

Legal Aid Review submission by David Bell, solicitor, Paterson Bell Ltd, Kirkcaldy

My proposal in relation to summary criminal legal aid has been based upon my experience in operating in one of the country's busiest criminal law practices and appearing in many of the sheriff courts throughout Scotland on a daily basis for over 20 years. In addition this proposal has been fine tuned with discussion with many experienced practitioners over several years.

THE AIMS

To try to provide a simpler system of providing publicly funded criminal legal representation whilst making the court process more efficient and with either no increase in cost to the taxpayer or even at a reduced cost.

THE SCOPE

The model proposed is for sheriff court summary cases though it could be further developed for the justice of the peace court cases.

THE CURRENT SYSTEM

The present system is overly complicated with different and complex tests applied for both interests of justice and means assessment . This is compounded by the complex rules in relation to where grants can be made eg duty cases, appointed solicitor tests . This results in huge amounts of time being spent by practitioners trying to secure verification of income and capital of the applicants, by staff at SLAB having to assess all documentation and the implementation of the complex assessment rules on means and merits and court delays as practitioners battle back and forward with Slab trying to secure funding for their case rather than focussing upon the case itself to try to achieve swift resolution in what are supposed to be summary proceedings. It also results in bad feeling generated between practitioners and SLAB as each perceive the other as making life difficult for them.

It should not be forgotten that ,at its heart , the system of legal aid was created to allow access to justice for those who cannot afford legal representation, not to fund or create employment in a state run quango. The system of summary justice was designed to allow less serious cases to be resolved quickly, fairly and effectively.

THE PROPOSAL

At its heart , this proposal has a plan to remove means testing and interests of justice testing from sheriff court summary legal aid. The proposal is blind to statistics but I'm sure these could be readily made available by SLAB and Scottish Courts to assist in the calculations referred to. At present summary cases in the sheriff court attract a core fee of £485 for Abwor grants and Criminal Legal Aid (CLA) where the applicant qualifies on means and merits testing. The grant is either made by the solicitor and approved by SLAB or by the board for CLA. There are also provisions for cases being funded under the duty scheme or of course privately funded where the applicant doesn't qualify due to their means. Add ons to the core fee are available for trials and third deferred sentences etc.

I would estimate that about 90% of cases across Scotland at sheriff court level ultimately result in a grant of Abwor or CLA *. In other words the tests applied only result in 10% of cases not being publicly funded.

* This figure can be amended from gathered statistics and the model can be amended accordingly.

If we removed the current interests of justice test and replace it with the interests of justice test

being met by virtue of the fact the case is being prosecuted in the sheriff court and is accordingly sufficiently serious AND removed the means test then in effect publicly funded access to justice would be made available in 100% of sheriff summary cases.

On the figures given above this would result in an increased cost of c10% to sheriff court summary payments. This could be immediately off set by reducing the core payment by 10%. However given that there would be related savings in reduction in the number of publicly funded staff at Slab and consequential efficiency savings made in the courts, this offsetting could be reduced depending on the figures produced. As indicated at worst this would be cost neutral, at best savings could be made to the tax payer.

It should of course be noted at this point that the fixed fee of £500 was introduced in 1999 based on the average time and line cost of a summary case in the sheriff court on the 1992 rates. The fee was subsequently changed to £515 subsuming 2 deferred sentences and any pre court advice and assistance. It was then reduced to £485. Multiple deferred sentence payments and removal of payments for failure to appear charges and half fees for breach of bail cases also occurred, notwithstanding that they featured as small time in line fees in the calculation of the average fee back in 1999 thus helping reduce that figure. In effect with a case where 2 deferred sentences occurred along with eg £50 a&a account the solicitor would receive £650 in 1999 based on fees that hadn't increased for 7 years. It is now £485 or £510 in 2017. With inflation the figure of £650 in 1999 would be £1033 in 2016 and taking it from 1992 it would be £1234 in 2016.

HOW IT WOULD WORK

A client who is prosecuted in the sheriff court on a summary complaint would continue to instruct the solicitor of their choice who would be Slab registered or be assigned the duty agent if they did not have a solicitor. The solicitor would automatically be entitled to receive the core fee. This would not be dependent upon whether the case starts as a custody, undertaking, citation or by warrant. This would not be dependent upon whether the case was a guilty plea, not guilty plea or a continuation without plea. The core fee is in effect a case resolution fee or trial preparation fee as appropriate. Add ons for trials and deferred sentences can still be part of the scheme.

The grant would be made by the solicitor and approved by the board. There would be no means test. A single page simple mandate would require to be signed by the applicant confirming that they are instructing the solicitor chosen or appointed for the particular prosecution case reference. The mandate would, importantly, contain a clause that the case was not being funded by any other means (see later). The solicitor would submit an electronic version of this to the board and provided no other application had been granted for that case reference the grant would be automatically approved. The only additional involvements that Slab would have in the applications process would be to deal with transfers of grants to a new solicitor, and the current test for those would still apply with core fees continuing to be split at the conclusion of the case, and sanction applications which would continue as present.

Upon conclusion of the case the account process would be an even simpler version of the current online system ie a tick box system for the core fee and any add ons if appropriate.

THE ADVANTAGES (PROS)

1. The amount of time solicitors would spend upon chasing financial verification and arguing with SLAB over the appropriateness of Abwor grants and refusal of CLA grants would diminish to zero. This would mean they could run their practices more efficiently and focus on case preparation and resolution rather than those matters in the above sentence.

2. The courts would run more efficiently as no longer would cases be delayed due to lack of

legal aid. This would result in savings to the taxpayer.

3. The system would result in a greater number of cases resolving early as the uncertainty over payment due to the complexity of tests and unnecessary barriers in the current Abwor system and differentials in means tests. This would result in fewer trials being fixed thus saving costs to the courts and prosecution in citation of witnesses. It of course would benefit these witnesses in not having to attend or be cited.

4. The experience of the client would improve as their solicitor client relationship would be more focussed on the case representation rather than the constant demands for information about the application at present.

5. Considerable savings would be made in the cost of running Slab. I don't have the figures but there are many staff employed whose sole purpose is to check bank statements vigorously, check court minutes to see that Abwor is being properly granted and apply the tests of the legal aid rules, which I fully accept are necessary in the current complex and cumbersome system. They would not be required in the proposed system (or at least not as many) creating significant savings in salary and pensions payments. As previously stated the function of the legal aid system is to provide access to justice, not create employment for civil servants in scrutinising the system.

DISADVANTAGES (CONS)

1. The government would have to handle the PR backlash from the media that legal aid was being made available for the wealthy criminal or offender. This is true but if properly presented the taxpayer can be assured that the overall cost to them will be reduced and the experience of court users including witnesses would be enhanced due to the greater efficiency. In addition the safeguard of the mandate being signed that the case is not being funded in any other way should deter a client who is being asked to pay privately for a case in signing such a document as this would open them up to a fraud investigation. The unscrupulous solicitor who has made a grant of legal aid and sought a private fee in addition would be committing a fraud in submitting such a grant for approval. There is of course the potential for unscrupulous solicitors and clients to commit legal aid fraud in the present system. Given that many privately paying clients will continue to do so rather than applying for legal aid even though it is available, but given they can't do both without committing a fraud, then the full take up by the 10% referred to above is unlikely to happen, thus saving further money if the core fee reduction assumes that all will.

2. Solicitors will be disappointed by any reduction in the core fee however this disappointment will be offset by the efficiency savings they can make in their practices given the change in workload and the reduction in stress as they try to ensure they are being remunerated for court work they are conducting.

3. The loss of jobs at Slab but I think I've covered that. They will be unhappy and against the scheme as turkeys don't vote for Christmas but the agency is too big and needs trimmed down to provide value for money to the taxpayer whilst maintaining sight on why legal aid is provided in the first place.

CONCLUSIONS

This proposed scheme is not perfect and I have acknowledged both the advantages and

disadvantages (there maybe others in each category I haven't identified) however the current system in my view (and that of many others) is way too complicated and not achieving its desired aims. It leaves solicitors, clients, courts and Slab stressed and unhappy and doesn't represent good value for the taxpayer as a result.

The present proposal needs a lot of tweaking in particular accurate statistics would help tidy up the detail however the whole package must be introduced to make it even a possibility. That means removing both the interests of justice test and means testing . Any cherry picking eg leaving the means test in place whilst adopting the single grant approach or removing the interests of justice test ,is missing the whole point as the savings to allow the advantages of the scheme can only be made in that way.

I would be happy to answer any questions and consider any criticism of the proposal or attend any meeting to discuss further.

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