Justice Committee

Summary Justice Reform

Written submission from the Scottish Legal Aid Board

1. Background

1.1 Between September 2007 and June 2008, the criminal justice system in Scotland underwent the largest and most far reaching reforms in a generation. Following consultation, the Scottish Government introduced reforms of summary criminal legal assistance on 30 June 2008.

1.2 Scottish Ministers determine legal aid policy, including fee rates and we provide advice to the Scottish Government on the operation of legal aid and administer the legal aid system. We worked in partnership with the Scottish Government, the Crown Office and Procurator Fiscal Service (COPFS), the Police, the Scottish Courts Service and the Law Society of Scotland to successfully implement the reforms. It was an excellent example of the significant things that can be achieved through partnership working.

1.3 The reforms to the summary justice system and summary criminal legal assistance complement each other and illustrate the potential of ‘whole systems’ approaches to policy development for the delivery of clearly specified outcomes. The reforms also illustrate the importance of legal aid in the wider justice system. The summary criminal legal assistance changes were specifically designed to support the main features of the wider reforms, such as the use of alternatives to prosecution, early effective preparation, early resolution of cases where appropriate and the intention to bring cases to court more quickly. Summary criminal legal assistance had to be changed to support the reforms and to ensure that solicitors would not be remunerated at lower levels as a result of the wider justice system changes.

1.4 This was an extremely challenging and major piece of work. We were asked to implement the summary criminal legal assistance reforms and associated new computer systems in around three months following consultation and succeeded in implementing the reforms on 30 June 2008. We held twelve information seminars for the legal profession across the country prior to implementation. We held a further nine seminars on accounts issues after the reforms were implemented. Following implementation, there have been periodic meetings between the Cabinet Secretary for Justice, officials from SLAB, COPFS, the Scottish Government and representatives of the Law Society of Scotland to discuss the operation of the legal aid changes. We continue to communicate with solicitors and hold bi-lateral discussions with the Law Society of Scotland about the effects of the reforms and how to

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1 Criminal legal assistance is the collective term used to describe the different forms of legal aid available for criminal cases: (i) advice and assistance; (ii) criminal legal aid; and (iii) ABWOR “Assistance by way of representation” which is a type of advice and assistance.
ensure the system operates effectively. In general, the feedback we have received from solicitors is positive about summary criminal legal assistance.

2. Reform of Summary Criminal Legal Assistance

2.1 The payment structure for summary criminal legal aid had remained unchanged for a number of years. Fixed payments were introduced in 1999 and they marked a radical departure from the system of detailed accounting. The fixed payments arrangements operate on the basis of a fixed fee for conducting a summary criminal case (within the range of cases to which they apply) involving a degree of “swings and roundabouts” across the range of cases rather than remuneration for each and every item of work in the circumstances of an individual case. An outline of the fees payable for guilty or not guilty pleas is available at Appendix 2.

2.2 The changes to summary criminal legal assistance which came into effect on 30 June 2008 were designed to support the wider summary criminal justice reforms and address a number of key issues:

- to appropriately reward solicitors for the work done in progressing the case
- to facilitate preparation
- to facilitate early disposal of cases where appropriate
- to remove a number of what were seen as perverse incentives in the old system which provided significantly higher payments to solicitors whose clients pled not guilty
- to avoid wasteful expenditure
- to encourage early communication between Crown and defence, thereby facilitating informed decision making by the accused.

2.3 The new legal aid system was designed to achieve these aims by front-loading the payment system for solicitors to help encourage early, effective preparation and, where appropriate, the earlier resolution of cases.

2.4 The main changes to the existing scheme were:

- the extension of the fixed payments structure to ABWOR in summary criminal proceedings
- the payments for ABWOR and summary criminal legal aid became the same in the sheriff court, thereby removing the perverse incentive to apply for criminal legal aid. The same case disposal fee was created for the sheriff and stipendiary magistrates courts of (£515) for ABWOR and criminal legal aid (the latter where the case does not proceed to trial beyond thirty minutes). Previously, the basic ABWOR fee was £70. The fee of £515 was specifically calculated and designed to include items such as preliminary advice work, attendance at a police station (where under two hours) and the first two deferred sentences
- the introduction of the “appointed solicitor” – with appropriate checks, solicitors who have a previous relationship with the accused can represent their clients from custody and be paid for this work, rather than the previous system in which only the duty solicitor could be paid for
representing those appearing from custody. Where a solicitor has a previous relationship with an accused, they are more likely to be aware of their client’s full personal circumstances and alongside early disclosure, can therefore advise on an appropriate plea
• payment for advice and assistance provided at the outset of a case is now subsumed into a subsequent grant of ABWOR or criminal legal aid
• the extension of ABWOR to cases which are continued without plea
• changes to the feeing structure for the duty solicitor scheme.

Issues prior to implementation

2.5 The Glasgow Bar Association (GBA) were unhappy with certain aspects of the proposed reforms to summary criminal legal assistance, particularly fee rates and they also objected to the overall projected reduction in criminal legal assistance expenditure flowing from the predicted decrease in case volumes resulting from the wider reforms. They took industrial action in 2008, which involved trying to disrupt Glasgow Sheriff Court by not operating the duty plan as normal. This meant that, following a request from Kenny MacAskill, Cabinet Secretary for Justice, only the solicitors from the Public Defence Solicitors’ Office (PDSO) and a small number of other duty solicitors represented those appearing from custody. The custody courts were able to operate despite this industrial action. The GBA would not communicate with us at that time and in 2009 they raised an action for judicial review of our decision to allocate slots on the duty solicitor plan to the PDSO, which they subsequently withdrew after interim interdict was refused. We are pleased that relations have since improved and we have re-commenced bi-lateral discussions with the GBA on the operation of legal aid.

3. Monitoring of the Reforms

3.1 An ongoing programme of monitoring the changes is taking place. Three meetings have been held with the Cabinet Secretary for Justice, officials from SLAB, COPFS, the Scottish Government and representatives of the Law Society of Scotland to discuss the operation of the legal aid changes. These meetings took place in December 2008, April 2009, and September 2009.

3.2 The reforms to summary criminal legal assistance have had an immediate impact.

Plea rates

3.3 As a result of the introduction of disclosure and the changes made to reduce the difference between the fees paid to solicitors for not-guilty or guilty pleas, we expected to see a reduction in the number of cases pleading not guilty at the outset of a case. At the beginning of the reforms, between June 08 and July 08, the percentage of guilty pleas tendered at first calling increased from 9.8% to 23.9% in Glasgow and from 31.6% to 43.9% in Dundee. More generally, across Scotland, we have also seen increases in
guilty plea rates at pleading diets. In 2007-08, the guilty plea rate at first calling was 22%. In 2008-09, this figure had risen to 33%.

Volume of cases and legal aid applications

3.4 The Scottish Government’s reforms to the summary justice system included the use of alternatives to prosecution, such as Fiscal direct measures. As a result, we expected to see a reduction in the number of summary criminal cases being prosecuted, but with a greater proportion of the remaining prosecutions relating to more serious matters. As legal aid is more likely to be granted for more serious matters, we expected to see an increase in the proportion of prosecutions in the summary courts receiving a grant of representational legal aid: either ABWOR or summary criminal legal aid. Experience to date bears this out:

- In 2006-07, prior to summary justice reform, 92,371 grants of ABWOR and summary criminal legal aid were made, which was 58% of the 159,500 cases in the courts.
- In 2008-09, there were 93,598 grants of ABWOR and summary criminal legal aid, (excluding breach cases such as breach of probation) which is 67% of the 138,713 cases prosecuted in the courts.

3.5 For the first full 12 month period since the changes were implemented, that is July 2008 to June 2009, volumes of applications have changed considerably:

- average grants of criminal advice and assistance by solicitors have fallen by 67% compared to the average receipts for April to June 2008. This is primarily because any advice and assistance provided is subsumed into any subsequent grant of ABWOR or criminal legal aid (with the exception of advice being tendered at a police station and the duration of such advice including travel and waiting exceeds 2 hours).
- grants of criminal ABWOR (mainly for guilty pleas or cases continued without plea) have increased by 153%. Disclosure and changes to fee rates has meant that the accused can make an early, informed decision on whether to plead guilty. This has led to an increase in grants of ABWOR.
- the average number of applications for summary criminal legal aid following a not guilty plea fell by 23%. This is because the perverse incentive to tender a plea of not guilty has been removed, thereby removing the need to apply for criminal legal aid and if disclosure is made in a case, the accused can make an early informed decision on whether to plead guilty and therefore use ABWOR instead of criminal legal aid.
- there has been a 22% reduction in cases going through the Duty Solicitor scheme. This is principally because of the significant number of cases which start in custody but where the solicitor is able to use the appointed solicitor scheme.
Expenditure

3.6 Our original costing model (based on the Scottish Government’s assumptions and estimates using 2006-07 volumes) projected that expenditure on summary criminal legal assistance for the first full year after the reforms (July 2008 to June 2009) would be around £57,789,452 compared to actual payments made to solicitors for all summary criminal work in 2006-07 (prior to the reforms) of £61,686,495.

3.7 For the first full 12 months (July 2008 to June 2009) the total payments to solicitors for summary criminal legal assistance will be around £57,362,176, a difference of £427,276 compared to the original costing model. The main difference between the revised forecast cost and the original estimate continues to be the greatly reduced numbers of advice and assistance grants by solicitors, the increased numbers of grants of ABWOR by solicitors and the very slow movement in the numbers of legal aid applications between the sheriff and Justice of the Peace courts. We have not seen any considerable movement of legal aid applications downwards from the Sheriff Court to the Justice of the Peace Courts.

Reductions in bureaucracy

3.8 Another key element of the reforms was the desire to simplify the system of criminal legal assistance and to reduce bureaucracy where possible. The new system was designed to reduce the number of times a solicitor has to interact with us for decisions or to submit accounts for payment.

3.9 The new arrangements have already led to a significant reduction in form filling for solicitors. As any work done under criminal advice and assistance is now subsumed into subsequent grants of summary criminal legal aid or ABWOR, solicitors now complete approximately 50% fewer advice and assistance forms. 51,971 intimations were received in 2008-09 compared to 103,932 in 2007-08. In addition, we have removed the need for separate accounts to be framed and sent to us for many of these cases. We estimate that solicitors will produce and send us around 87,000 fewer advice and assistance accounts a year.

3.10 In addition, when the reforms were introduced, solicitors could use Legal aid Online for intimating grants of criminal advice and assistance and ABWOR which is more efficient and easier to use than the revised paper forms. In September 2009, we launched Criminal Legal Aid Online and solicitors can now process summary criminal legal aid applications and sanction applications online. Legal aid Online allows solicitors’ firms to operate more efficiently: forms can be completed more quickly, we have faster turn-around times for our decisions and solicitors have increased cash flow through more efficient payment processes.

3.11 The current statistics for legal aid online participation are:
43% of criminal firms submit summary criminal legal aid applications online and the most current figures show that 43% of summary criminal legal aid applications are submitted online.

64% of firms submit advice and assistance grants and increase applications online and 64% of intimations and increases are received online. 33% of criminal advice and assistance accounts are received online.

Monitoring the effectiveness of the reforms and monitoring arrangements

3.12 These were very substantial changes and we are carrying out a programme of reviews into various aspects including:

- Review of duty solicitor scheme and appointed solicitors - We are reviewing the Duty Solicitor scheme and the ‘appointed solicitor’ arrangements to ensure that these provide best value and are operating effectively in supporting the summary justice reforms. It is solicitors who grant ABWOR and must satisfy themselves that the statutory tests have been met. We check all grants of ABWOR made by appointed solicitors and our compliance auditors are looking closely at these cases during their visits to firms as we have found instances in which the appointed solicitor process is not being operated as intended.

- Difference in financial tests between ABWOR and criminal legal aid - We are reviewing the relationship between the different financial eligibility test for advice and assistance/ABWOR and summary criminal legal aid and the extent to which this may impact on applications for criminal legal aid.

- Verification of financial eligibility in advice and assistance and ABWOR - We are reviewing the information an applicant must provide to their solicitor before the solicitor can be satisfied that they qualify financially for advice and assistance and ABWOR and make a grant.
Appendix 1

The Board’s Performance

Summary criminal legal aid applications

We publish annual performance targets and service standards for timeliness and accuracy in our Corporate Plan and report on our performance in our annual report. These documents are available on the Board’s website at www.slab.org.uk.

For timeliness, we aim to take a decision on 99% of summary criminal legal aid applications within 8 calendar days (or 5 calendar days if it is an online application). For the year to date we have achieved this target. The Board’s average processing time is just over 1 day. The average total duration (taking account of time when it is out of the Board’s hands after we have continued an application to ask the applicant or the solicitor for further information) is 7.3 calendar days. The processing times for summary criminal legal aid applications are therefore very fast.

For accuracy, we aim to make 98% of decisions free from materials errors. We are currently achieving 99% performance.

Appendix 2

Summary Criminal Legal Aid – Fees Payable from June 2008

<table>
<thead>
<tr>
<th></th>
<th>Sheriff Court &amp; Stipendiary Magistrates Court</th>
<th>Justice of the Peace Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plea of guilty – covers all work undertaken in the case with the exception of the following additional payments:</td>
<td>£515.00</td>
<td>£150.00</td>
</tr>
<tr>
<td>Attendance at a police station to provide advice and assistance or representation of the accused and the total time engaged (including, travel, waiting and attendance) exceeds 2 hours</td>
<td>Payable in addition to the above fee on a detailed basis</td>
<td>Payable in addition to the above fee on a detailed basis</td>
</tr>
<tr>
<td>Conducting a proof in mitigation for the first day (after the first 30 minutes)</td>
<td></td>
<td>£50.00</td>
</tr>
<tr>
<td><strong>Representation in court at a diet of deferred sentence (payable from the 3rd and subsequent diet)</strong></td>
<td>£50.00</td>
<td>£25.00</td>
</tr>
<tr>
<td><strong>Representation at any one diet of deferred sentence at which the court considers a report required under section 203 of the 1995 Act and where the case is disposed of.</strong></td>
<td></td>
<td>£50.00</td>
</tr>
<tr>
<td><strong>All work done in connection with a bail appeal</strong></td>
<td></td>
<td>£50.00</td>
</tr>
<tr>
<td><strong>Plea of not guilty - covers all work undertaken in the case with the exception of the following additional payments:</strong></td>
<td>£515.00</td>
<td>£315.00</td>
</tr>
<tr>
<td><strong>Attendance at a police station in relation to the provision of advice and assistance or representation of the accused and the total time engaged (including, travel, waiting and attendance) exceeds 2 hours</strong></td>
<td>Payable in addition to the above fee on a detailed basis</td>
<td>Payable in addition to the above fee on a detailed basis</td>
</tr>
<tr>
<td><strong>Conducting a trial or proof in mitigation for the first day (after the first 30 minutes)</strong></td>
<td>£100.00</td>
<td>£50.00</td>
</tr>
<tr>
<td><strong>Conducting an adjourned trial diet, during which no evidence is led, where there was no intention nor anticipation that evidence would be led, the only matter in consideration being the determination of the further procedure of the</strong></td>
<td>£50.00</td>
<td>£25.00</td>
</tr>
<tr>
<td>Description</td>
<td>First Day</td>
<td>Subsequent Days</td>
</tr>
<tr>
<td>----------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>Conducting a trial or proof in mitigation for the second day</td>
<td>£200.00</td>
<td>£50.00</td>
</tr>
<tr>
<td>Conducting a trial or proof in mitigation for the third and subsequent days (per day).</td>
<td>£400.00</td>
<td>£100.00</td>
</tr>
<tr>
<td>Representation in court at a diet of deferred sentence (payable from the 3rd and subsequent diet)</td>
<td>£50.00</td>
<td>£25.00</td>
</tr>
<tr>
<td>Representation at any one diet of deferred sentence at which the court considers a report required under section 203 of the 1995 Act and where the case is disposed of.</td>
<td>£50.00</td>
<td>£25.00</td>
</tr>
<tr>
<td>All work done in connection with a bail appeal</td>
<td>£50.00</td>
<td>£50.00</td>
</tr>
<tr>
<td>Where the solicitor represents an assisted person who has been remanded in custody at or subsequent to the first calling of the case and that assisted person is at any time during that remand under 21 years of age.</td>
<td>£100.00</td>
<td>£100.00</td>
</tr>
<tr>
<td>Rural court supplement</td>
<td>£50.00</td>
<td>-</td>
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