

International Legal Aid Conference

Antwerp 2007

National Report: Scotland

Key points

- The long term trend for both volumes and cost of criminal legal assistance is upwards, while that for civil legal assistance is downward. Total expenditure on all forms of legal aid over the last two years has been at its highest ever level.
- The Board, Scottish Executive and the professional bodies have been and continue to be involved in a wide ranging programme of reform to the structures and payment regimes for all forms of legal aid. This is designed to ensure proper remuneration for work done by lawyers, while focusing expenditure more effectively, providing better overall financial control and introducing quality assurance arrangements for all aspects of legal assistance.
- Much of this reform work has been necessitated by, or contributes towards, reforms in the wider justice system, of which legal aid is a key element.
- The Board has recently been given new powers and a more proactive role in working with and funding the advice sector, through block and grant funding arrangements, and employing solicitors directly to provide civil services direct to clients.

Overview

1. Legal advice and assistance is available on any matter of Scots Law. Legal aid is available for both civil and criminal proceedings. It covers the cost of assistance from, and representation in court by, solicitors and advocates where this is required, as well as any out of pocket expenses incurred by solicitors in providing these services.
2. The total gross cost of legal aid in 2005/06 was €232m¹, a 4% decrease on the previous year, but still the second highest total ever. The increase over a ten year period has been 11%. In 2006, Scotland had an estimated population of 5,116,900, meaning that the overall per capita gross cost of legal aid was approximately €45. The net cost in 2003/04 was €216m, giving a net per capita cost of €42. The per capita figures are broadly unchanged since the Killarney conference.
3. Responsibility for policy matters on legal aid rests with the Scottish Executive (the devolved government of Scotland). This includes matters of eligibility, the proceedings for which legal aid is available and the rates payable to solicitors and advocates.
4. The responsibility for the administration of the legal aid system in Scotland rests entirely with the Scottish Legal Aid Board (the "Board") which is an independent statutory body. Ministers are expressly prohibited by statute from intervening in the Board's handling of individual cases.
5. The Board is a non-Departmental public body (NDPB) and acts independently within the powers afforded to it by statute. Its Management Statement and

¹ 1 GBP = 1.46287 EUR

Financial Memorandum are determined by the Scottish Executive after consultation with the Board.

6. The Board currently consists of a chairman and 13 members. At least 2 members must be members of the Faculty of Advocates; at least 2 members must be members of the Law Society of Scotland and at least one other member must have experience of the procedure and practice of the courts. The Board currently employs around 300 staff.
7. The functions of the Board under the Act are :-
 - advising Scottish Ministers on the current operation and development of legal aid provision
 - investigating different ways of delivering a legal aid service
 - developing operational plans and procedures, including e-business, to improve the delivery and administration of legal aid
 - considering applications for civil and where appropriate criminal legal aid and making decisions on whether to grant or refuse these.
 - examining accounts sent in by solicitors and advocates for all legal aid work, and paying them the appropriate amount for the work they have done
 - collecting expenses and contributions
 - registering firms and solicitors under the Code of Practice in relation to criminal legal assistance and monitoring their ongoing compliance
 - investigating and pursuing abuse of legal aid
 - advising Scottish Ministers on legal aid matters
 - administering the Legal Aid Fund
 - carrying out research
 - operating the Public Defence Solicitors Office
 - employing solicitors to provide civil legal assistance, and other services in pilot projects under Part V of the Act.
8. The Board has also recently been given the power to provide grants for a range of purposes, including direct advice, assistance and representation, as well as other activity which supports the provision of such services.
9. Payments made out of the Legal Aid Fund are financed by a grant from the Scottish Executive, contributions from assisted persons, recovery of expenses, and any property recovered or preserved by the assisted person in the proceedings. The grant is not cash limited as it covers the shortfall between the payments made out of the Fund and the "income" received from contributions/expenses/damages. The cost of running the administration of the Board is paid by a grant-in-aid from the Scottish Executive, which is cash-limited.
10. Legal aid is increasingly and appropriately seen as part of the wider justice system. This is particularly important as there is currently a significant reform programme in Scotland affecting in particular the criminal justice system. Legal aid is a key element of the criminal justice system and is increasingly recognised as having an important role in ensuring the effectiveness of reforms, for example to court structures or procedures. Specific examples are given below. It is also increasingly recognised that trends and reforms in the wider justice system have a clear impact on expenditure under legal aid.
11. Despite its core statutory functions being largely administrative in nature, the Board has in recent years become considerably more proactive in identifying and pursuing reform both of the legal aid system and other areas with which it interacts. Legal aid is also seen more and more as being part of the wider system

of advice provision, which also includes a wide range of services provided by not-for-profit agencies or local government.

12. These developments have recently been recognised in the addition of grant funding to the Board's powers, alongside an extension of the advice and assistance scheme to advisers other than lawyers.

Types of Legal Aid

Advice and Assistance

13. Advice and assistance enables persons of limited means to obtain advice from a solicitor, or where appropriate, from counsel, on any matter of Scots Law. Applicants can raise questions relating to marriage, employment, injury, wills, criminal matters, and so on. A solicitor will often provide advice and assistance to ascertain if a client has a sufficiently strong case to apply for civil legal aid. Advice and assistance does not cover a solicitor representing his/her client in court or at a tribunal (although see ABWOR below).
14. An application for advice and assistance must be made to a solicitor. The applicant must provide his/her solicitor with information about his/her income/capital and that of his/her spouse. The solicitor undertakes a short calculation and can then tell the applicant there and then if he/she is eligible.
15. Applicants in receipt of various state benefits and with disposable capital of less than €2197 will be eligible for advice and assistance without payment of a contribution.
16. An applicant whose disposable income (in respect of the seven days up to and including the date of application) does not exceed €133 and with disposable capital of less than €2197 will also be eligible for advice and assistance without payment of a contribution.
17. If disposable income is between €133 and €315 and disposable capital does not exceed €2197, the applicant will be eligible for advice and assistance subject to the payment of a contribution, calculated on a sliding scale between €10 and €181. Any contribution due to be paid by the applicant is paid to the solicitor.
18. If disposable income exceeds €315 and/or disposable capital exceeds €2197, the applicant will be ineligible for advice and assistance.
19. The solicitor is required to intimate to the Board that he/she has made a grant of advice and assistance. Due to the reforms of the 1st May 2007, a solicitor will in some circumstances be restricted to incurring expenditure of up to €51 for diagnostic advice and assistance. In most cases, the solicitor can make a grant of advice and assistance in approved categories of €139 or, in some circumstances, €263. Any further expenditure requires the prior authorisation of the Board.

Assistance by Way of Representation (ABWOR)

20. ABWOR is a form of advice and assistance under the Legal Aid (Scotland) Act 1986. ABWOR is provided by a solicitor or counsel in connection with any proceedings before a court, tribunal, or statutory inquiry as prescribed by regulation.

ABWOR - criminal matters

21. ABWOR allows a solicitor, in certain circumstances, to represent a client who is not in custody on the matter at issue and intends to plead guilty or, having made a not guilty plea, now intends to change that plea to guilty. A solicitor can make the grant if the applicant qualifies financially for advice and assistance and where he is satisfied that the sentence is likely to result in the applicant losing their liberty or livelihood, or if they cannot understand the proceedings or state their own case.

ABWOR - civil matters

22. ABWOR is also available for a number of civil proceedings, for example, petitions by a debtor for his own sequestration; proceedings arising from a failure by a person to pay a fine or other sum or obey an order of the court; proceedings before an Employment Tribunal (subject to additional tests relating to the ability of the applicant to understand the proceedings or the complexity of the case); and proceedings before the Immigration Appellate Authorities (which comprises adjudicators and the Asylum and Immigration Tribunal).

Advice and assistance – volumes and costs

23. Civil advice and assistance continues to be dominated by family-related issues, but covers a very wide range of subjects including housing, debt, employment, state benefits, personal injury, mental health and immigration/asylum.
24. Numbers of intimations (including ABWOR) have fluctuated over the years and reached a peak in 1999/200. They have since fallen by 30% to 117,600 and look set to continue to fall.
25. Over the last ten years or so, social welfare subjects have become more significant at the expense of more traditional areas such as family and personal injury. However, almost all areas have seen similar relative reductions over the last few years.
26. The main exception to this trend is immigration and asylum, which rises or falls depending on the dispersal of asylum seekers around the UK. Numbers are lower now than over the last three or four years, but significantly higher than in earlier years.
27. Criminal advice and assistance reached a peak in 2001/02 and has dropped since, although less dramatically than civil. The volume in 2005/06, at just over 145,000 (including ABWOR), is 12% lower than 2001/02.
28. The cost of civil advice and assistance in 2005/06 was €30.3 million, with criminal advice and assistance costing €17.3 million.

Reforms

29. Reforms introduced on 1 May this year mean that for the first time, civil and criminal advice and assistance will be treated differently.
30. The reforms see changes to the unrestricted right of a solicitor to grant advice and assistance. A broad list of subjects is set out in relation to which advice and assistance will remain available largely as previously. For other matters, solicitors will be able to provide diagnostic advice, with further advice requiring the authority of the Board. The overall thrust of the reforms is to focus advice and

assistance on matters that require the assistance of a solicitor and to provide better control of expenditure for the Board.

Civil Legal Aid

31. Civil legal aid is available in relation to various court, tribunal and other proceedings. It is not available for actions for defamation or verbal injury (although recent changes mean that this general exception may not apply in all cases), election petitions, simplified actions of divorce, small claims and certain proceedings under the Debtors (Scotland) Act 1987 or for proceeding before any courts or tribunals not listed in the Legal Aid (Scotland) Act 1986.
32. An application for civil legal aid must be made, through a solicitor, to the Board which requires to satisfy itself that the application meets the 3 statutory tests of financial eligibility, probabilis causa (that the applicant has a statable case), and reasonableness.
33. Civil legal aid is available without contribution where disposable income and capital are less than €4513 and €10063 respectively.
34. It is available subject to a contribution where disposable income is between €4513 and €14737 and/or disposable capital between €10063 and €16680.
35. The level of contributions is, if payable from income, one third of the applicant's disposable income over the lower income limit and, if payable from capital, the entire amount of disposable capital over the lower capital limit. Contributions towards civil legal aid are collected by the Board and, where they are payable from income, are payable over 20 months. Where contributions are payable from capital, contributions are generally collected as a lump sum at the outset of the case.
36. Where the contribution looks likely to exceed the cost of the case by a substantial amount, the Board may agree to collect a lower amount. The client will remain liable for the full contribution should the cost of the case turn out to be more than the contribution.
37. Civil legal aid is not available to anyone with disposable income in excess of €14737. Where disposable capital exceeds €16680, the Board has discretion to grant legal aid where it appears to the Board that the applicant cannot afford to proceed without legal aid: the Board is very rarely required to exercise this discretion.
38. The Board has commissioned external researchers to assess the likely increase in eligibility, take up and cost that would arise if the upper eligibility limits and contribution structure were reformed to introduce greater 'tapering' of eligibility for those who currently exceed the limits. This would bring more people into eligibility, but on the basis that they would pay substantial contributions that would cover the cost of an average case.
39. Where an assisted person wins their case and is awarded expenses by the court, these are paid to the Board to cover the costs of the case. If, after recoupment of these expenses and any client contribution that may be payable, there is still a "net liability" of the legal aid fund, the Board will recover as much of this as possible from any property recovered or preserved as a result of the action taken under legal aid.

Civil legal aid: volumes and cost

40. Applications for civil legal aid peaked in 1992/93 at 36,018. Since then the numbers have dropped steadily to 16,859 in 2005/06, a reduction of 53%.
41. This trend shows no signs of halting, although it has slowed in the last couple of years. Although we believe that much of the reduction stems from demographic and socio-economic changes, as well as different patterns of advice-seeking and dispute resolution, we remain concerned that continued reduction may result in problems of access to justice.
42. The mix of case types in civil legal aid has not changed a great deal over the years. Civil legal aid always has been and remains a family law and, to a lesser degree, reparation (mostly personal injury) orientated service.
43. Family law includes actions relating to separation or divorce and matters often considered alongside such actions, including those relating to financial arrangements and children, interdicts and exclusion orders. Although the long term trend has seen a reduction in all types of case, we are now seeing a particularly sharp fall in relation to family law.
44. Solicitors have become increasingly vocal in their criticisms of the fees paid for legal aid work, which is paid at rates well below those chargeable for private work, arguing that it is not profitable and that many firms will stop providing this service. We have certainly seen a reduction in recent years in the number of firms providing a civil legal assistance service.
45. Civil legal aid moved to a block fee structure in 2003, along with a substantial increase in fees. The perception amongst much of the profession is that the reforms have not delivered the necessary increase and that some types of case have become even less profitable than before.
46. Additional changes have now been made to address some of the 'rough edges' of the 2003 reforms. However, it seems that some firms have decided that legal aid is no longer commercially viable and they have pulled out as a result. A separate paper for this conference explores this issue in greater depth.
47. Gross expenditure on civil legal aid peaked at €51 million in 1996/97. It then fell for six years, before rising slightly to between to €43 and €45 million between 2003/04 and 2005/06. Expenditure now sits some 16% below the 1996/97 peak. (These figures include solicitors' and advocates' fees, outlays (disbursements) and VAT.)
48. The reduction in spending in recent years is the result of the fall in volumes noted above: the cost per case has continued to increase throughout this period.
49. The Board recovers part of the cost of legal aid in a variety of ways. In 2005/06, we recovered contributions of €1.7 million, expenses of €12.8 million and amounts from property recovered and preserved of €1.3 million. These recoveries represented 36% of the gross cost of civil legal aid, meaning that civil legal aid cost just over €27.5 million in the year. The average net cost of a civil legal aid case was €2380.
50. The cost of a particular case and recoveries against that cost may be spread over a number of years. The level of recoveries also varies from year to year, although the proportion of gross cost recovered has increased markedly in the last few

years: for most of the 1990s the proportion varied between 21% and 29%, but has since 1999/00 been 30% or higher. The figures for the last few years (between 36% and 40%) are largely a result of improved success in the Board's recovery of expenses from opponents in legal aid cases.

51. Over 25% of civil legal aid costs relate to outlays: costs incurred by the solicitor in the course of a case on such items as court dues, sheriff's officers' fees, travelling expenses, witness expenses and expert witness fees. Over the last ten years there has been a rise in the proportion of the total costs of civil legal aid accounted for by outlays.

Criminal Legal Aid

52. Criminal legal aid essentially consists of legal representation in criminal proceedings in the High Court and in the sheriff and district courts. As well as representation, criminal legal aid also includes all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings.
53. Criminal proceedings are classed as summary or solemn. Summary proceedings are the less serious e.g. most road traffic prosecutions, breach of the peace, minor theft, and assault etc which are dealt with in the District Court or by the sheriff sitting alone. Solemn proceedings are the most serious type of proceedings e.g. murder, culpable homicide, serious assault, rape, fraud etc - and are dealt with in the sheriff court or the High Court and may involve a jury trial.

Duty Solicitor Scheme

54. Criminal legal aid is available automatically through the duty solicitor for -
- attendance at identification parades
 - pre-bail work in solemn cases
 - the initial hearing in summary cases where the accused is appearing from custody (and thereafter if the accused pleads guilty)

Criminal legal aid in summary proceedings

55. Summary criminal legal aid is available after the first appearance where the accused pleads not guilty². In order to qualify for summary criminal legal aid, the Board must be satisfied that the accused or his family would suffer undue hardship if the accused had to pay for his/her own defence. Additionally, the Board must be satisfied that it is in the interests of justice that the accused should receive criminal legal aid. Criminal legal aid is non-contributory.

Criminal legal aid in solemn proceedings

56. If an accused person is charged and brought before the sheriff in a solemn case then s/he is automatically entitled to criminal legal aid until s/he is given bail or placed in custody. The accused person can choose his/her own solicitor or ask to see the duty solicitor.

² ABWOR is available if the accused intends to plead guilty at the first appearance and for any subsequent diets of deferred sentence.

57. Automatic legal aid only covers the first stage of the case, so it is necessary for the accused person to apply for solemn criminal legal aid straight away. The application has to be made to the court, which must be satisfied, after consideration of the applicant's financial circumstances, that the expenses of the case cannot be met without undue hardship to him or his dependants and that the applicant does not have available to him other rights and facilities making it unnecessary for him to obtain legal aid.
58. The court does not require to consider whether it is in the interests of justice for legal aid to be given, whether in solemn proceedings or in the limited summary proceedings in relation to which the court may make legal aid available. Consideration of the interests of justice applies only in the case of applications submitted to the Board.
59. Recent legislation paves the way for the transfer of responsibility for granting solemn criminal legal aid from the courts to the Board. This is intended to provide greater consistency in the application of the test of undue hardship.

Appeals

60. Application must be made for a fresh grant of criminal legal aid in connection with an appeal. Except where the applicant had criminal legal aid for the proceedings at first instance, full information must be provided about his financial circumstances and the availability of other rights and facilities. The statutory test is whether the financial circumstances of the applicant are such that the expenses of the appeal cannot be met without undue hardship to the applicant or his dependants.
61. Where the applicant wishes to be represented in an appeal at the instance of the prosecutor, only the financial eligibility criteria apply. The need to apply any other criteria will depend on the statutory or other basis under which the appeal is made. In some cases, the Board must be satisfied that in all the circumstances of the case it is in the interests of justice that the applicant should receive criminal legal aid.

Criminal legal aid – volumes and costs

62. Applications for summary criminal legal aid have risen rapidly since 1998/99. The 2005/06 total of 85,916 was 34% higher than the 1998/99 figure. This trend is broadly in line with those elsewhere in the justice system i.e. more cases are being prosecuted in the courts most likely to attract legal aid.
63. There is also some evidence that the structure and payment regime for summary criminal legal aid may encourage more initial pleas of not guilty and that this may have contributed to the overall growth: the most profitable fees are paid for work that follows a plea of not guilty. Although this has always been so, it has been suggested that the introduction of fixed payments in 1999 (see below) may have added to the incentive for solicitors to advise clients to plead not guilty.
64. Nevertheless, we believe that the strongest drivers of the upward trend are to be found elsewhere in the criminal justice system. In addition, the increase in expenditure resulting from this upward trend would have been far more problematic had fixed payments not been in place.
65. The total cost of criminal legal aid in 2005/06 was €132 million. Although this was almost €6 million lower than the previous year, it was still higher than in any

other previous year and was 33% higher than in 2000/01. The 2000/01 total was the lowest for several years at that time, a combined impact of lower volumes than seen before or since and the reduction in fees brought about by fixed payments.

Reform agenda

66. Following protracted negotiations with the legal profession, we have very recently consulted on the development of a wide reaching package of reforms of fee structures and levels for solemn legal aid. The key feature of the reforms will be a move towards block fees rather than the current detailed charging arrangements.
67. Alongside reforms to fee structures, we are currently developing a peer review process for criminal legal assistance, similar to that introduced in 2004 for civil legal assistance. Peer review criteria were developed and piloted in the pilot Public Defence Solicitors' Office (see below) before being refined to cover all aspects of criminal legal assistance in consultation with the Law Society of Scotland. We are now setting up the governance structures for this system and will shortly be recruiting peer reviewers from within the profession.
68. At the same time, we are developing a peer review system in conjunction with the Faculty of Advocates, to assess the work carried out by counsel. A different model is being developed here: as counsel's work is not file based, the process currently being discussed is based on an assessment of advocacy, using senior counsel as reviewers.
69. The biggest reform programme is that for summary criminal legal assistance, which is intimately related to wider changes to the summary justice system. Detailed proposals currently being finalised by the Board prior to consultation aim to remove some of the artificial barriers between different forms of legal aid (advice and assistance, ABWOR, the duty solicitor scheme and summary criminal legal aid) to create a more seamless, efficient and effective process.
70. The reformed system will encourage the early investigation of cases, allowing a realistic assessment of available defences to be made before an application for 'full' legal aid has to be made. This would be supported by the payment regime to remove the current disjunction between the fee available for an early guilty plea under ABWOR and that paid for summary criminal legal aid when the accused pleads not guilty (even if they subsequently change their plea at the next available opportunity).
71. We believe that such a system will ensure proper remuneration for lawyers while also protecting clients and the interests of justice. Full funding would remain available as at present for cases in which the client has a meaningful defence to the charges against them.
72. These changes tie in with other reforms to the operation of the courts and the prosecution. This has been the subject of a separate review of the summary justice system. The various strands of reform (including fuller early disclosure by the prosecution and diversion of more cases from the courts system) will be implemented over the next 6 months or so. The changes to criminal legal assistance will need to be introduced to the same very tight timetable.

Current policy developments

Public Defence Solicitors' Office (PDSO)

73. Previous ILAG conferences have been updated on progress with the pilot Public Defence Solicitors' Office in Edinburgh. The PDSO opened in October 1998 as a five-year pilot scheme to compare the provision of criminal legal aid by private solicitors with salaried solicitors employed by the Board. Two more offices were opened in 2005 and Ministers decided last year that there should be further expansion of the service.
74. Three new offices opened in April, with one more due to open in May and a final two to follow later in the year. Each of the new offices is starting small, with two solicitors and administrative support. Each office will be set up to serve a range of courts, most of which have largely self-contained legal markets. This approach allows PDSO to build a caseload across a wider geographic area than most firms of comparable size, while limiting its impact on local firms in any one area.
75. A progress report is required by Parliament by 2008. It is not intended to replicate the very comprehensive and expensive yet equivocal research study carried out between 1998 and 2001. Instead, the Board will be monitoring the costs of the offices, the quality of the work carried out (assessed by peer review) and client satisfaction.

Advice for All consultation and Legal Profession and Legal Aid (Scotland) Act

76. Regular ILAG attendees may recall the presentation given in Killarney on the wide-ranging strategic review of legal aid carried out in 2004. The Scottish Executive consulted on some of the recommendations of the review in summer 2005. Some of the proposals on which Ministers consulted were then included in a bill introduced last spring and finally passed in December 2006.
77. The new Act makes various technical changes to the operation of legal aid. The most significant change is that noted above; the power to provide grants for a range of purposes, including direct advice, assistance and representation, as well as other activity which supports the provision of such services.
78. We are currently developing our approach to grant funding. We do not wish the Board's grant fund to be seen as an alternative to existing funding for local advice service and so intend to focus on more strategic, second tier or nationally significant projects and services.
79. We do not yet know the size of the grant fund; clearly this will affect how much the board is able to achieve.
80. The Act also requires the Board to prepare a Code of Practice for advice organisations, which will be able to register with the Board to provide advice and assistance in much the same way as solicitors' firms. This is the first time the non-lawyer sector will be directly funded on the same basis as solicitors, although it is likely that the range of circumstances in which Ministers will prescribe regulations allowing them to do so will be quite limited.

Civil Legal Assistance Network

81. As the separate Scottish conference paper sets out, there are increasing concerns that too few firms of solicitors are available to meet the need for civil legal assistance in certain parts of the country or areas of law.
82. Although the Board's preferred option is very much for the legal aid system to be sustainable within private practice, we have also persuaded Ministers that the

only way to ensure availability is for the Board to be able to employ its own solicitors to provide direct casework services.

83. We have now appointed a solicitor to head up a small network of offices. We will have three offices to start with, each with two to three solicitors. We are not presenting this as a pilot in the same way as the PDSO and future developments will very much be considered in response to emerging needs.
84. There is a risk that the private sector may use the network as a dumping ground for their least profitable cases and that this may make the employed service appear less cost-effective than the private sector. However, this network is not designed to compete with private practices. Rather we want to complement the services they provide and encourage them to continue doing so. Taking their least profitable cases may be enough in some areas to keep practices within the system that may otherwise have left.