to the wider "civil justice system". This is intended to bear its ordinary meaning, and would include matters such as arrangements for the administration of the courts by the Scottish Court Service, the availability of legal assistance in pursuing disputes, and the law governing civil procedure in the courts.

29. Subsection 2(1)(c) provides that the Council is to prepare and submit draft civil procedure rules to the Court of Session. "Civil procedure rules" are defined at subsection (4), by reference to subsections (5) and (6). Subsection (5)(c) makes it clear that in addition to preparing draft procedure rules and submitting them to the Court of Session, the Council may also draft rules in relation to a proposed court in anticipation of that court being established; and in anticipation of the Court of Session being given the power to make rules for that court.

This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill as amended at Stage 2 (SP Bill 13A)

30. Subsection (3) sets out the principles which the Council must have regard to in carrying out its functions. Subsection (3)(c) provides that one of the principles is that, where appropriate, practice and procedure should be as similar as possible in all civil courts. This recognises that there may be instances where a distinct procedure is necessary, for example, where legislation provides that a case must be raised in a particular court.

31. The principle at subsection (3)(d) - that methods of resolving disputes which do not involve the courts should, where appropriate, be promoted - would include methods such as arbitration, mediation or adjudication.

Section 3 – Powers of the Council as amended at Stage 2

32. Subsection (1) makes it clear that the Council may take any action it considers necessary or desirable in pursuance of its functions. Subsection (2) sets out specific actions that the Council may take.

33. Subsection (2)(a) enables the Council to take into account proposals for future legislation which might affect the civil justice system.

34. Under subsection 2(c) the Council will be able to take into account the civil justice system's interaction with the criminal justice system.

35. Under subsections (2)(d), (e) and (ea), the Council may consult and work with other persons in order to carry out its functions. These provisions will enable the Council to, for example, seek the views of and commission non-governmental organisations to carry out research on matters relating to the civil justice system.

36. Subsection (2)(f) makes it clear that the Council may make recommendations for change to the Scottish Ministers, for example, if it considered primary legislation was necessary.

37. The Council must publish a summary of any recommendations it makes under subsection (2)(f) by including these in its annual report, provided for at section 5. It may however, publish any (and all) of its recommendations under subsection (2)(g).

Section 4 – Court of Session to consider rules

38. This section provides that any draft civil procedural rules submitted by the Council must be considered by the Court of Session. The Court of Session may approve (with or without modification) or reject the draft rules, and if it approves them must embody them in an act of sederunt. The Bill does not however affect the ability of the Court of Session to prepare or make civil procedure rules of its own initiative, or under any other enactment.

Section 5 – Annual programme and report

39. This section provides that the Council must, before 1 April each year, prepare a programme which sets out its objectives and priorities for the following year. As soon as is reasonably practicable after 31 March each year it must also prepare a report on its activities for the preceding year.

40. Subsection (4) requires the Council to lay a copy of its programme and report before the Scottish Parliament. Under subsection (5) the documents can be combined when doing so. The programme and report may therefore be laid before Parliament after 31 March each year, once the Council's report is prepared.

Section 6 – Composition of the Council

41. Section 6 makes provision for the composition of the Council, setting the maximum number of members at 20 and the minimum at 14. The section is to be read in conjunction with sections 7 (Lord President appointment process), 8 (Tenure), 9 (Disqualification and removal from office), 10 (Expenses and remuneration) and 16 (Interpretation of Part 1).

42. The section provides for the following types of member who, with the exception of the office holder members (listed in subsection (1)(a) to (c)) and the Scottish Ministers' appointee (appointed under subsection (2)), are all appointed by the Lord President.

- **Office holder members:** these are set out at subsection (1)(a) to (c) and are: the Lord President, the Chief Executive of the Scottish Court Service and the principal officer (who is the Chief Executive) of the Scottish Legal Aid Board (“the Board”). Each of these offices is defined at section 16. Section 8(1) provides that these individuals are members by virtue of their office and therefore are not appointed for any fixed period. These members are not eligible for remuneration for time served on the Council or any of its committees, as provided for by subsection 10(2). Sections 12(6) and 12(7) (Proceedings) allow the Chief Executive of the Scottish Court Service and the principal officer of the Board to send representatives to Council meetings in their place.
- **Judicial members:** under subsection (1)(e), the Council is to include at least four judges as members, including at least one judge of the Court of Session and at least one Sheriff Principal or sheriff. Section 8(3) provides that judicial members are to be appointed for three years, unless replaced, or unless removed under that section. These members are not eligible for remuneration, as provided for by section 10(2).
- **Advocate members:** under subsection (1)(f), the Council is to include at least two practising advocates as members. An advocate is defined at section 16 as a member of the Faculty of Advocates. The statement of appointment practice to be prepared under subsection 7(2) will provide that the Lord President must consult the Faculty of Advocates before appointing advocate members. Advocate members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).
- **Solicitor members:** under subsection (1)(g), the Council is to include at least two practising solicitors as members. A “solicitor” is defined at section 16 as a person qualified to practise as a solicitor under section 4 of the Solicitors (Scotland) Act 1980 and includes solicitor advocates. The statement of appointment practice to be prepared (under section 7(2)) will provide that the Lord President must consult the Law Society of Scotland before appointing solicitor members. Solicitor members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).

- **Consumer representative members:** the Council is to include at least two individuals who, in the Lord President’s opinion, between them, fulfil the criteria set out at subsection (1)(h)(i) to (iii). Persons with knowledge of the non-commercial advice sector include both lawyers and non-lawyers with knowledge of the not-for-profit provision of legal advice and services. The statement of appointment practice to be prepared under section 7(2) will provide that the Lord President must consult the Scottish Ministers before appointing a consumer representative member. Consumer representative members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2).
- **LP members:** the Lord President may appoint up to a further six persons as members of the Council under subsection (1)(i). The statement of appointment practice to be prepared under section 7(2) will provide that the Lord President must consult the Scottish Ministers before appointing LP members. LP members are appointed for a period of three years under section 8(4). These members are eligible for remuneration (if the Scottish Court Service decides to pay them) for time served on the Council or any of its committees under section 10(2), unless they fall within the categories set out at section 10(3).
- **Scottish Ministers’ appointee:** under subsection (2), the Scottish Ministers must appoint a Scottish Government member of staff to the Council. Under section 8(2), the Scottish Ministers’ appointee holds office until such time as a replacement member is appointed. Section 10(2) excludes the member appointed by the Scottish Ministers from being eligible for remuneration. Subsection 12(8) allows the Scottish Ministers to send another member of Scottish Government staff to representative to attend Council meetings in place of that member.

43. Under subsection (3), the Scottish Ministers have power, after consulting the Lord President, to amend the overall number of Council members and the numbers referred to in each category of membership. This would allow Ministers to alter the composition of the Council but, as specified at subsection (6), would not allow Ministers to modify the description of a category of membership (including the repeal of a category).

Section 7 – Lord President appointment process

44. This section places a duty on the Lord President to appoint the members in section 6(1)(e) to (i). That is, all members other than the office holders (referred to under section 6(1)(a) to (c) and the Scottish Ministers’ appointee (appointed under section 6(2)). The Lord President must also ensure the number of members in section 6(1)(e) to (i) stays at the required level.

45. Subsection (2) requires the Lord President to publish a statement of appointment practice which sets out the process which will be followed in appointing the advocate, solicitor, consumer representative and LP members. Subsections (2A) and (2B) require the Lord President, when preparing the statement of appointment practice, to have regard to the principles that appointments should be made fairly and openly; and that so far as reasonably practicable, all eligible persons should have the opportunity to be considered for appointment.

46. Subsection (3) specifies which bodies and persons the Lord President must consult before appointing certain members.

Section 8 - Tenure

47. This section should be read with section 9 (Disqualification and removal from office). It provides that all members, except the Scottish Ministers' appointee and office holder members, hold office for a period of three years. It also deals with various circumstances in which members cease to hold office.

48. Judicial members hold office for three years unless either replaced, or removed by the Lord President under subsection (3).

49. Under subsections (5)(d) and (6), a LP member ceases to hold office if, in the Lord President's opinion, the basis of their appointment has materially changed. This might occur where, for example, the person had been appointed on account of holding a post in a representative body and, since appointment, had stepped down from that post.

50. Subsection (7) provides that members are eligible for reappointment.

Section 9 – Disqualification and removal from office

51. Subsection (1) sets out certain categories of persons who are disqualified from being appointed as Council members. Subsection (2) provides for the circumstances in which persons appointed by the Lord President (under section 6(1)(e) to (i)) may be removed.

Section 10 – Expenses and remuneration

52. This section makes provision for expenses and remuneration. It provides that the Scottish Court Service ("the SCS") may, but need not, remunerate certain specified types of Council members or persons appointed as a member of a committee of the Council. Section 10(3) provides that members of staff of the Scottish Administration are not eligible for remuneration. This would exclude, for example, court clerks from remuneration as well as any Scottish Government staff.

53. All Council members and persons serving on committees (whether or not they are a Council member) are eligible to be paid such expenses as the SCS thinks fit.

Section 11 – Chairing of the Council

54. Under subsections 11 (1) and (2) the Lord President may appoint as chair of the Council the Lord President or any Senator member of the Council.

55. Subsection (4) provides that members must elect one of their number as deputy to the chair.

Section 12 – Proceedings

56. Except for subsections (1) and (2) under which the Lord President may specify the number of members which constitutes a quorum for Council meetings, section 12 provides that the Council may determine its own procedure and the procedure of any committees established by it.

57. Subsections (5) to (7) enable the office holder members to nominate persons to attend and participate in meetings on their behalf. Similarly, the Scottish Ministers may appoint an alternative member of Scottish Government staff to attend meetings in place of their appointed member. Under subsection (5) in particular, the Lord Justice Clerk may attend meetings on behalf of the Lord President, including as chair, whether or not the Lord Justice Clerk is a member of the Council.

Section 13 – Committees

58. This section makes provision for the establishment of committees. Under section 13(2), individuals may be appointed to committees although they are not Council members.

Section 14 – Dissolution of existing rules councils

59. Section 14 provides for the dissolution of the Court of Session Rules Council and Sheriff Court Rules Council and the repeal of the relevant statutory provisions under which those bodies were established.

Section 15 – Modification of enactments

60. Section 15 provides for various statutory amendments arising from the establishment of the Scottish Civil Justice Council and the dissolution of the Court of Session Rules Council and Sheriff Court Rules Council.

61. Subsection (1) makes amendment to the Legal Aid (Scotland) Act 1986 which makes clear that the Court of Session is to consult the Scottish Civil Justice Council before making procedural rules in relation to legal aid and assistance.

62. Subsection (2) makes an amendment to the Sheriff Courts (Scotland) Act 1971 to provide that the Court of Session must consult the Council before making rules of civil procedure in the sheriff court, except where those rules were submitted by the Council.

63. Subsection (3) makes an amendment to the Judiciary and Courts (Scotland) Act 2008 which provides that the Scottish Court Service has the function of providing administrative support for the Council.

Part 2 – Criminal Legal Assistance

Section 17 – Contributions in respect of automatically available criminal advice and assistance

64. Section 17 inserts a new subsection (1A) in section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Section 8A was introduced following the decision of the Supreme Court in *Cadder v HMA* by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. Section 8A currently provides that Scottish Ministers may make regulations prescribing the circumstances in which A&A in relation to criminal matters can be provided without reference to the financial limits in section 8. Section 8 prescribes the eligibility test for A&A which is based on a person’s financial circumstances.

65. The new subsection allows regulations to prescribe the circumstances in which A&A in relation to criminal matters may be provided without payment of a contribution in terms of section 11 of the 1986 Act.

Section 18 – Availability of criminal assistance by way of representation

66. Section 18 amends provisions in Part II of the 1986 Act about the availability of criminal A&A. Specifically, section 18 inserts a new paragraph (dda) in section 9(2) and inserts sections 9A and 9B. A consequential modification to section 9(2)(de) is made in section 23.

67. Section 9 of the 1986 Act provides that Scottish Ministers may make regulations in relation to the availability of assistance by way of representation (“ABWOR”) under Part II of the 1986 Act. Section 9(2)(de) provides that regulations can prescribe the proceedings at which ABWOR is available without contributions being levied under section 11 of the 1986 Act. Under section 11 a person may have to pay a contribution towards the A&A received where the person’s disposable income is over a certain specified limit or where the person is in receipt of certain benefits.

68. A related amendment to section 9 is in section 23(5) of the Bill which amends section 9(2)(de) of the 1986 Act to include reference to the new section 11A (which is inserted by section 19 of the Bill). As a result of the amendment the Scottish Ministers will have power under section 9(2)(de) to prescribe the proceedings at which ABWOR is available without being subject to contributions under section 11 or contributions for criminal ABWOR under section 11A.

69. Section 18 inserts a new paragraph (dda) into section 9(2) of the 1986 Act. This new paragraph provides that regulations can prescribe the criminal proceedings to which the new sections 9A and 11A are to apply instead of sections 8 and 11 in relation to criminal ABWOR.

70. Section 18 inserts a new section 9A into the 1986 Act. Section 8 of the 1986 Act provides the current eligibility test which determines whether A&A can be provided to a person. A&A can include ABWOR. The section 8 test is based on the financial circumstances of the applicant: whether the person has disposable income or capital exceeding certain amounts or whether the person is in receipt of certain benefits.

71. The new section 9A(1), inserted by section 18, sets out a new eligibility test for criminal ABWOR. The proceedings in respect of which criminal ABWOR may be provided will be prescribed by regulations made under section 9(2)(dda). The solicitor must consider the financial circumstances of the applicant, under section 9A(1)(a)(i), and must be satisfied that the criteria in section 9A(2) are met before criminal ABWOR can be provided to the person. The criteria in subsection (2) are that the scheme of eligibility (set out in section 9B) provides that the fees and outlays of the assistance cannot be met without causing undue hardship to the person or his/her dependants, and any other criteria that are prescribed by Scottish Ministers under section 9(2)(c) of the 1986 Act.

72. Separately, under section 9A(1)(b), criminal ABWOR can be provided to a person where the Board has approved the grant of ABWOR to that person. In addition, a person can ask the

Board to consider his/her application under the procedure created by the Board under section 9A(3).

73. Once criminal ABWOR has been granted under section 9A it is intended that the client will be obliged to alert his/her solicitor to a change in his/her financial circumstances, in order to ensure that the client is still eligible for criminal ABWOR. This obligation will be set out in regulations made under the existing powers in section 36(1) of the 1986 Act.

74. The “scheme of eligibility” is defined in subsection (4) for the purposes of the references to it in sections 9A and 9B to mean any scheme which has been approved by Scottish Ministers, or any part or modification of such a scheme.

75. Section 9A(5) provides that the availability of criminal ABWOR in terms of section 9A may be subject, by means of regulations, to the provisions of section 8A(1). Section 8A allows for criminal A&A to be made automatically available in certain circumstances.

76. Section 9B, also inserted by section 18 of the Bill, makes provision about the scheme of eligibility referred to in section 9A. Under subsection (1), it is for the Board to prepare and publish the scheme of eligibility. The Board must submit the draft scheme, under subsection (2), for approval by the Scottish Ministers. The Scottish Ministers may, by virtue of subsection (3), modify or approve the draft scheme. Under subsection (4) the Scottish Ministers have power to approve the scheme (including a modification of a scheme) or withdraw approval of a scheme or a modification, and to require the Board to prepare and publish a scheme under subsection (1). Under subsection (5), the Board must comply with any directions given by Scottish Ministers when preparing and publishing a scheme. Subsection (6) allows the scheme to make different provisions for different cases or classes of case.

Section 19 – Clients’ contributions for criminal legal assistance by way of representation

77. Section 19 amends section 11 of the 1986 Act. Section 11 of the 1986 Act provides for the levying of contributions in respect of A&A, which currently includes criminal ABWOR. Section 11(1) provides that a person is not liable to pay a contribution where the person does not meet the test in section 11(2) of having disposable income or capital of a certain amount, or where the person is in receipt of certain benefits. Section 19(1) amends section 11(1) to refer to the new section 11A and subsection (2) changes the title of section 11. The effect of the amendments is that a person is not required to pay a contribution under section 11 in respect of A&A (excluding criminal ABWOR) or a contribution under section 11A in respect of criminal ABWOR unless the test in section 11(2) or 11A(1) is met.

78. Section 19(3) inserts section 11A which makes provision about contributions due in respect of criminal ABWOR. The proceedings to which section 11A will apply can be prescribed by regulations made under section 9(2)(dda) of the 1986 Act, as inserted by section 18 of the Bill. A contribution is due where a person has disposable income over a certain prescribed amount and is not in receipt of certain benefits or capital, above a prescribed amount as provided for in section 11A(1). Section 11A(2) provides that a person must pay the contribution in respect of the assistance provided. The Scottish Ministers can, under section 33ZA(1) of the 1986 Act (as inserted by section 22 of the Bill), specify by regulations the amount payable by way of contribution and the maximum amount payable.

79. Section 11A(3) provides that, unless regulations prescribe otherwise, where criminal ABWOR is provided by a solicitor employed under sections 26, 27 or 28A of the 1986 Act, it is for the Board to determine the amount of the contribution under subsection (2) and to collect it. In all other situations, the contribution for ABWOR due under subsection (2) will be determined, and collected, by the solicitor. Section 11A(4) provides that a contribution collected by the solicitor is treated as a contribution towards fees or outlays properly incurred by the solicitor.

Section 20 – Contributions for criminal legal aid

80. Section 20 inserts a new section 25AC into the 1986 Act in respect of contributions for criminal legal aid. Section 25AC(1) provides that contributions are only due for criminal legal aid by virtue of subsection (3) or section 25AA(5) (which makes provision in respect of appeals under section 303A of the Criminal Procedure (Scotland) Act 1995).

81. Section 25AC(2)(a) provides that no contribution will be payable where a person is in receipt of legal aid under section 22(1) or section 23(1) of the 1986 Act. Section 22 concerns the automatic availability of criminal legal aid in certain circumstances and section 23(1) provides for the court to grant criminal legal aid in certain circumstances.

82. In proceedings where a contribution is due, a person is only liable to pay a contribution where, under section 25AC(2)(b), he or she has income above a certain prescribed amount and is not in receipt of certain benefits or capital above a prescribed amount.

83. Section 25AC(3) provides that a person must pay the contribution in respect of the assistance provided. The Scottish Ministers have power under section 33ZA(1) of the 1986 Act (as inserted by section 22 of the Bill) to specify by regulations the amount of contribution due and the maximum amount payable.

84. Section 25AC(4) makes provision about who collects the contribution. Unless otherwise provided for by regulations, where criminal legal aid is provided in connection with solemn or appeal proceedings, or by a solicitor employed under sections 26, 27 or 28A of the 1986 Act, it is for the Board to collect the contribution. In all other cases, the solicitor collects the contribution due.

85. Section 25AC(5) provides that a contribution collected by the solicitor is to be treated as a contribution towards any fees or outlays incurred by the solicitor.

86. “The solicitor” as referred to in section 25AC is defined in subsection (6) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

87. Section 20 of the Bill also inserts new section 25AD into the 1986 Act. Section 25AD sets out how the fees and outlays of a solicitor who has provided criminal legal aid are to be paid. Under subsection (1), unless regulations provide otherwise, the order of payment should be, first, from any contribution due, second, (in priority to all other debts) from any expenses payable by order of a criminal court and third, by the Board from the legal aid Fund.

88. Subsection (2) of section 25AD provides that the fees and outlays referred to in subsection (1) are those properly chargeable in accordance with section 33 of the 1986 Act, but do not include a salary payable to a solicitor employed under section 26, 27 or 28A of the 1986 Act. “The solicitor” as referred to in section 25AD is defined in subsection (3) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

Section 21 – Contributions for appeals where appellant is deceased

89. Section 21 of the Bill inserts additional subsections into section 25AA of the 1986 Act. Section 303A of the Criminal Procedure (Scotland) Act 1995 makes provision about the transfer of the rights of a deceased person to an authorised person. The authorised person is the deceased’s executor or a person the court considers has a legitimate interest. Section 25AA of the 1986 Act sets out the circumstances where criminal legal aid is available to the authorised person to institute or continue with such an appeal.

90. Subsection (5) of section 25AA, as inserted by section 21 of the Bill, provides that the Board may require the payment of a contribution, determined by the Board, for the criminal legal aid provided. Subsection (6) provides that either the estate of the deceased or the authorised person may be liable to pay the contribution, and subsection (7) provides that the contribution determined by the Board cannot exceed the whole expenses of the criminal legal aid being provided. Subsection (8) provides that the Board, when determining the contribution due, must take into account any contribution paid by the deceased prior to his or her death.

Section 22 – Regulations about contributions for criminal legal assistance

91. Section 22 inserts a new section 33ZA into the 1986 Act. This section gives the Scottish Ministers power to make regulations in connection with the amount, determination and collection of contributions (in relation to criminal legal assistance) due under sections 11 (only insofar as relating to criminal matters), 11A, 25AA or 25AC. Particular types of regulations which may be made under subsection (1) are listed in subsection (2). These are as follows: under subsection (2)(a) making provision to allow a lesser contribution to be levied where it can be shown that to levy such a contribution would result in undue hardship to the person or his/her dependants; under subsection (2)(b), making provision about determining contributions where a person is in receipt of criminal legal assistance for two or more distinct proceedings; under subsection (2)(c) specifying whether the Board or the solicitor determines or collects a contribution; under subsection (2)(d) specifying how contributions are to be transferred or accounted for where the contribution is in respect of proceedings which, whilst still live, change procedure; and under subsection (2)(e) making provisions about payment of contributions by instalments.

92. In terms of subsection (3), any regulations made under subsection (1) can make different provision for different cases or classes of case. “The solicitor” as referred to in section 33ZA is defined in subsection (4) to mean the solicitor who provides the criminal legal aid, or, where counsel provides the criminal legal aid, the solicitor who instructs counsel.

Section 23 – Consequential modifications

93. Section 23 makes consequential modifications to the 1986 Act as a result of the amendments and insertions made in sections 17 to 21 of the Bill. Subsection (2) amends section 4 of the 1986 Act to allow contributions paid to the Board in respect of criminal legal assistance to be paid into the legal aid fund.

94. Subsection (5) amends section 9(2)(de) to provide that section 11A shall not apply as respects ABWOR received in relation to such proceedings as Scottish Ministers may prescribe under section 9(1).

95. Subsection (6) amends section 11 of the 1986 Act to reflect changes made both by previous legislation to the legal status of solicitors employed by the Board under sections 26, 27 and 28A of the 1986 Act, and by Part 2 of this Bill.

96. Subsection (9) amends section 36(2)(b) of the 1986 Act to provide that regulations can be made to substitute different amounts for the amounts referred to in all the sections concerning criminal legal assistance (as currently provided for in the 1986 Act and as inserted by the Bill). The amendments also allow regulations to prescribe different amounts for different cases or classes of case in respect of all the current and inserted provisions.

97. Subsection (10) amends section 37(2) of the 1986 Act to provide that any regulations made under section 33ZA(1) will be subject to the affirmative resolution of the Parliament.

Part 3 – General

Section 24 – Ancillary provisions

98. This section provides ancillary order making powers for Scottish Ministers. Exercise of the powers will be subject to negative procedure, unless an order adds to, replaces or omits any part of the text of an Act in which case the order would be subject to affirmative procedure.

Section 25 – Commencement

99. This section deals with the date of commencement. Different elements of the Bill may be commenced at different times.

Section 26 – Short title

100. This section deals with the short title.

This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill as amended at Stage 2 (SP Bill 13A)

SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL

REVISED EXPLANATORY NOTES

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