

Summary Justice Reform & Criminal Legal Assistance.

Factual Background.

The policy of Summary Justice Reform (SJR) had the unanimous support of all parties in the Scottish Parliament. Where the Summary Justice Reform programme required legislative change provisions were included in the Criminal Proceedings etc (Reform) Scotland Act 2007 (CPR Act) which was passed unanimously by the Scottish Parliament and given Royal Assent in February 2007.

<http://www.opsi.gov.uk/legislation/scotland/acts2007/20070006.htm>.

The policy for Summary Justice Reform is contained in a Safer Scotland publication called "Safer and Stronger, Summary Justice Reform, System Model" published by the Scottish Government in 2007. This policy document contained a ministerial forward from Kenny MacAskill, Cabinet Secretary for Justice and Elish Angiolini, QC, Lord Advocate.

<http://www.scotland.gov.uk/Publications/2007/09/06092618/0>

Summary Justice Reform, amongst other things, was introduced to allow, where possible, the early resolution of cases in the summary criminal courts. The Scottish Government wished to have a system of criminal legal assistance that complemented the summary justice reform model. As a consequence, in October 2007, the Scottish Government, in conjunction with the Scottish Legal Aid Board (SLAB), published a consultation paper entitled "Reform of Summary Criminal Legal Assistance".

<http://www.slab.org.uk/profession/summarycriminal>.

These proposals were then consulted on with a deadline of 24th December 2007. There followed a period of intense consultation and debate within the profession, along with road shows by the Scottish Legal Aid Board and various meetings with the Scottish Government including a meeting with the Cabinet Secretary and representatives from different Faculties throughout Scotland including Aberdeen, Stirling, Dumfries and Galloway, the Borders, West Lothian, Edinburgh, Falkirk, Hamilton and Districts and Glasgow. The aim was not to be exclusive but rather reflective of a broad range of professional opinion.

In brief, the "headline" proposed provisions were:

1. Advice and assistance was to be subsumed in a subsequent grant of ABWOR or summary legal aid.
2. Solicitor of choice from custody at the same rate as the duty Solicitor, £63

and thereafter £9.

3. The accused appearing on undertaking - block fee of £70 rising to £300 (Sheriff) £200 (J.P. court) subject to successful application(s) to SLAB
4. Cited cases - essentially the same as undertaking cases.
5. An application for summary legal aid would require to provide SLAB with a disclosable summary and an " offer of resolution" from the Crown Office and Procurator Fiscal Service (COPFS).
6. The subsuming of two diets of deferred sentence within the core fee for ABWOR and summary legal aid.

There was universal opposition from the profession to these proposals and the Government, in response, extended the consultation period beyond 24th December to mid February 2008 to allow further discussion and possible changes to be made to the original legal aid proposals. A Summary Reform Working Party was set up to include representatives from the Scottish Government, SLAB and the profession. The profession's representatives included amongst others, the Convenor of the Legal Aid Solicitors Committee, the Presidents of the Edinburgh Bar Association and the Glasgow Bar Association. This working party was instructed to revise the proposals contained in the October consultation paper.

What are The Scottish Government seeking to achieve?

As stated above, the Scottish Government wish to introduce a system of criminal legal assistance that complements their Summary Justice reform (SJR) model. They wished to have a system of Criminal Legal Assistance (CLA) that, where possible, encouraged the early resolution of cases. However, their rationale was that given there were to be fewer cases within the summary court system, they desired to achieve a budget cut in summary legal aid expenditure of 7%. The Government argued that retaining the status quo under SJR would result in an 18% reduction in summary legal aid expenditure.

Upon what does the Scottish Government base its calculations?

The financial calculations for summary criminal legal assistance are based on two factors. Firstly, they are based on assumptions of revised level of business provided by COPFS in January 2008. Secondly, with these assumptions the Scottish Legal Aid Board were instructed to produce a costing model based on estimated levels and types of business in the summary courts.

What are the COPFS assumptions?

The COPFS assumptions are contained in the revised proposals for summary criminal legal assistance:

<http://www.slab.org.uk/profession/summarycriminal>

Appendix 2 details the COPFS calculations based on their figures for 2006/2007. In short, these assumptions were:

1. 10% reduction to 35,500 in the number of accused reported to COPFS due to an increased use of Police Direct Measures;
2. 355,000 standard prosecution reports;
3. 132,100 cases to be dealt with by Direct Measures;
4. 15% increase in accused issued with Direct Measures by the COPFS;
5. 156,400 accused prosecuted in the summary courts broken down into 94,100 at the Sheriff Court and 62,300 at the new JP Courts;
6. Maximum of 26,600 failed Direct Measure;
7. 6,000 persons accused of breach proceedings and to be prosecuted in the Sheriff Court;
8. 12,000 accused prosecuted in the JP Court instead of the Sheriff Court as a result in changes in RTA legislation;
9. 550 accused persons prosecuted at the Sheriff summary level instead of solemn.
10. 4640 persons charged with common law offences prosecuted in JP Courts instead of Sheriff Court.

Using these assumptions and their own methodology, SLAB produced a costing model, detailed in Appendix 3 of the aforementioned revised proposals. This costing model estimated grants of all types of legal aid under the proposed new CLA scheme and involved a series of detailed calculations based entirely on assumption and estimation.

This approach was the subject of fierce criticism from the profession who pointed out that the livelihoods of their members were to be dictated by an entirely new system of CLA was not based on empirical research but assumptions. In particular, with regard to Direct Measures (DMs), the profession simply did not accept an intricate costing model from SLAB based on their best estimates and the data from COPFS.

The revised proposals of summary criminal legal assistance was sent to all Deans and Secretary's of Faculties by The Law Society on the 5th March 2008. The document was described as the final consultation document and the Law Society of Scotland stated:

"The working party recognised this document constituted a significant

improvement on the original consultation paper, in particular the working party welcomed the introduction of a single core or disposal fee which would be accessible to all clients irrespective of their status";

"However the working party recognised that the Society's representatives did challenge many of the assumptions upon which the final modelling had been based and welcomed the commitment from the Cabinet Secretary to an early and continuing review over the interim process aligned to a commitment to revisiting these assumptions and to making changes should unforeseen consequences render this necessary."

The Law Society invited further submissions from the profession in advance of a further meeting with Faculty representatives and the Cabinet Secretary later in March.

The points of the revised proposals were -

1. Subsuming of advice and assistance in a subsequent grant of ABWOR or summary legal aid.
2. Disposal fee under ABWOR of £515 in the Sheriff Court and Stipendiary Magistrates Court and £150 in JP Courts. This was available in all types of cases cited, undertaking and custody cases.
3. Self certification of ABWOR by solicitor rather than application and grant by SLAB were case detailed in Appendix 5
4. Subsuming of two diets of deferred sentence in ABWOR and summary legal aid cases.
5. Application for summary legal aid to include disclosable summary from COPFS and offer of resolution from COPFS.

Following the publication of the revised proposals the Cabinet Secretary invited Faculty representatives to meet with him on 26th March. At this meeting Faculty representatives indicated the revised proposals were not acceptable to the profession. However, the Cabinet Secretary made clear that a new system of criminal legal aid assistance required to be introduced and the revised proposals were the route the Scottish Government intended to take. The Cabinet Secretary was then offered constructive comment and criticism. In particular, he was advised that a credible review procedure was fundamental to any prospect of success their model had. Such a review procedure must also attract the confidence of the profession.

He was also advised that the subsuming of two deferred sentences was a bone of contention given the time constraints these cases usually involved. It was also

pointed out that a different test for financial eligibility between ABWOR and summary legal aid would simply frustrate the Government's intended workings of SJR.

Those representing the profession further argued that the granting of power to SLAB in terms of non-appendix 5 cases was unacceptable, bureaucratic and likely to cause delay and frustration. The Cabinet Secretary was also informed that there was a fundamental principle involved in solicitors requiring to provide SLAB with disclosable summaries relating to their clients.

Following this meeting the Cabinet Secretary wrote to Deans of all local Faculties on 4th April. This correspondence ended the consultation period and confirmed the introduction of a new system of CLA. However the Cabinet Secretary in his correspondence conceded many of the points raised by Faculty representatives at the meeting on 26th March. In particular he set out that the review process on the new model would be "open and transparent".

The Cabinet Secretary removed SLAB's proposed role in the grant of ABWOR in the Sheriff Court and Stipendiary Magistrates Court by removing the appendix 5 distinction and leaving the grant of ABWOR in the Sheriff Court as an exclusive right of the solicitor.

He also removed the requirement of providing disclosable summaries to SLAB in an application for summary legal aid. There were also further concessions concerning police custody visits and deferred sentences.

The Cabinet Secretary repeated his position that:

"Were we to make no changes to legal aid summary justice reforms would be likely to lead to a reduction in legal aid expenditure of around 18%".

He then indicated that the Government's proposed cut in the budget was reduced from 7% to 6%.

It was the Law Society of Scotland's view that these concessions were not only a positive outcome in terms of engaging in the consultation process but also significant on their own terms. The removal of SLAB's proposed role in the grant of ABWOR was a particular benefit. However, the view remained that the proposals were deficient and the profession's role in the review process was crucial.

The timescale for introducing the new system of CLA was 30th June.

However, the full model of SJR has been operational since 10th March and the most immediate impact is that of Direct Measures.

What are Direct Measures?

The system of Direct Measures was introduced in Sections 50-54 of the CPR Act and their application extended after 10th March by the Police and COPFS.

The policy of DMs was also referred to in the aforementioned "Safer and Stronger" policy document introduced by the Cabinet Secretary and Lord Advocate.

Paragraph 14 states:

"serious or persistent offenders will not be offered a Direct Measure".

As detailed above the COPFS have made assumptions relative to Direct Measures which, in part, underwrite the financing of the new system of criminal legal aid assistance. The assumptions have been already detailed above. The Law Society in written submission and in consultation and negotiation with the Scottish Government have repeatedly challenged the COPFS figures, in particular, the % rate of "opting out" of a Direct Measure. It is exactly this sort of assumption our representatives in the review process will call COPFS to account for.

There are also prospective political problems if there is a relaxed used of DMs. The recent publicity in the news media emphasises the sensitivity of this policy ("Soft Touch Scotland").

Further, any miscalculation will also directly affect the costing model produced by SLAB, which was based on assumptions given to them by COPFS. This will, in turn, impact on the fee structure. The Cabinet Secretary has already recognised that this model was assumption based and requires to be reviewed in an open and transparent way.

The Convenor of the Legal Aid Solicitors Committee appointed various solicitors who had been involved in the consultation process and the meetings with the Cabinet Secretary to represent the profession in a newly created Summary Justice Review Group. This Group will meet on a regular basis with the Scottish Government and the Scottish Legal Aid Board to review the working of the criminal legal assistance scheme.

The Review Group shared the scepticism of the profession concerning many aspects of the CLA model and met with the Scottish Government and SLAB for the first time on 29th May. COPFS were not present at this first meeting but were invited to attend future meetings. They have accepted this invitation and will be represented at the second meeting to take place on 2 July. At the first meeting

the Review Group requested the following statistics from the Government:

1. The number of prosecutions since March (a global figure and broken down into each Sheriffdom).
2. The number of diversion offers made and how many of those were accepted (this figure should include Police fines)
3. Statistics on the balance of case load between Sheriff and JP Courts and total number of reported crimes for that period.

In response the Scottish Government indicated they did not anticipate any difficulty in principle in obtaining these statistics. The Scottish Government confirmed that statistical data was available quarterly in arrears and agreed the need for early and reliable data. The Review Group also requested figures on the challenge rates for Police fixed penalties by September 2008 and the Government also agreed to that request. The Review Group also requested that some mechanism for making the Cabinet Secretary's assurances in consultation and in correspondence be codified in a public document. The Scottish Government agreed to consider this.

A meeting of those involved in this review process will take place in December and be attended by the Cabinet Secretary where it is anticipated there will be a detailed review of the CLA scheme based on the evidence then available and other aspects of the operation of SJR since 10th March.

Despite the importance of the profession's interest in SJR and the significance of the review process, the Society and those representing the profession in the review process have faced considerable criticism from the profession, particularly from the Glasgow Bar Association (GBA).

The GBA, like everyone else, opposed the proposals for CLA. Their then President played a significant and important role in the subsequent revision of the original proposals into the final proposals sent to the Faculties on 5th March.

However, after the consultation process finished, the GBA elected to conduct "industrial action" in Glasgow Sheriff Court from 6th May. The Cabinet Secretary met with representatives of GBA in advance of their industrial action and reiterated that he considered justice was best served by maintaining a thriving private independent bar but that he would expand the use of the PDSO if he felt it necessary to avoid disruption in the justice system. The GBA conducted their "industrial action" but later suspended their action and a representative from Glasgow was invited to join the review group.

The Law Society felt that engaging in the review process with the Government in an open and transparent way was not consistent with "industrial action" designed to cause disruption. There was perceived to be a difficulty in insisting on openness and transparency from others whilst reserving the right to disrupt the

court system at any given time.

A Glasgow representative participated in the first review group meeting on the 29th of May however the GBA repeated industrial action on 9th June by engaging in a "wild cat strike" and as a consequence both The Law Society and the Glasgow representative felt his continued participation in the review group was not possible.

It is unfortunate that the Glasgow Bar Association have refused to participate in the review process and that they have under consideration a requisition for a Special General Meeting of the Law Society to propose a vote of no confidence in the Convenor of the Legal Aid Solicitors Committee, who also chairs the Society's Review Group. There is no reasonable alternative to taking part in the review process and holding to account those who devised the principles of the new criminal legal aid model, as the Society has done. The Society hopes that wise counsel will prevail in the GBA and that conflict can be avoided and the many talents of the GBA can be used to help focus on using the emerging evidence from the criminal justice system to protect and promote the interests of justice, the public and the profession.