

ILAG 2001

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International Legal Aid Group

Lindsay Montgomery
National Report: Scotland

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National report: Scotland

Lindsay Montgomery

General

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 1999/00 at \$367m was the lowest total since 1993/94 (and over \$42m million lower than in 1997/98) but marks a 92% increase over a ten year period. In 1999, Scotland had an estimated population of 5,119,200, meaning that the overall per capita gross cost of legal aid was approximately \$72. The net cost in 1999/00 was \$339m, giving a net per capita cost of \$66.
3. Responsibility for policy matters on legal aid rests with the Scottish Executive. 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 Financial Memorandum are determined by the Scottish Executive after consultation with the Board.
6. The Board currently consists of a chairman and 11 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 290 staff.
7. The functions of the Board under the Act are :-
 - ensuring that legal aid and advice and assistance are available in accordance with the Act
 - administering the Legal Aid Fund.
8. To carry out these functions, the Board:-
 - considers applications for civil and criminal legal aid and makes decisions on whether to grant or refuse these (the courts are responsible for dealing with applications for criminal legal aid in solemn cases and in limited circumstances in summary cases).
 - examines accounts sent in by solicitors and advocates for legal aid work, and pays them the appropriate amount for the work they have done
 - collects expenses and contributions

- registers firms and solicitors under the Code of Practice in relation to criminal legal assistance and monitors their ongoing compliance
 - investigates and pursues abuse of legal aid
 - advises Scottish Ministers on legal aid matters.
 - manages the Legal Aid Fund.
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.

Public Defence Solicitors' Office (PDSO)

10. The PDSO opened in Edinburgh 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.
11. In the early days of the pilot, clients were directed to the PDSO to ensure that the public defence solicitors had a sufficient throughput of cases to make a fair and valuable comparison with solicitors in private practice. To ensure this was done randomly, clients whose birthdays fell in specific months were referred to the PDSO.
12. The power of direction was removed for cases with pleading diets after 1 July 2000. From July 2000, the public defence solicitors began to participate in the Edinburgh Sheriff Court Duty Solicitor Scheme and to undertake a small amount of associated solemn business where the client chooses to instruct them.
13. The pilot scheme is being independently evaluated and the public defence solicitors will be compared against private practice solicitors in terms of cost effectiveness, quality of service, client satisfaction, and contribution to the efficiency of the wider criminal justice system. A report will be made to the Scottish Parliament in October 2001 (3 years into the pilot) and it will be for the Scottish Parliament to decide whether the pilot is extended beyond a five-year period.

Types of Legal Aid

Advice and Assistance

14. 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, debts, 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).

15. 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.
16. Applicants in receipt of various state benefits and with disposable capital of less than \$2820 will be eligible for advice and assistance without payment of a contribution.
17. An applicant whose disposable income (in respect of the seven days up to and including the date of application) does not exceed \$223 and with disposable capital of less than \$2820 will also be eligible for advice and assistance without payment of a contribution.
18. If disposable income is between \$223 and \$525, and disposable capital does not exceed \$2820, the applicant will be eligible for advice and assistance subject to the payment of a contribution, calculated on a sliding scale between \$20 and \$302. Any contribution due to be paid by the applicant is paid to the solicitor.
19. If disposable income exceeds \$525 and/or disposable capital exceeds \$2820, the applicant will be ineligible for advice and assistance.
20. The solicitor is required to intimate to the Board that he/she has made a grant of advice and assistance. A solicitor can make a grant of advice and assistance up to \$226. (In certain special cases set out in regulations, this initial limit can be \$423). Any further expenditure requires the prior authorisation of the Board.

Assistance by Way of Representation (ABWOR)

21. 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

22. 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

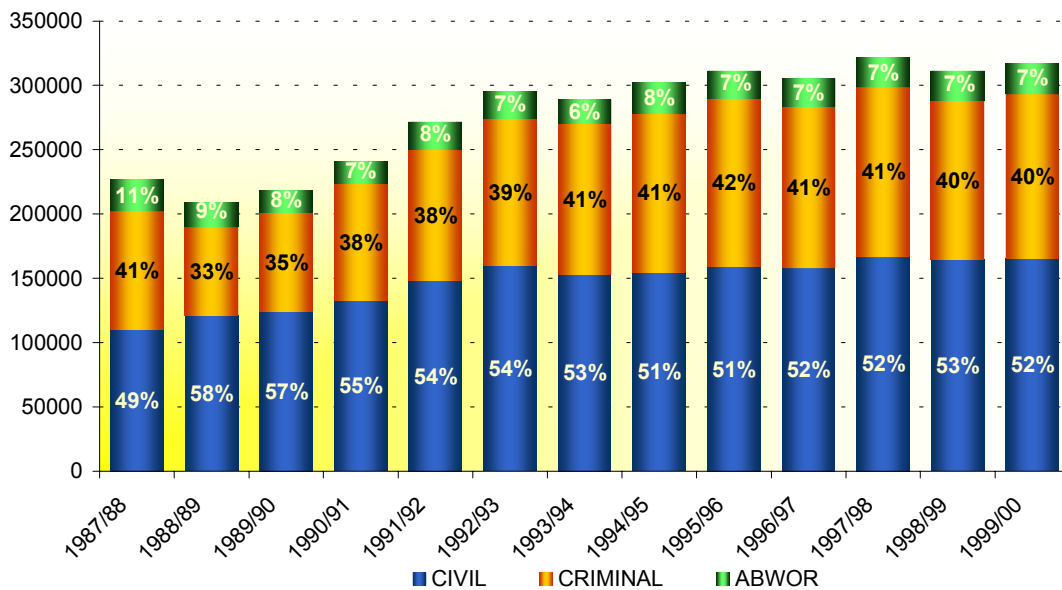
23. ABWOR is also available for a number of civil proceedings, for example, petitions by a debtor for his own sequestration; proceedings arising from a failure by a person to pay a fine or other sum or obey an order of the court; proceedings before an Employment Tribunal (subject to additional tests 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 Immigration Appeal Tribunal).

Advice and assistance – volumes and costs

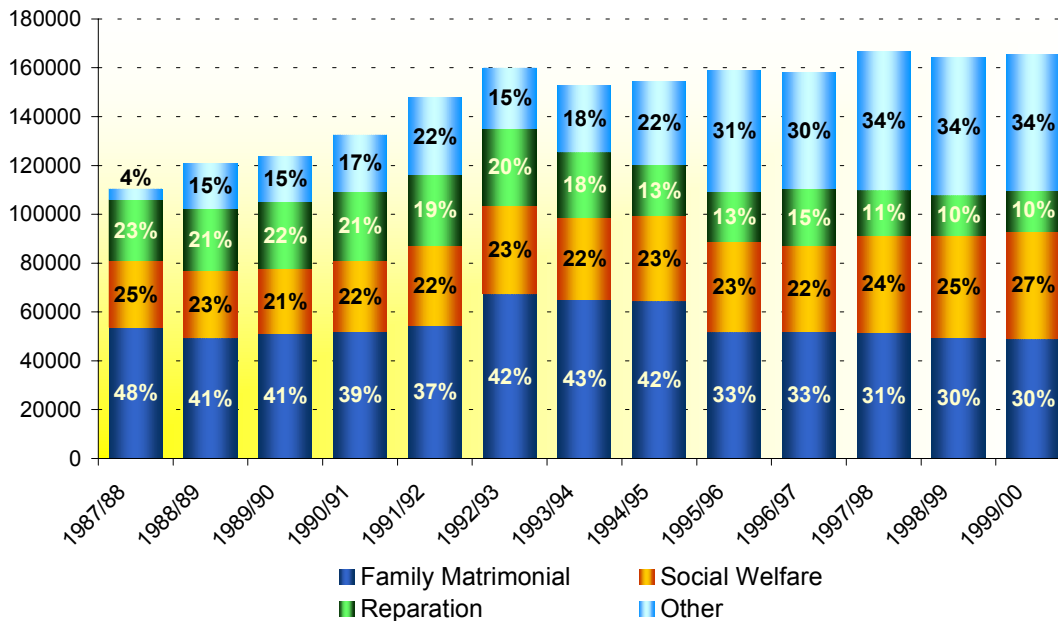
24. The cost of advice and assistance in 1999/00 was \$79.8 million, 129% higher than it was ten years ago. Chart 1 shows that numbers of advice and assistance intimations have fluctuated, but there has been a rise of 31% over the ten year period to a total of 316,822. While the total costs of civil advice and assistance are more than double those of criminal, both have seen similar rates of growth. There has also been substantial growth in the use of ABWOR. In 1999/2000, 23,686 intimations of grants of ABWOR by solicitors were made to the Board. A large majority of these related to criminal matters.

Chart 1: A&A intimations



25. Advice and assistance for civil matters still accounts for just over half of intimations and almost 65% of costs. Within civil advice and assistance there have been more significant shifts, as shown in Chart 2. Family/matrimonial cases now account for 30%, down from over 40%, while reparation cases have dropped even more dramatically, from over 20% to 10% (a substantial drop in volume as well as share). The number of intimations relating to social welfare law, on the other hand (in this context meaning housing, employment, benefits, debt and mental health), has risen by considerably, also increasing its share of the total. The biggest change has been in relation to unspecified ‘other’ categories, which cover a wide range of matters.

Chart 2: uses of A&A



Civil Legal Aid

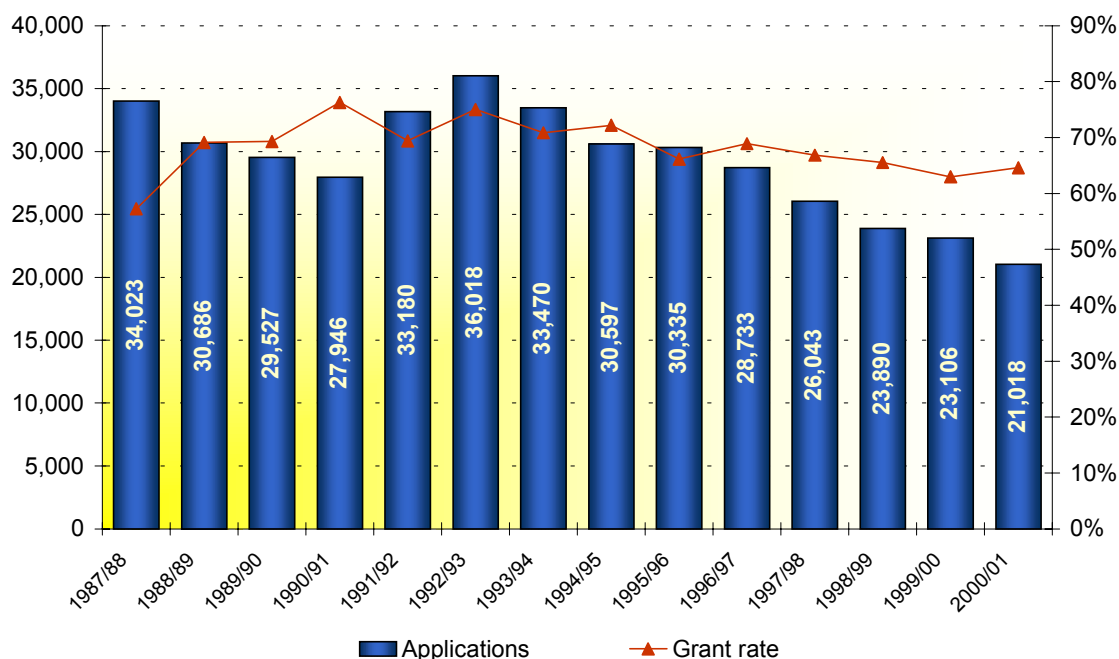
26. Civil legal aid is available in relation to various court, tribunal and other proceedings. It is not available for actions for defamation or verbal injury, election petitions, simplified actions of divorce, small claims and certain proceedings under the Debtors (Scotland) Act 1987 or for proceeding before any courts or tribunals not listed in the Act.
27. 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 storable case), and reasonableness.
28. Civil legal aid is available without contribution where disposable income and capital are less than \$7803 and \$8460 respectively.
29. It is available subject to a contribution where disposable income is between \$7803 and \$25,476 and/or disposable capital between \$8460 and \$24,139.
30. 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 10,15 or 20 months, depending on amount. Where they are payable from capital, contributions are collected as a lump sum at the outset of the case.
31. Civil legal aid is not available to anyone with disposable income in excess of \$25,476 and/or disposable capital in excess of \$24,139 (although the Board has discretion to grant legal aid where disposable capital exceeds the upper limit but it appears to the Board that the applicant cannot afford to proceed without legal aid).

32. 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

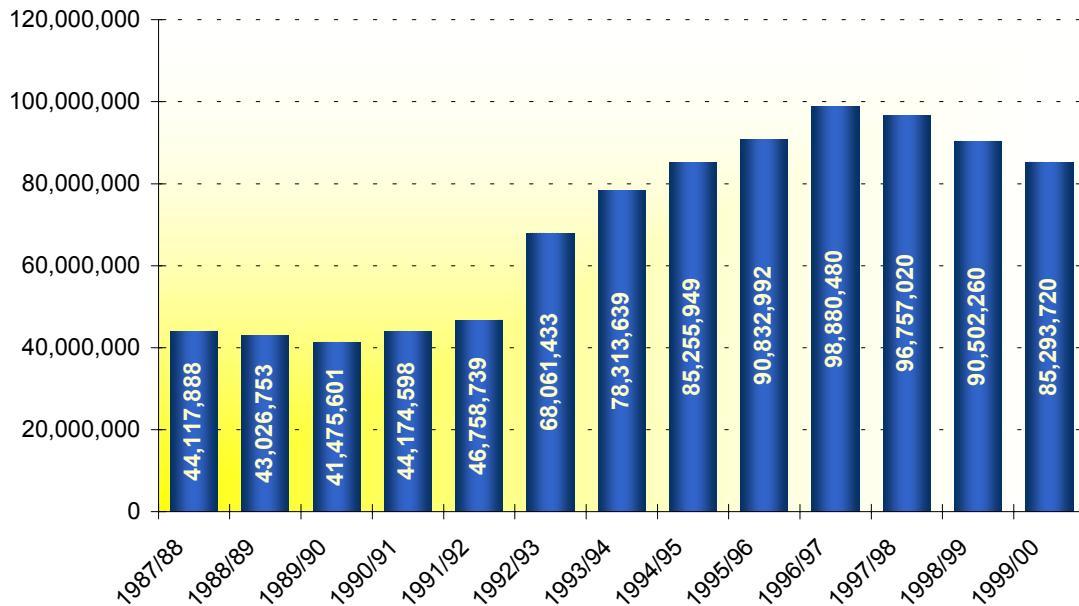
33. Chart 3 shows that applications for civil legal aid peaked in 1992/93 at 36,018. Since then the numbers have dropped steadily to 23,106 in 1999/00, a reduction of 36%. The Chart also shows that the grant rate for civil legal aid varies from year to year. In 1999/00, 63% of applications were granted. This compares to an average between 1983/84 and 1989/90 of 61%. Between 1990/91 and 1994/95 the average was 73% and over the last five years the average has been 66%.

Chart 3: total civil applications and grant rate



34. Chart 4 shows that gross expenditure on civil legal aid rose from \$44.3 million in 1987/88 to a peak of \$98.7 million in 1996/97. It has fallen since then to \$85.5 million in 1999/00. These figures include solicitors’ and advocates’ fees, outlays (disbursements) and VAT.

Chart 4: cost of civil legal aid (AUS\$)

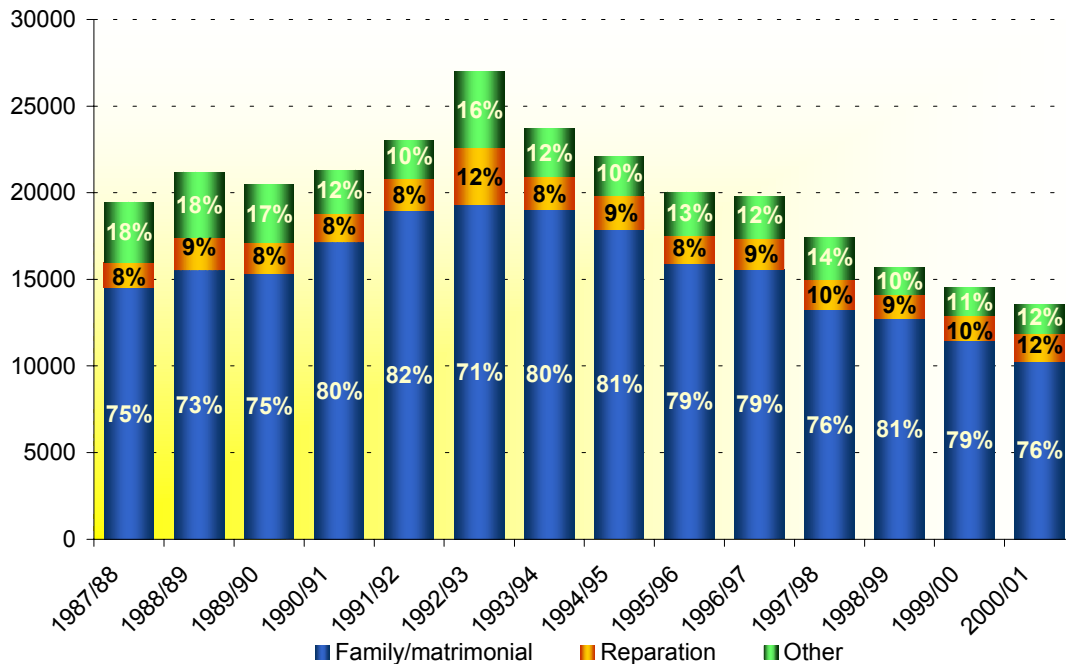


35. The Board recovers part of the cost of legal aid in a variety of ways. In 1999/00, we recovered contributions of \$3.9 million, expenses of \$19.7 million and amounts from property recovered and preserved of \$4.5 million. These recoveries represented 33% of the gross cost of civil legal aid, meaning that civil legal aid cost just over \$56.4 million in the year. The level of recoveries varies from year to year. The cost of a particular case and recoveries against that cost may be spread over a number of years.
36. Around 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 officer's 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.

What do people use civil legal aid for?

37. Chart 5 shows that 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 orientated service. These categories' combined share of civil legal aid applications (86%) and grants (89%) is slightly higher than ten years ago. 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. Reparation relates in the most part to actions for damages relating to personal injury.

Chart 5: types of case for which civil legal aid granted



38. There is a clear contrast between advice and assistance, the uses of which have diversified and shown a partial shift in focus towards social welfare law, and civil legal aid, which remains firmly focused on family law and reparation. This may partly be explained by the fact that work in many areas of social welfare law is not geared towards instigating or defending proceedings for which civil legal aid is available.

WHY ARE FEWER PEOPLE APPLYING FOR CIVIL LEGAL AID?

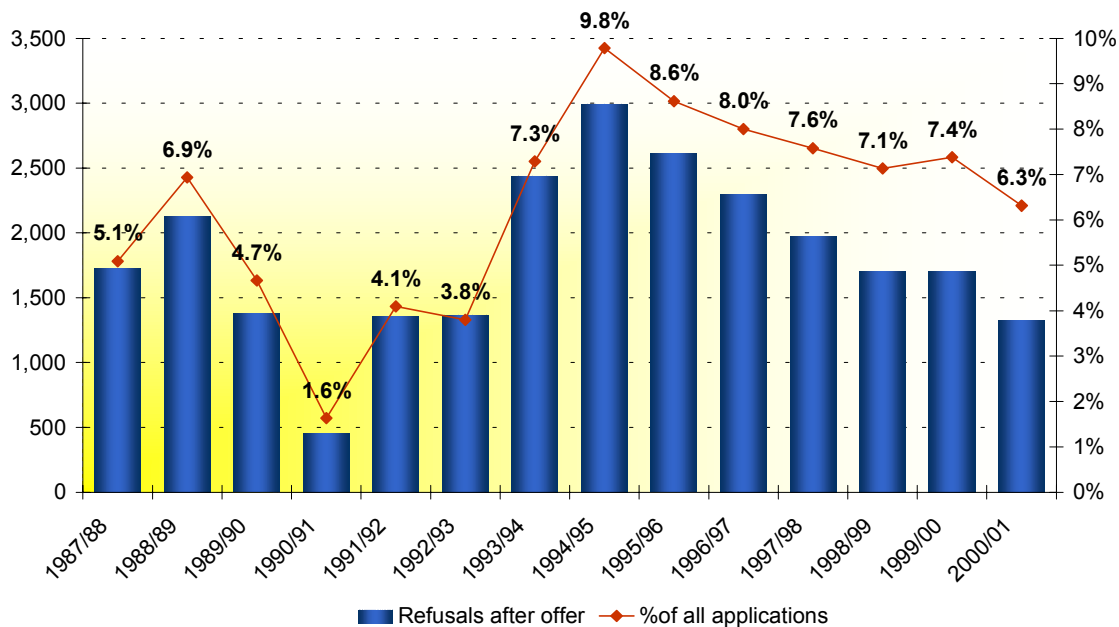
Are fewer people eligible for legal aid?

39. There appears to be a widespread perception that fewer people are eligible for legal aid than in the past and that those that do qualify are more likely to be charged a contribution.
40. Reductions in eligibility were made by the then Government in 1993. The lower income eligibility limit for free civil legal aid (i.e. the limit of disposable income below which an applicant pays no contribution towards the cost of their case) was reduced by 25%. At the same time, the maximum contribution payable by those applicants with a disposable income above that level was increased from one quarter to one third of the excess of disposable income.
41. These changes brought the civil legal aid lower income limit broadly into line with that for Income Support and it has been uprated annually on the same basis. The upper income limit has broadly kept in line with inflation, while the upper capital limit has actually increased ahead of inflation. The lower capital limit, however, has not been uprated since 1983.

Do more people have to pay a contribution?

42. The proportion of applicants who are eventually granted or offered legal aid with a contribution will depend on the incomes and capital of people that actually apply for and are granted legal aid. The proportion of grants of legal aid with a contribution is higher now than at any time since the Board's inception (20% in 1999/00 compared to a 13 year average of 17%). However, in the mid-late 1970s, between 29% and 34% of grants of civil legal aid required a contribution. It wasn't until the mid-1980s that this figure dropped briefly to 10%.
43. Chart 6 suggests that the immediate effect of the 1993 changes, particularly the increase in the maximum proportion of disposable income payable as a contribution, was a sudden jump in the number and proportion of cases in which an applicant is offered legal aid with a contribution and declines to accept the offer. Although the numbers have reduced since then, there are still more refusals after offer now than in the years before 1993/94.

Chart 6: refusals after offer - number and % of applications



Criminal Legal Aid

General

44. 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.
45. 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. The maximum period of imprisonment available on conviction for a summary offence is six months. 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

46. 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

47. 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

48. 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.

49. 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.

50. 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.

Appeals

51. 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.

52. 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

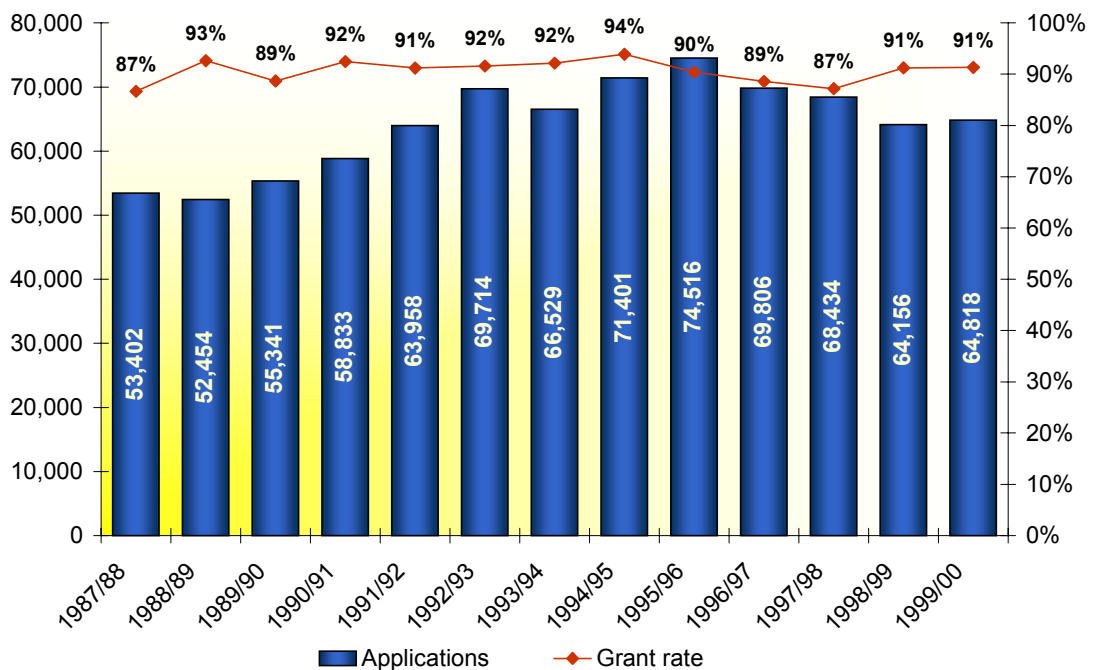
cases, the Board must be satisfied that in all the circumstances of the case it is in the interests of justice that the applicant should receive criminal legal aid.

Registration and Code of Practice

53. From October 1998, all solicitors providing criminal legal assistance (criminal legal aid and advice and assistance on criminal matters) have to be registered by the Board. To be registered, solicitors and firms must comply with a Code of Practice drawn up by the Board in consultation with the legal profession and approved by Scottish Ministers. The Scottish Legal Aid Board audits compliance by the profession with the Code.

Criminal legal aid – volumes and costs

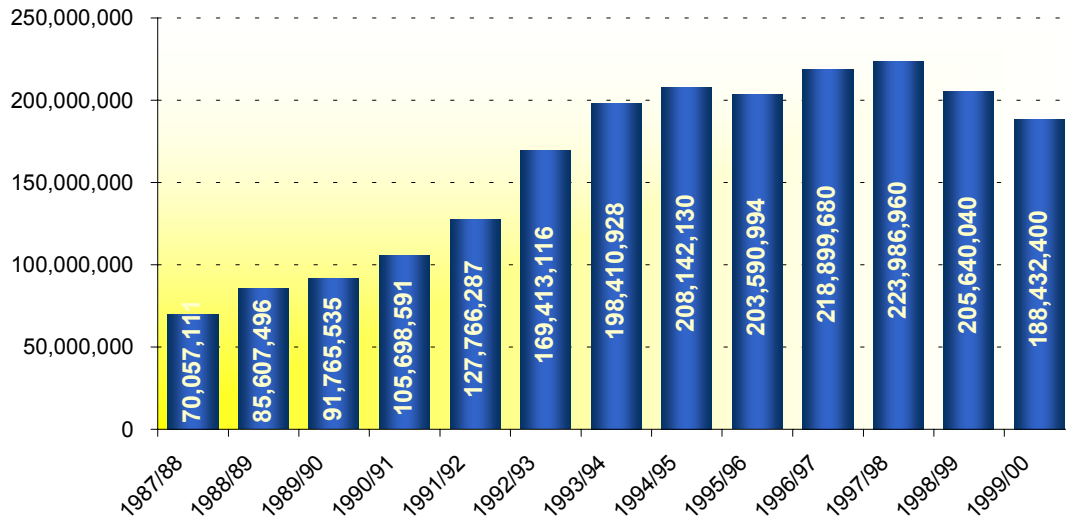
Chart 7: summary criminal applications and grant rate



54. Chart 7 shows that applications for summary criminal legal aid rose slightly last year, but that the total number is still lower than at any time between 1992/93 and 1997/98. The latest figures suggest that there will be a further increase in the current year. The chart also shows that the grant rate for summary criminal legal aid applications determined by the Board has fluctuated in the past but has been fairly stable for the last three years.

55. Chart 8 shows that the total cost of criminal legal aid increased by 220% between 1987/8 and 1997/8, from just over \$70 million to almost \$224 million. The cost has, however, fell considerably during the following two years to \$188.4 million, a fall of 18%.

Chart 8: total cost of criminal legal aid (AUS\$)



Fees payable to solicitors and counsel

56. The Board pays solicitors according to the rates set out in Tables of Fees approved by Parliament. The level of fees for advice and assistance and criminal legal aid has not been increased since 1992, and that for civil legal aid has not been increased since 1995. However, a new fee structure was introduced in 1999 for summary criminal cases.

Civil legal aid

57. A solicitor can send the Board his/her bill in two forms, depending on which court the cases is raised in:

- s/he can claim fees for every letter, meeting, time in court, telephone calls etc, **or**
- s/he can claim a “block fee”, where a fee is paid for a stage or specified item of work.

58. The solicitor chooses the format of the bill, and is likely be driven by what s/he considers to be the more profitable option. S/he will also charge us for “outlays” incurred (e.g. medical reports). In some courts the bill can only be submitted on the detailed basis shown above.

Criminal legal aid

59. In solemn legal aid cases, the solicitor must send the Board a detailed breakdown of time at meetings, number of phone calls, time at court, length of letters etc. S/he would be paid \$119 for an hour in a meeting or \$154.54 for an hour in court.
60. Since 1 April 1999, summary cases have been paid on a “fixed payment” basis. This has a core fee for all work up to a certain stage of the case and additional payments for further steps in the case. The core payments are –
- \$846 for a case in the district court
 - \$1410 for a case in the sheriff court (\$1551 in certain remote courts).
61. There are additional payments for bail appeals (\$141), diets of deferred sentence (\$70 in the district court, \$141 in the sheriff court) and trials lasting longer than thirty minutes:
- The payment for the first day of a trial, after the first thirty minutes is \$141 in the district court and \$282 in the sheriff court
 - For the second day of a trial, the payment is \$141 in the district court and \$564 in the sheriff court
 - For the third and any subsequent day of trial, the payment is \$282 per day in the district court and \$1128 per day in the sheriff court.
62. These fees are paid plus VAT. Solicitors can also claim reimbursement of most outlays, although not those relating to the taking of precognitions. The cost of precognitions is included in the core payment.
63. Separate rates also apply to the duty solicitor who may have attended the accused person when he was first arrested.

Current policy developments

Community Legal Services

64. The Board is a member of and services a multi-agency group set up by the Scottish Executive to provide recommendations for introducing a Community Legal Service in Scotland. The group also includes representatives of the Scottish Executive, the legal profession and the voluntary advice sector.
65. The group will present proposals to the Minister for Justice later this year. In developing its proposals, the group is considering issues such as funding, quality of service, effective referral between agencies and innovative ways of providing advice and information. It is too early to predict what shape the group’s proposals will take.

Pilot Projects

66. Alongside the work on the Community Legal Services Working Group, we have invited interested organisations to submit proposals to develop a range of pilot projects relating to community legal services. The aim of the pilots is to allow the evaluation of different

methods of improving access to justice through the direct employment of solicitors by the Board.

67. These solicitors may provide advice and representation through the usual legal aid schemes, or provide support to advice giving organisations. This might involve training for lay advisors, a second tier advice and support service for advisors or the promotion of effective referral between agencies and local solicitors. We are currently assessing proposals for what we hope will be the first two or three in a rolling programme of projects.

Inquiry into legal aid and access to justice

68. The Scottish Parliament's Justice 1 Committee is conducting an inquiry into legal aid and access to justice which could have significant implications for the justice system. The themes of the inquiry are

- to assess the impact of recent changes in the legal aid system (both civil and criminal)
- to assess the likely impact of possible and prospective changes on the contribution made by the legal aid system to securing access to justice for individuals and organisations in Scotland.

69. The Board has submitted evidence to the Committee, on the practical operation of the legal aid system and our concerns about issues such as eligibility limits for civil legal aid and the public's ability to access legal advice and representation.

The European Convention on Human Rights

70. The Scottish Executive became subject to the human rights provisions of the Scotland Act in July 1999, when the new Scottish Parliament came into existence. The Board became subject in October 2000. This opened up its decisions to direct challenge under the European Convention of Human Rights.

71. We began a review of our policies and procedures before the provisions came into force, and subjected our review to independent external audit. We have embraced the positively, and are continuing to improve our procedures and service in the light of our obligations under the Act.

72. The Board has yet to receive any challenges, although there have been a number relating to legal aid, aimed at the Executive.