

The Scottish Legal Aid Board



Proposals for the Review of Summary Criminal Legal Assistance

June 2004



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About the Board

Legal aid allows people who would not otherwise be able to afford it to get help for their legal problems.

The Scottish Legal Aid Board was set up in 1987 to manage legal aid in Scotland. We are a non-departmental public body responsible to the Scottish Executive.

Mission statement

To promote the development and delivery of appropriate access to quality legal assistance for those eligible, in a cost effective manner.

Strategic objectives:

- to achieve consistent, timely and sound decision making at all stages of an application for legal assistance
- to achieve consistent, timely and sound decision making at all stages of assessing and paying accounts
- to achieve effective financial management of the Legal Aid Fund
- to improve the effectiveness of the delivery of our service while achieving a reasonable balance between cost and quality
- to communicate effectively with applicants, opponents, their advisors and other stakeholders in a clear, concise, timely, informative and pro-active manner
- to provide sound advice to Scottish Ministers and the Scottish Parliament on the current operation and development of the provision of legal aid.

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Chapter 1 - Executive summary

Overview

- 1.1 The existing system of helping those people who have been charged with a summary criminal offence to get legal advice and representation paid for from public funds is provided by a combination of four types of legal aid: advice and assistance (3.1), assistance by way of representation (ABWOR) (3.3), the duty scheme (automatic legal aid) (3.20) and summary criminal legal aid (3.26).
- 1.2 The Board considers that:
- the existing system is too inflexible, compartmentalised and inefficient;
 - it does not provide the profession with consistent payment arrangements for the work done on behalf of their clients where it is of a similar nature;
 - it is inconsistent in its approach to assessing an applicant's financial eligibility to receive such advice or representation;
 - it requires a better balance between payment for guilty pleas and cases which proceed to trial;
 - the financial eligibility arrangements should be revised so that they are more consistent between the various stages;
 - the financial test for summary criminal legal aid should be revisited;
 - the system of contributions in criminal advice and assistance should be removed and solicitors' fees adjusted accordingly;
 - summary criminal legal assistance does not stand on its own but is a key component of the justice system. Scottish Ministers are committed to modernising the justice system, and are taking this forward through new legislation and reviews such as Sheriff Principal McInnes' review of summary justice.
 - the review of summary criminal legal assistance cannot be discussed effectively in isolation from proposals to review the justice system as a whole;
 - the present system requires to be revised to facilitate optimum appropriate representation for accused persons
- 1.3 This review does not deal with the following:
- The Board has not provided costings for its proposals. To do so would be premature until a clearer picture develops on how Scottish Ministers intend to take forward the proposals contained within Sheriff Principal McInnes' review.
 - Criminal legal aid granted by the court in solemn cases (ie with a jury) is not dealt with

although court grants of summary criminal legal aid is.

- There is no detailed analysis of the system of fixed payments made to solicitors in summary criminal legal aid cases because it is the subject of independent research commissioned by the Scottish Executive.

SUMMARY OF RECOMMENDATIONS

The Existing System

1.4 We recommend that:

- The current regulations should be amended to remove the requirement to make an application for summary criminal legal aid within 14 days of tendering a not guilty plea so that defence agents are not encouraged to apply prematurely for summary criminal legal aid.
- The regulations should also be amended to remove the prohibition of reverting to ABWOR if an application for summary criminal legal aid has been refused so that guilty pleas and subsequent sentencing arrangements in those circumstances are covered under the provisions.
- The interests of justice test should be retained but the factor pertaining to the defence should be weighted higher in terms of priority than the other factors because it is fundamental to deciding whether assistance should be provided for the conduct of a trial as distinct from the principle of representation in general.
- The current reference to a “non frivolous defence” should be removed and a more meaningful statement of defence substituted in its place so that more informed decisions can be made in deciding whether to grant summary criminal legal assistance for the conduct of a trial.
- The powers of the court to make publicly funded representation available, where it is felt desirable for the accused to be represented, should be extended so that a “safety net” is provided by, for example, appointing a duty solicitor or by the Board employing a solicitor under its powers.

An Integrated System

1.5 We recommend that:

- Future arrangements should be based around a single integrated system providing advice, assistance and representation to the extent required for each accused and his case.
- The system could be based on the current advice and assistance scheme with one grant and with one reference number.
- The system should incorporate different stages at which different tests are to be met, depending on how the case progresses and what work needs to be done for the accused.

- Although these stages might appear to result in additional work for the solicitor, in essence they are similar to the existing stages at which either an increase in authorised expenditure is requested or the interests of justice test is applied. The proposal to introduce a templating system for increases [5.23] should also make it easier for solicitors to use.
- Solicitors will continue to grant applications for advice and assistance and ABWOR but at the different stages of the case where different work needs to be done, different levels of authority would be needed from the Board.
- The stages at which differing levels of authority would be needed would be:
 - a diagnostic stage
 - the tendering of a guilty plea
 - the tendering of a guilty plea following upon investigations,
 - preparing for and conducting the trial
 - post conviction hearings
 - appeals.
- Adequate controls and balances would be needed to ensure value for money.

Duty Solicitors

1.6 We recommend that the duty solicitor scheme should remain but propose that:

- Accused persons appearing from custody or on an undertaking to appear should be able to get access to their solicitor of choice who by having better knowledge of the accused's circumstances, can make more informed decisions. This would also reduce the incidence of formal not guilty pleas being made by duty agents who then pass papers to the solicitor of choice.
- The capped follow up fee of £108.85 payable to duty solicitors should be removed so that follow up work and in particular hearings to deal with sentence can be appropriately remunerated.

Financial Eligibility

1.7 We recommend that:

- The current financial eligibility tests for summary criminal legal aid should be reviewed and standardised across the different stages of the case based on likely case costs and the ability of the individual to meet them as opposed to "undue hardship" so that there is a fairer system of assessing ability to pay.
- There should be a redetermination of an assisted person's means where authority is sought to prepare for and be represented at trial so that adequate controls can be put in place to ensure value for money.
- A less onerous means test should be applied at the diagnostic stage.
- Adequate controls are needed to ensure appropriate vouching of an applicant's eligibility

to receive criminal legal assistance.

- There be removed the requirement for applicants for summary criminal legal assistance to pay a contribution towards their costs which is generally not collected by solicitors. An appropriate adjustment to the fees payable to solicitors should be made to reflect the net amount paid at present so that the current anomaly between advice and assistance, summary criminal legal aid and the duty scheme can be removed.

Fees

1.8 We recommend that

- There should be consistent feeing arrangements, providing appropriate remuneration to solicitors for work done of a similar nature on behalf of their clients so that there is no distinction drawn, for example, where representation is provided under ABWOR and legal aid.
- That a lower level of fee would apply at the diagnostic stage and higher fees for representation.
- The current minimum fee arrangement should be removed.
- The definition of a trial in the legal aid legislation should be reviewed to provide that only in exceptional cases would payment be made for representation at a trial at which a changed plea of guilty is tendered.

Effects

1.9 Many of our recommendations cannot be discussed effectively in isolation from the associated recommendations contained in other current reviews, most notably that of Sheriff Principal McInnes. It is hoped that by making these recommendations at this time they will contribute to Scottish Ministers' intended reform of the criminal justice system, the ongoing Strategic Review of legal aid and help effect the culture changes needed to improve the justice system as a whole.

1.10 Essentially we need a legal aid system:

- that reduces bureaucracy where possible and appropriate
- appropriately rewards work done, and
- provides adequate controls and balances to facilitate the efficient working of the criminal justice system and provides criminal legal assistance in a cost effective and efficient manner.

Chapter 2 - Introduction

- 2.1 In its Corporate Plan, the Board set out its intention to set up a Working Party to review the interests of justice test in summary criminal legal aid. This is the test laid down by Parliament which lists factors to be taken into account by the Board in deciding whether to grant legal aid to an applicant who wishes to defend himself against a criminal charge.
- 2.2 There are a number of reasons for such a review to take place not least that the environment in which legal aid and the courts operate has changed significantly since the inception of the Board in 1987. In particular, the following matters have had a significant impact:
- the changes in volume and expenditure
 - the introduction of fixed fees on 1 April 1999
 - the introduction of the facility to grant exceptional case status in June 2002
 - a reduction in the amount of business being prosecuted in the district court
 - the increase in diversion from prosecution schemes
 - the changing profile of cases prosecuted in the District and Sheriff Courts, and
 - the test has not been revisited since the inception of the Board.
- 2.3 The remit of the Working Party was to:
- review the application of the existing guidelines for the interests of justice test by examining sample cases
 - review its findings through external consultation, and
 - make recommendations for change.
- 2.4 It became clear in the early stages of the process that what was needed was a much wider review than simply the interests of justice test. The Board therefore broadened the scope of the review to consider wider aspects of summary criminal legal assistance, that is to include not only how legal aid is granted but also how the system of providing legal advice and representation operates as a whole. More fundamental changes are needed to improve the efficiency and effectiveness of legal aid, and its impact on the courts. The review does not however look in detail at fixed payments for summary criminal legal aid. This is the subject of independent research commissioned by the Scottish Executive and being carried out by the University of Strathclyde.
- 2.5 A key consideration in this review was the recognition that summary criminal legal aid cannot be considered in isolation from the justice system as a whole. Likewise, the review could not be considered in isolation from the other major reviews of the criminal justice system being undertaken at the same time, most notably, that of Sheriff Principal John McInnes. Other

work conducted by the Board in consultation with the Law Society and the Scottish Executive into the operation of the existing advice and assistance scheme also has an important bearing on the recommended changes.

2.6 The Working Group proceeded by

- conducting an external consultation exercise on the operation of the summary criminal interests of justice test;
- sampling cases;
- analysing trends in applications received by the Board.

2.7 In October 2002, we consulted with various parties, (the list of respondents is Appendix 1) advising them of our current review of the effectiveness of the approach to the interests of justice test, and inviting views on how the application of the test could be improved. By and large, the consultation, while providing suggestions for some minor changes to our guidelines, resulted in most solicitors' organisations stating that no changes were needed. However, there were also interesting responses from a number of organisations that suggested more radical changes to the system such as, for example,

- Establishing a scheme whereby any solicitor registered to provide criminal legal aid can be reasonably remunerated in relation to early disposal of cases.
- Exploring whether in all other cases any changes can be introduced which would provide motivation and incentive to expedite cases but without penalising solicitors in relation to cases in which (despite their best endeavours) the matter remains unresolved until a trial.
- ABWOR, or some variation, ought to be more readily available.

2.8 We also met with Sheriff Principal John McInnes and members of his Review Committee.

2.9 Our case sampling exercise demonstrated that while there was a variety of views expressed on the merits of the cases, there was general agreement on the decisions taken by the Board to either grant or refuse summary criminal legal aid. It was however noted that in a number of cases representation was clearly necessary, but for a plea in mitigation and not to proceed to trial. Full summary criminal legal aid did not appear to be the appropriate vehicle to provide representation in many of the randomly selected sample of cases.

2.10 The analysis of our trends information and other reports such as the Central Research Unit's Evaluation of the Public Defence Solicitors' Office, suggests that the summary criminal legal aid system might be adding to other incentives in the justice system to promote the tendering of not guilty pleas.

2.11 The current system, as summarised in Chapter 3 is analysed in Chapter 4 and a model of how the new system might work is provided in Chapter 5.

The purpose of this document and how you should respond

2.12 The purpose of this paper is:

- First and foremost to put into the public domain the Board's views on how the summary criminal legal assistance scheme needs to develop but it is also,
- to inform and contribute to the Strategic Review of legal aid and Scottish Ministers' intended reform of the criminal justice system as a whole, as well as
- complementing and contributing towards the consideration of Sheriff Principal McInnes' review of summary justice.

2.13 We ask you to consider and comment on the views expressed in this paper. In it you will find facts and figures about the current summary criminal legal assistance scheme, how it works, who is involved and at what stage, how applications are made, decided and how members of the profession are paid for the work they undertake on behalf of their clients. We would ask you to consider and comment on the views which have been expressed taking into account the proposals flowing from the other current major reviews, such as that of Sheriff Principal John McInnes. In setting out your comments, you should respond to the specific proposals that are set out in Chapter 1, and also comment on other sections of the paper.

2.14 We are seeking comments to our proposals by **Friday 16 July**. You should complete the enclosed response form, to give information and to advise if that response is confidential. This will help ensure we handle responses appropriately. The response form also includes a summary of the recommendations to which we are seeking comments. If you cannot respond by this date please let us know.

2.15 Written comments should be submitted by 16 July, confirming by whom the response is being made, to:

Review of summary criminal legal assistance
Communications Department
The Scottish Legal Aid Board
44 Drumsheugh Gardens
EDINBURGH EH3 7SW

Alternatively you can send your response by:

- Hays DX to: DX ED555250 Edinburgh 30
- Legal post to: LP2 Edinburgh 7

You can also fax your response to: 0131 220 4878
Or email: general@slab.org.uk

2.16 Copies of the discussion paper and response form are available on the Board's website at www.slab.org.uk, or you can request a copy from the Board's Communications Department, direct tel 0131 240 1985 or email general@slab.org.uk

2.17 If you have any queries on the paper, contact: Kingsley Thomas, Manager of Criminal Applications, direct telephone 0131 240 2085 or email thomaski@slab.org.uk

Chapter 3 - Summary of the current arrangements

Criminal Advice and Assistance

- 3.1 Advice and assistance helps to pay a solicitor to give advice on any matter of Scots law whether that involves a civil or criminal matter. For example, in criminal matters as well as giving a person general legal advice, a solicitor is able to give an accused person advice on how to prepare for his court appearance, or can write to the court intimating a guilty plea on his behalf. Where the applicant is financially eligible to receive advice and assistance, the cost of this will be met from public funds through the Board, apart from any amount the person may have to pay by way of contribution to the solicitor.
- 3.2 Generally, advice and assistance will not enable the solicitor to represent the person in court except in certain types of proceedings laid down by Parliament. In these proceedings cover is available under a special type of advice and assistance called ABWOR (Assistance By Way of Representation).

ABWOR

- 3.3 ABWOR is mainly used where a plea of guilty is tendered but it is also available for other forms of representation in court as laid down by Parliament. It covers preliminary pleas, for example, where a charge is considered to be incompetent or irrelevant.
- 3.4 The solicitor must apply criteria, laid down by Parliament, before deciding whether his client is eligible to receive ABWOR. Primarily these criteria require the solicitor either to be satisfied that the court is likely to send his client to prison or his client will lose his job as a result of the sentence or that the client is unable to understand the proceedings. Differing criteria apply for other types of court process such as, for example, preliminary pleas. In all cases however the solicitor must be satisfied his client does not have other rights and facilities available to fund the work, e.g. trade union membership or insurance cover.
- 3.5 ABWOR cannot be made available to make a not guilty plea, nor is it available where the accused is held in custody nor can it be used where an applicant has previously tendered a plea of not guilty and wishes to change that plea.

Availability and Eligibility

- 3.6 Advice and assistance (which includes ABWOR) is granted by the solicitor and not by the Board. The solicitor must be satisfied the advice or assistance relates to a matter of Scots Law.
- 3.7 The applicant is subject to a means test. The solicitor must be satisfied that his client is financially eligible to receive advice and assistance. The applicant must be eligible on both income and capital limits to qualify. Currently, disposable income (that is total income less standard allowances laid down by Parliament) must not exceed £192 per week and disposable capital (that is total capital less standard allowances laid down by Parliament) must not exceed £1330.

- 3.8 Where the applicant is in receipt of income support or income based job seekers' allowance, he is automatically eligible on income. Where the applicant is in receipt of other benefits, most of these and tax credits are disregarded from the income assessment. The applicant receiving benefits must still pass the disposable capital test.
- 3.9 Depending on his financial circumstances, the applicant may expect to pay a contribution ranging from £7.00 to £114.00.
- 3.10 It is for the solicitor to collect the contribution from the applicant. The Board deducts the amount of the assessed contribution from the solicitor's final account at the conclusion of proceedings, on the assumption that the solicitor will have collected it. In practice, the financial circumstances of many applicants are such that they are not assessed by the solicitor as liable to pay a contribution. However, where a contribution is assessed as payable, in many cases it may not be collected by the solicitor.
- 3.11 Once a solicitor grants the application for advice and assistance he is authorised to carry out work and incur outlays up to an initial value only, usually £80, but this may increase to £150 depending on the circumstances. For example, in ABWOR cases the increased limit applies where a second or subsequent hearing is fixed by the court. If the solicitor considers either limit is not enough for the work he wishes to do, he must ask the Board for an increase in authorised expenditure to cover that additional work and receive authorisation from the Board before starting the work. An increase cannot be backdated and any work carried out which exceeds the initial or increased authorised level of expenditure at any given time cannot be paid for by the Board.
- 3.12 However, where a grant of ABWOR is made, because of the feeing arrangements currently in place, the solicitor can receive only a maximum payment of £70 for all the work he has done up to and including the tendering of a plea. This applies irrespective of whether a guilty plea is tendered with or without a preliminary plea having been argued [3.3].

Feeing Arrangements

- 3.13 Where a contribution is payable by a client, this must be applied to payment of the solicitor's account first before any account is submitted to the Board for payment.
- 3.14 After taking into account the contribution, the solicitor is entitled to submit his account to the Board for payment for work done and outlays he has incurred in connection with the advice and assistance he has given. He has to satisfy the Board that the work has actually been done and that it was necessarily and reasonably done (that is, that the work advanced the case). There are detailed tables of fees laid down and generally they are based on time and line accounting.
- 3.15 Under criminal advice and assistance the maximum payment to a solicitor for the work done and outlays incurred is £80 unless the solicitor receives authorisation from the Board to exceed this expenditure or it falls within the increased initial limit [3.11 & 3.16]. Payment is made on the basis of "time and line" accounting reflecting both the time taken and the number of letters, telephone calls etc. made. However, where the fees allowable to a solicitor, calculated in this way, amount to less than £25 or where a solicitor elects to claim only this fee, a detailed time and line account need not be submitted by the solicitor to entitle him to receive the £25 minimum payment.

3.16 Under ABWOR the solicitor will receive only £70 for all work up to and including the first diet at which the plea is tendered. Where a second or subsequent diet is fixed by the court the solicitor may continue to act up to a limit of £150 on a time and line basis. Once this limit is exhausted the solicitor must seek further increases in authorised expenditure from the Board.

Criminal Advice and Assistance and ABWOR Volumes

3.17 Grants by solicitors of criminal advice and assistance (and ABWOR)

	2003-2004	2002-2003	2001-2002
Criminal advice and assistance	136,102	137,732	142,400
Criminal ABWOR	22,931	21,631	22,488

3.18 Increases in authorised expenditure

	APPLICATIONS			GRANTED BY BOARD			REFUSED BY BOARD		
	03/04	02/03	01/02	03/04	02/03	01/02	03/04	02/03	01/02
Criminal advice and assistance	20,964	20,839	18,341	17,579	17,410	16,418	1,271	1,213	1,049
Criminal ABWOR	18,140	16,493	14,521	16,204	14,507	13,716	443	454	365

3.19 Payments from the Fund

	MINIMUM FEE				DETAILED ACCOUNTS			
	Numbers		Paid (£'000)		Numbers		Paid (£'000)	
	03/04	02/03	03/04	02/03	03/04	02/03	03/04	02/03
Criminal advice and assistance	44,985	46,207	1,280	1,312	85,329	82,909	7,732	7,567
Criminal ABWOR	2,767	2,570	78	72	16,332	15,400	3,366	3,289

Average case costs (£)

	2003-2004	2002-2003	2001-2002
Criminal advice and assistance	69	69	67
Criminal ABWOR	180	187	151

The Duty Solicitor Scheme (Automatic Legal Aid)

- 3.20 When an accused person is taken into police custody and is asked at the police station to take part in an identification parade or if he has been charged with murder, attempted murder or culpable homicide, he has the right, if he wishes, to use the duty solicitor. He can do this regardless of his financial circumstances. He will not have to apply for legal aid for this nor pay for using the duty solicitor. Where an accused person has been asked to take part in an identification parade or if he has been charged with murder, attempted murder or culpable homicide, he also has the right to use his solicitor as if he were the duty solicitor, and again, he will not have to apply for legal aid or pay for using his solicitor.
- 3.21 Conversely, where, an accused is in custody at the police station for some other reason, (that is other than on a charge of murder, attempted murder or culpable homicide) he does not have the right to use the duty solicitor. The duty solicitor may agree to attend, or the accused may ask his solicitor to attend. In either case, if the accused person is eligible, that solicitor may be able to give him advice and assistance. Depending on the accused person's financial circumstances, he may have to pay towards the costs of the advice and assistance given [3.7 to 3.9].
- 3.22 Where the police keep the accused person in custody (usually in the police station) he will appear before a sheriff or magistrate in court on the first court day after his arrest. He has the right to instruct the duty solicitor, regardless of his financial circumstances. The duty solicitor can represent the accused person at his first appearance in court and, if he pleads guilty, to deal with any follow up hearings until the end of the case. The accused person will not have to apply for legal aid for this, and he will not have to pay for instructing the duty solicitor.
- 3.23 On the other hand, if the accused person wants his solicitor of choice rather than the duty solicitor to represent him at the first appearance in court, he has the right to ask him to do so but he will be liable for the costs of representation. Public funds cannot pay for this although if the accused is eligible to receive advice and assistance his solicitor of choice may grant that to provide advice before appearing in court but not for court appearances. Any solicitor who acts for an accused person and is to be paid from public funds must be on the Criminal Legal Assistance Register. (All solicitors who provide advice and assistance, ABWOR or legal aid in criminal matters must be registered with the Board to do so.) All duty solicitors must be similarly registered.
- 3.24 Duty solicitors are paid by the sessions the court fixes to deal with the accused persons appearing from custody. They are paid £44.40 for the first session which includes payment for the first accused with £6 for each additional accused up to a maximum of £96.25. An additional payment of up to a maximum of £64.55 is paid on a similar basis for each subsequent session. They receive a maximum fee of £108.85 for any preliminary pleas and for any follow up work after a guilty plea has been tendered.

3.25 Duty Solicitors Volumes

TOTALS	NUMBER OF ACCUSED	TOTAL PAID £'000	COST PER ACCUSED £
2003 - 2004	30,233	945	31
2002 - 2003	25,399	878	35
2001 - 2002	22,141	813	37

Summary Criminal Legal Aid

3.26 When the person decides to plead not guilty then regardless of whether he is appearing from custody or not, he can apply for criminal legal aid. How he does this depends on the seriousness of the charges. Where charges are less serious (summary ie non-jury) he must apply to the Board for summary criminal legal aid within fourteen days of pleading not guilty, although the Board may accept a late application where special reasons exist.

3.27 A decision to grant will depend on whether:

- (a) The Board considers that the applicant could pay his own legal costs without undue hardship to him or his dependents. This will depend on his financial circumstances, and the likely cost of the case. There is no statutory guidance for assessing financial eligibility based on this test. In 2001 the Board decided, in assessing the application under this test, to use similar capital and income limits to those used in civil legal aid. Thus a capital limit of £6,100 and an upper income limit of £179 per week are applied with the added flexibility that these limits may be exceeded for more complex cases which would be more expensive to fund privately.
- (b) The applicant might be able to get help with the costs of the case from somewhere else, for example, an insurance company or trade union.
- (c) It is in the interests of justice for the applicant to be granted legal aid. This includes questions such as -
 - is the applicant likely to go to prison or lose his job if he is found guilty;
 - will the case be complicated to argue in court because the evidence is difficult;
 - can the applicant understand the proceedings;
 - is it in someone else's interests for the applicant to be represented in court;
 - does the applicant have a non frivolous defence.

These do not exclude other factors being taken into account by the Board, for example, the minor or straightforward nature of a case or the lack of serious consequences for the accused. Nor is it suggested that the matters are listed in any particular order of importance or priority. The Board must look at the whole circumstances of the case and take a balanced decision.

3.28 The Board may also make legal aid available for example, by telephone to a solicitor in court where there is special urgency making it difficult to lodge an application in the normal way. The greatest use made of the special urgency provisions is however in criminal appeals for example where the solicitor marks the appeal prior to submitting a full application for legal aid for the appeal [3.37].

The following table shows the number of applications for special urgency granted over the last three years.

Number of applications granted in matters of special urgency

	2003-2004	2002-2003	2001-2002
Summary Criminal	57	112	139
Criminal Appeals	2,550	2,649	2,627
Totals	2,607	2,761	2,766

3.29 Summary criminal legal aid volumes

Applications to the Board for summary criminal legal aid

	District Court			Sheriff Court			Totals		
	03/04	02/03	01/02	03/04	02/03	01/02	03/04	02/03	01/02
Applications received by Board	14,487	14,116	14,623	68,512	65,811	61,904	82,999	79,927	76,527

Grants by the Board of summary criminal legal aid

Grants made by Board	Granted at first instance			Granted after review			Totals		
	03/04	02/03	01/02	03/04	02/03	01/02	03/04	02/03	01/02
District Court	10,748	10,877	11,501	965	724	1,017	11,713	11,601	12,518
Sheriff Court	60,897	59,199	56,043	2,804	2,967	2,271	63,701	62,166	58,314
Totals							75,414	73,767	70,832

Accounts paid and average case costs

Court	Number of Cases		Total Paid (£'000)		Average Case Cost (£)		
	2003/2004	2002/2003	2003/2004	2002/2003	03/04	02/03	01/02
District Court	11,169	11,123	4,438	4,434	397	399	400
Sheriff Court	62,762	59,873	44,421	41,622	693	695	691

Summary Criminal Legal Aid Granted by the Court

3.30 The court may also grant legal aid in a summary case but limited to where a person has not previously been sentenced to imprisonment or detention and the court is considering such a sentence. In these cases the court has to consider only whether the person could pay his own legal costs without undue hardship to him and his dependents.

3.31 Volumes of court grants

	2003/2004	2002 - 2003	2001 - 2002
Grants made by Court	1142	1170	1017

Feeing Arrangements

3.32 Where criminal legal aid is provided by a solicitor in relation to summary proceedings (other than in some excluded proceedings, such as summary criminal legal aid granted as a matter of special urgency), he is entitled to a fixed payment for the work done.

3.33 Fixed payments were introduced in 1999 and they represented a radical departure from the former system of time and line accounting. Fixed payments are based on a prescribed "rate for the job" which is designed to ensure remuneration for solicitors undertaking summary criminal legal aid with a degree of "swings and roundabouts" in relation to the remuneration to any individual case. Payments are made for blocks of work which differ depending on the court in which the work is done, for example, £500 for any work done up to and including the first 30 minutes for a trial in the sheriff court or in the district court where the proceedings are set down before a stipendiary Magistrate, with additional blocks for work done thereafter for later stages in the process, for example, the remainder of the first day of trial at £100 and the second day at £200. But for the same work before a lay magistrate in the District Court the payments are £300, £50 and £50 respectively.

3.34 In June 2002 the fixed payment regulations were changed to take into account "exceptional cases". It was recognised that there could be exceptional cases where an assisted person would be deprived of a fair trial because of the amount of the fixed payment. Where this arises, the Board may, using criteria laid down by Parliament, determine that instead of receiving the fixed payment, the solicitor should be paid on a detailed time and line basis. In 2002/03 we received 158 requests for exceptional case status. We granted 28 and refused 130.

3.35 In summary criminal cases which are exempted from fixed payments for example, cases reduced from solemn to summary procedure or work done under the special urgency arrangements, payment is on a time and line basis for work actually and reasonably done (that is, work necessary to further the defence in the case) and for outlays, travel and waiting time actually and reasonably undertaken or incurred, due regard being had to economy (that is, was the work carried out in the most efficient and cost effective manner consistent with the conduct of the case). These cases are, however, small in number.

3.36 In the event of a question or dispute between the Board and the solicitor the matter is referred to another party to decide, namely the Auditor of Court.

CRIMINAL LEGAL AID FOR APPEALS

- 3.37 The accused person can apply for criminal legal aid to cover the cost of an appeal against the verdict or the sentence, or both, or for him to oppose any appeal taken by the Crown.
- 3.38 Once the accused person has been granted legal aid for an appeal, he will not have to pay anything towards the cost of the case. Legal aid will cover all the legal costs of his solicitor and advocate, if used, and any other expenses such as expert witnesses. (The solicitor may however have to ask the Board's permission before employing advocates and experts.)
- 3.39 Volumes of legal aid for criminal appeals

	APPLICATIONS			ACCOUNTS		AVERAGE CASE COST (£)
	Received	Granted	Refused	Received	Paid (£'000)	
2003 - 2004	2,782	2,629	27	2,497	2,413	966
2002 - 2003	2,973	2,776	24	2,697	2,410	893
2001 - 2002	3,080	3,002	24	3,106	2,460	792

TRANSFERS

- 3.40 The person in receipt of legal aid, may change the solicitor representing him but will have to show the Board that there are good reasons for this such as, for example, the ill health of the solicitor, a conflict of interest as between solicitor and assisted person or that the assisted person has moved from the area where the solicitor works, making it more convenient to instruct another solicitor.

Chapter 4 - The need for change

4.1 The main criticisms of and indicators for change in the current summary criminal legal aid system are:

- it is too inflexible and compartmentalised,
- there is an artificial distinction in the treatment of guilty and not guilty pleas,
- changes in volume and expenditure,
- the proposals for changes to other parts of the justice system, and
- the present system ought through the passage of time be reviewed.

The current summary criminal legal aid system is too inflexible and compartmentalised -

4.2 There are 4 different types of legal aid: advice and advice, ABWOR, the duty scheme (automatic legal aid) and summary criminal legal aid. Many cases need a combination of these types of legal aid. These distinct aid types have separate application forms, different feeing arrangements, and different eligibility criteria.

4.3 Summary criminal legal aid provides representation of an accused at trial and the stages following thereon up to and including giving advice on the prospects of appeal. But it is only available once a plea of not guilty has been tendered.

4.4 Once a not guilty plea has been tendered, irrespective of whether an application for summary criminal legal aid is made, ABWOR is unavailable to change that plea to one of guilty.

4.5 After summary criminal legal aid has been made available, any change of plea can be made using the grant of legal aid. Both advice and assistance and ABWOR are unavailable to the accused at this stage. There is a prohibition of using advice and assistance and its derivative ABWOR during the currency of a grant of legal aid.

4.6 Advice and assistance provides advice on Scots law but does not cover representation in court unless ABWOR can be used. It can, however, cover the solicitor lodging a written plea of guilty with the court on behalf of his client.

4.7 ABWOR is available, in cases where an accused is not in custody (cited cases), for the solicitor to tender a plea of guilty or to make a preliminary plea [3.3] in court on behalf of his client. However, if the accused is appearing from custody ABWOR cannot be used. The accused must look to the duty solicitor for assistance or alternatively privately fund his solicitor of choice.

4.8 **There is no interchangeability between advice and assistance and summary criminal legal aid.**

- 4.9 Summary criminal legal aid is available only after the not guilty plea has been tendered. The solicitor has 14 days from the not guilty plea to make the application to the Board. The Board may consider a late application if there are special reasons.
- 4.10 Because of this timescale, the application has to be made at a time when little information is available to the defence solicitor about the charge and the quality of any line of defence. The effect of this is reflected in the number of cases that actually go to trial and the number in which there is subsequently a change of plea.
- 4.11 From a random sample of cases in which a grant of summary criminal legal aid had been made, we found that:

Stage proceedings disposed of	Percentage disposed of
Cases in which there was a change of plea to guilty:	
- before intermediate diet	2 %
- at intermediate diet	25 %
- between intermediate diet and start of trial	13.5%
- on day of trial before evidence lead	19.5%
- after evidence lead	3.5%
Cases which proceeded at trial to conclusion	17.5%

- 4.12 The key results are:
- 63.5% were resolved by way of change of plea
 - only 17.5% proceeded to conclusion of trial.
- 4.13 **This suggests that the application for summary criminal legal aid was in some cases submitted too early in the proceedings, and certainly before any meaningful investigations into the circumstances of the case were concluded.**
- 4.14 Representation from public funds is unavailable for the sentencing stages following a finding of guilt where summary criminal legal aid has been refused on merits.
- 4.15 **Representation, appropriately remunerated, needs to be available to cover sentencing arrangements which may involve several court appearances following conviction.**
- 4.16 When the accused is appearing from custody, the duty scheme covers the first appearance. However, if the accused is to have his costs covered from public funds he must accept the services of the duty solicitor. There is no scope in summary proceedings, other than identification parades [3.20], for the accused to employ the services of his own solicitor and be paid from public funds.
- 4.17 Should the accused appearing from custody be able to get access to his solicitor of choice this would reduce the number of not guilty pleas which are made in many cases solely to allow the papers to be passed over to the nominated solicitor by the duty solicitor or where busy duty solicitors have insufficient time and opportunity afforded to them to enable

suitable enquiry before a plea is tendered. The client's solicitor of choice will normally have a more detailed knowledge of the client and his circumstances and would therefore be more likely to make a more qualitative appraisal of the situation and offer more informed advice and thereby possibly reduce the number of formal not guilty pleas made.

4.18 The accused should have freedom of choice to employ the services of his solicitor of choice (as if that solicitor were the duty solicitor) when appearing from custody in summary proceedings and an appropriate payment is needed for the client's solicitor of choice to appear, plead guilty and represent the accused at the sentencing stages.

4.19 However, if a solicitor of choice were to be enabled to provide representation in both custody and non-custody situations under the auspices of the duty scheme or ABWOR, then an anomaly would exist. Legal assistance under the duty scheme is automatic, with no means or merits tests, whereas under ABWOR, the client must be financially eligible, there are merits criteria to be applied and a contribution may be demanded.

4.20 Consideration will need to be given to the removal of such anomalies.

In the current summary criminal legal aid system there is an artificial distinction in the treatment of guilty and not guilty pleas -

4.21 There is an artificial distinction drawn between the legal aid arrangements for guilty and not guilty pleas, with different arrangements for both including:-

- financial tests
- merits tests, and
- feeing arrangements.

Financial tests

4.22 At present, different financial eligibility tests apply to different types of criminal legal aid with summary criminal legal aid being linked to civil legal aid limits.

4.23 In advice and assistance/ABWOR cases, the solicitor determines financial eligibility. Disposable capital must not exceed £1,330, after the deduction of standard allowances for dependents living with the applicant. Disposable income must not exceed £192 per week after standard allowances are deducted for the maintenance of dependents. When the applicant is in receipt of Income Support or Income Based Jobseekers Allowance, the applicant is automatically eligible on income. Most other state benefits are disregarded from the assessment. The applicant may be required to pay a contribution towards the cost, where disposable income is between £82 and £192. The size of the contribution is based on a sliding scale and ranges between £7 and £111.

4.24 In criminal advice and assistance cases, most clients are not assessed with a contribution to be paid. In 2002/03, we received 159,363 intimations of criminal advice and assistance and criminal ABWOR. In only 7,057 (4%) of these cases was the client assessed by the solicitor as having a contribution to pay.

- 4.25 The responsibility for collection of contributions rests with the solicitor. However, there is evidence that in practice most solicitors do not pursue their clients for contributions. When we pay solicitors' final accounts, the value of the contribution payable is automatically subtracted from the amount paid to the solicitor.
- 4.26 In summary criminal cases, there is no statutory guidance for assessing financial eligibility, or determining that the costs cannot be met without causing undue hardship. In practice, we assess financial eligibility using similar capital and income limits to those specified for civil legal aid. Thus a capital limit of £6,100 and an upper weekly disposable income limit of £179 are applied, with the added flexibility that these limits can be exceeded for more complex cases which would be more expensive to fund privately. The civil eligibility criteria are not however best suited to deal with criminal cases as the proceedings for which civil legal aid is made available are generally more costly than summary criminal proceedings. A fairer system would be to base eligibility on likely case costs and the individual's ability to meet these as opposed to "undue hardship". In the limited cases where the court grants summary criminal legal aid there is also no statutory guidance for assessing financial eligibility.
- 4.27 For different schemes there can be variations between financial eligibility. It is not uncommon for clients to exceed the limits for advice and assistance/ABWOR, but to qualify for summary criminal legal aid. For example, an applicant with income after tax and National Insurance of £300, with weekly payments towards mortgage and an outstanding loan of £100, and a dependent spouse would qualify for summary criminal legal aid with a weekly disposable income £168.90. (Below the £179 limit.) The same person would not qualify for advice and assistance/ABWOR, as only the dependent's allowance would be taken from the net weekly income, leaving disposable income of £268.90, which exceeds the limit of £192.
- 4.28 Similarly, an individual with £6,000 savings would not be eligible for advice and assistance/ABWOR for assistance with a guilty plea, but would be eligible for summary criminal legal aid.
- 4.29 **While there may be sense in a different approach to financial eligibility between A&A and summary criminal legal aid, such a distinction cannot be justified when comparing aid types which provide the same functions such as legal representation in court under ABWOR and summary criminal legal aid. In these circumstances the means tests should be brought closer in scope and level of detail.**
- 4.30 **The current financial eligibility test for summary criminal legal assistance should be reviewed and standardised across the different stages of the case.**

Merits tests

- 4.31 No merits test is applied if advice and assistance is used to tender a written plea of guilty to the court by the solicitor on behalf of the accused. However, if ABWOR is used by the solicitor to represent the accused in court then, depending on the plea to be tendered, varying criteria apply.
- 4.32 When a plea of guilty is tendered then before granting ABWOR the solicitor must be satisfied that either the court is likely to send his client to prison or his client will lose his job as a result of the sentence or that the client is unable to understand the proceedings.

- 4.33 When a preliminary plea is tendered not only does the solicitor have to be satisfied that the court is likely to send his client to prison or that his client will lose his job as a result of the sentence but he must also be satisfied that it is in the interests of justice to make the plea and that it is reasonable in the circumstances. There are no criteria laid down to help assess these tests.
- 4.34 By contrast there is a universal interests of justice test laid down by Parliament to be applied by the Board in assessing whether to grant summary criminal legal aid.
- 4.35 **When comparing aid types which provide similar functions, for example, representation under ABWOR and summary criminal legal aid there is no justification in applying different merits criteria.**
- 4.36 The interests of justice factors are not listed in any particular order of importance or priority. They include a requirement for there to be a “non frivolous defence”. They should instead include a requirement for there to be a proper defence to the charge. This would be a more robust test than at present, but if we can be satisfied that such a “proper” or “meaningful” or “legitimate” defence exists, then this should be the over-riding factor for a grant of criminal legal aid. This factor in the interests of justice test needs to be weighted higher than the others.
- 4.37 In addition, our trends analysis shows that the loss of liberty factor has become more prominent as a factor used in applications for summary criminal legal aid. This is of particular significance in district court cases where the use of this factor has risen from 25% in cases in 1997 to 37% of cases in 2002. The likelihood of custodial disposal in district court cases is low at around 1 % of the total cases annually [about 500] of which about half of this number are cases set down before a stipendiary magistrate. While this is dealt with currently by the Board’s assessment process it adds to the need for the individual factors to be weighted. [See Appendix 2, paras 7 -12 for fuller details.]
- 4.38 **The interests of justice test should be weighted in favour of the argument in support of the defence which defence should be a “proper” or “meaningful” defence as opposed to the statement of a “non frivolous” defence.**

Feeing arrangements

- 4.39 Under advice and assistance the maximum is £80 unless the solicitor receives authorisation from the Board to exceed this expenditure.
- 4.40 Under ABWOR the solicitor will receive only £70 for all work up to and including the first diet at which the plea is tendered. If a second or subsequent diet is fixed by the court the solicitor may continue to act up to a limit of £150.
- 4.41 Summary criminal legal aid is paid on the basis of fixed payments. That is, solicitors receive a basic payment of £500 in the Sheriff Court or before a stipendiary magistrate and £300 in the District Court. This covers all the work up to and including the first 30 minutes of the trial. Further blocks are payable thereafter for later stages in the process. [3.33]
- 4.42 **A better balance is needed between payments for work done under ABWOR and summary criminal legal aid to facilitate optimum appropriate representation. At present, the**

feeing arrangements are weighted towards summary criminal legal aid.

- 4.43 Under the duty scheme (automatic summary criminal legal aid) the solicitor is paid by the sessions the court fixes to deal with the accused appearing from custody. He is paid £44.40 for the first session which includes payment for the first accused with £6 for each additional accused up to a maximum of £96.25. with an additional payment of up to a maximum of £64.55 for each subsequent session fixed by the court.
- 4.44 Where the accused pleads guilty and the case is adjourned, the duty solicitor can be paid for the subsequent work up to the sum of £108.85 only. However, there may be subsequent diets fixed by the court to deal with sentencing arrangements.
- 4.45 **The capped fee does not provide adequate payment to cover the hearings to deal with sentence following conviction, of which there may be many.**
- 4.46 Fixed fees were introduced in 1999. Figures supplied by the Scottish Executive show that in the five years from their introduction there has been a 20% increase from 53,942 to 64,710 in the number of accused persons pleading not guilty in the first instance in summary criminal legal aid cases. Year on year the percentage of accused persons pleading not guilty has also increased over that period to a high of 51% in 2002/03.

	1998/99	1999/00	2000/01	2001/02	2002/03
Number and percentage of accused pleading not guilty	53,942 45%	52,778 44%	56,735 46%	61,763 47%	64,710 51%

- 4.47 Overall the differing financial tests, merits tests and feeing arrangements across the aid types appear to be favouring the submission of applications for summary criminal legal aid and as a consequence may act as a disincentive to pleading guilty.

CHANGES IN VOLUMES AND EXPENDITURE

- 4.48 There have been significant changes in volumes and associated expenditure in the five years since the introduction of fixed payments

4.49 Applications

AID TYPE	1998/1999	2003/2004	%CHANGE
Grants by solicitors of:			
• Criminal advice & assistance	123,829	136,102	+9.9%
• Criminal ABWOR	22,959*	22,931	- 0.1%
Requests for increases in expenditure by solicitors in:			
• Criminal advice & assistance	11,056	20,964	+ 89.6%
• Criminal ABWOR	10,406*	18,140	+ 74.3%
Applications for summary criminal legal aid received by Board	68,434	82,999	+21.3%
Duty Solicitor cases	27,397	30,233	+ 10.4%

*These figures include civil ABWOR intimations.

4.50 Expenditure (£'000)

AID TYPE	1998/1999	2003/2004	% CHANGE
Criminal advice and assistance	7,504	9,012	+20.1%
Criminal ABWOR	2,641	3,444	+30.4%
Summary criminal legal aid	48,589	48,859	+ 0.5%
Duty solicitor cases	943	945	+ 0.2%

4.51 Average Case Costs (£)

AID TYPE	1998/1999	2003/2004	% CHANGES
Criminal advice and assistance	63	69	+ 9.5%
Criminal ABWOR	168	180	+7.1%
Summary criminal legal aid	820	649	-20.9%
Duty Solicitor cases	34	31	-8.9%

4.52 Grant rates for summary criminal legal aid in all cases

1998/1999	1999/2000	2000/2001	2001/2002	2002/2003	2003/2004
91%	91%	91%	92%	92%	91%

4.53 It is of significance that these results show a reduction in the grants of criminal ABWOR but

an increase in the use of criminal advice and assistance and summary criminal legal aid. This may support the conclusion that current arrangements are indeed weighted in favour of summary criminal legal aid at the expense of other aid types and in particular those that may favour an early disposal of the case.

- 4.54 It is also of significance that while fixed payments have reduced the average case costs in summary criminal legal aid, the increased case costs in criminal advice and assistance suggest that at least some of these costs have been offset to advice and assistance.
- 4.55 **With significant changes such as these to the way in which aid types are used and the resultant costs, “no change” is not an option.**

The proposals for changes to other parts of the justice system

- 4.56 Our proposals take account of and complement many of the recommendations made by Sheriff Principal McInnes in his review. In particular, as discussed in Chapter 5, they take account of and complement:
- Encouraging early pleas
 - Sentence discounting
 - Dealing with multiple cases against an accused
 - Undertakings to appear in court
 - Electronic submission of documents
 - Early Disclosure of Crown Case
- 4.57 Some of these recommendations such as encouraging early pleas, including, the early release of information to the defence and sentence discounting need to work in tandem with our proposals if the significant changes in behaviour needed to improve the wider summary criminal system are to be achieved.
- 4.58 The effects of these proposals when taken together should be that:
- cases are resolved at an earlier stage,
 - those that proceed take less time,
 - fewer diets are needed, and
 - cases cost less.
- 4.59 In many ways these effects mirror those identified by the Central Research Unit in its evaluation of the Public Defence Solicitors’ Office. (Published Scottish Executive Central Research Unit in 2001)

Chapter 5 - A model for the new summary criminal legal assistance system

5.1 We need a system that:

- reduces bureaucracy
- appropriately rewards necessary work done, and
- provides adequate controls and balances.

5.2 Any proposals we make for change need to be compatible with those recommended by Sheriff Principal McInnes in his review. We consider that our proposals as described in this Chapter are consistent with those made by Sheriff Principal McInnes. In particular they relate to the recommendations he has made for:

- **Encouraging early pleas** - we are proposing that defence solicitors should be remunerated appropriately for work done at an early stage of the case and that they should be able to receive reasonable remuneration for work on behalf of their clients in pleading guilty at an early stage. In our proposals to deal with diagnostic and substantive advice, we have taken into account that the prosecution should be making available to the defence solicitors sufficient information to allow the latter to advise their client of the strength of the case against him at an early stage in the process. Our proposals also, by providing a more holistic approach to the provision of criminal legal assistance, would help to remove the current disincentive to plead guilty at an early stage whilst encouraging the early resolution of cases.
- **Sentence discounting** - we see the implementation of this proposal as critical to assisting in obtaining the necessary changes in behaviour which are required to make our proposals for reform effective.
- **Dealing with multiple cases against an accused** - our proposals to standardise the feeing arrangements for multiple cases at the sentencing stages [5.42] complements this recommendation and, in particular, in post conviction sentencing arrangements.
- **Undertakings to appear in court** - the McInnes recommendation that in the great majority of cases the accused should sign an undertaking to appear at a particular court on a particular date will be assisted by the expansion of our proposals for solicitors of choice to act rather than the duty solicitor or for ABWOR to be extended to allow a solicitor to act where a person who had been in custody is now released on an undertaking.
- **Electronic Complaints** - our proposal to submit applications in electronic format will complement this recommendation.

5.3 These proposals and others for the justice system as a whole need to be seen as a package of reform measures if each is to be efficient and effective. The proposed reforms cannot be effective in isolation. They necessarily require to be complemented by:

- Early disclosure of the crown case;
- Reasonable remuneration for work done;
- Sentence Discounting to become mandatory where the statutory tests are met.

- 5.4 Our proposals also need to provide an holistic result which embraces changes to criminal advice and assistance. In this regard, it was recognised that it would be helpful if reform of criminal advice and assistance could make provision available to enable solicitors to be appropriately remunerated to do sufficient work for their clients before a decision is taken to plead either guilty or not guilty; subject always to there being in place a system of adequate controls and balances at the various stages to ensure that applicants are and remain financially eligible to receive criminal legal assistance and, in the context of increased disclosure by the Crown, that the work to be done is reasonable and necessary to advance the case. Such a system of controls and balances will include the proposed Quality Assurance regime of peer review of solicitors providing criminal legal assistance.
- 5.5 Any new system ought to be much simpler, and where possible have similar arrangements for the main stages at which different levels of criminal legal assistance would be required, namely:
- Diagnostic stage: initial advice and assistance;
 - Guilty plea, including preliminary pleas, and pleas in bar of trial;
 - Investigation stage;
 - Guilty plea following investigation;
 - Preparing for and conducting the trial;
 - Post conviction hearings;
 - Appeals.
- 5.6 The duty solicitor scheme will also need to be re-visited by allowing freedom of choice of the solicitor representing the accused or having cases revert to ABWOR where an accused appears from custody or on an undertaking to appear. The current duty solicitor capped fee arrangements also need to be reviewed.
- 5.7 At present the scenarios at 5.5 are covered by 4 different types of legal aid: advice and assistance, ABWOR, automatic legal aid and summary criminal legal aid. Many cases need a combination of these types of legal aid, the most common being the advice and assistance cover for the initial investigations and a full certificate for the trial. Post conviction hearings, covering matters such as breach of probation are generally covered by ABWOR, even though the case itself was conducted under criminal legal aid. These distinct aid types have separate application forms, different feeing arrangements, and different eligibility criteria.
- 5.8 Therefore it is proposed that any new arrangements should be based around a single system of providing advice, assistance and representation with one grant of summary criminal legal

assistance and with one reference number. This system should incorporate different stages with different tests to be met, depending on the way the case progresses. The system could be based on the current advice and assistance system with different work requiring different levels of authority from the Board.

- 5.9 Given the proposal that a system of templating requests for increase is introduced [5.23], solicitors should find the system easier to use in seeking the increases in authorised expenditure needed to carry out the work. Changes in the financial circumstances of the applicant would necessitate additional checks on continued financial eligibility but these would be needed only where tests would currently be required, for example, at the transition from advice and assistance to ABWOR or to summary criminal legal aid. As a consequence applicants should also not be unnecessarily inconvenienced by the proposals.
- 5.10 Such a system would also be easier to administer, currently the Board has different teams of staff and IT systems for criminal advice and assistance/ABWOR and full legal aid. The single system could be administered by combining the two areas into one section, with the same staff responsible for considering all criminal work at these different stages. We expect that this would bring efficiency savings, and also provide a more rounded service to solicitors and applicants.
- 5.11 **The system could work as follows:**

Diagnostic stage: initial advice and assistance

The purposes of the diagnostic stage are:

- to determine the nature of the client's problem, and
 - where it is not expected a complaint will follow, to provide the initial advice which is deemed appropriate, and
 - where a complaint is to follow, to provide substantive advice to the client by moving on the next stage in the process.
- 5.12 The solicitor grants advice and assistance to the client, as at present, assuming the client is financially eligible. It is proposed that the norm should be a single grant of criminal legal assistance which would cover all the issues that currently affect the applicant. Where subsequent advice is sought during the currency of a grant, the existing grant should subsume the giving of that additional advice always subject to appropriate levels of authorised expenditure. In effect, there should normally be no second or subsequent grant of criminal legal assistance. This would involve completing a new advice and assistance form and submitting a copy of this to the Board, either in hard copy form or electronically using the forthcoming e-business system. Either way, this will generate a legal aid reference number which will remain with the client until the conclusion of the case. No representation is available at this stage.
- 5.13 At this stage most advice will be sought before the complaint is served. There will be some situations where initial advice is appropriate and needed, for example, when dealing with a first offender or in perhaps preventing a complaint from proceeding through discussion with the procurator fiscal. Equally, there will be situations where no substantial advice can be

given before the complaint is served, for example, in many road traffic offences. To make sure the system works effectively it may be necessary to monitor the scope of the pre-complaint advice that can be given by a solicitor, for example, to such cases where the impending complaint is serious or has serious consequences for the applicant.

- 5.14 We propose that a different means test would be applied at this stage. The expectation is that what would normally be applied at this stage is either a light touch or no test at all, especially if the complaint in contemplation was serious or had serious consequences for the applicant. We may need however to apply a more stringent test where the consequences were likely to have no major effect on the applicant or in a situation, for example, involving a road traffic offence where one might expect an applicant to be able to meet the costs of advice or, indeed, to have in place some other rights and facilities such as insurance which would cover that advice.
- 5.15 It is proposed that for the initial advice, a lower rate of remuneration should be paid to the solicitor. Currently, this type of work is generally remunerated under the minimum fee regime which the Board considers should be reformed because of its dubious value to the taxpayer [5.16]. Where the advice proceeds beyond the diagnostic stage into either the tendering of a plea or the investigation stage it is proposed that fees payable for these later stages will subsume the work done at this stage for the applicant.
- 5.16 The minimum fee system is inefficient and wasteful of resource. In the year 2002/03 there were 46,207 criminal minimum fee cases for which a payment was made from the Fund of over £1.3 million. Similarly, there were 2,570 criminal ABWOR minimum fees in which a payment from the Fund of £72,000 was made.

Guilty plea tendered at first instance, including preliminary pleas and pleas in bar of trial

- 5.17 Subject to the Crown providing more information about the case at an earlier stage, we can expect more guilty pleas to be tendered at an earlier stage. If a copy of the notes of evidence is to be provided with the complaint then, in cited cases, ABWOR could continue to be used to cover the tendering of the guilty plea. Presently, these notes of evidence are only available in certain situations on request. However, remuneration rates for guilty pleas need to be set at more appropriate levels, and significant increases to the current £70 ABWOR block fee for work leading up to and including the first appearance need to be considered. The fees payable at this stage would be higher than those proposed for initial advice at the diagnostic stage.
- 5.18 A more detailed means test would be applied at this stage than at the diagnostic stage. As the work carried out at this stage is similar in nature to that which might be carried out under legal aid the means test should be brought closer in scope and level of detail to that of summary criminal legal aid.
- 5.19 The assessment of eligibility for this type of assistance would continue to operate on the same basis as ABWOR as at present, with a lower threshold “interests of justice” test similar to the criteria currently assessed by the solicitor in making ABWOR available. In particular, the solicitor would have to be satisfied his client does not have other rights and facilities available to fund the work. There is no proposal that the Board should make this grant but that it should remain with the solicitor.

- 5.20 Because enhanced fees are proposed, adequate controls must however be put in place, for example, by post event sampling of cases, to ensure that the merits criteria are properly applied, including enquiries into whether other rights and facilities exist, as well as making sure that the financial eligibility criteria are also properly applied.
- 5.21 In custody cases, it is proposed that changes be made to the duty scheme (automatic criminal legal aid) to enable clients appearing from custody to get access to their solicitor of choice. This would reduce the number of formal not guilty pleas made, particularly where this is done solely to allow the papers to be passed over to the nominated solicitor by the duty solicitor and as a consequence may reduce the number of cases where full summary criminal legal aid would be needed. The client's solicitor of choice will in most cases be likely to have a more detailed knowledge of the client and his circumstances. He will also be more likely to make a more comprehensive appraisal of the situation, and perhaps advise the most appropriate plea to the client.

Investigation stage

- 5.22 Where investigations into the case are required before the solicitor can be in a position to recommend an appropriate plea, this work will be covered by this stage of criminal legal assistance, with an increased level of expenditure authorised by us. However, the solicitor would need to satisfy the Board that these investigations were needed, particularly when we expect more information about the case (notes of evidence etc) to be made available to the defence when the complaint is served. We have to be clear what work needs to be done over and above consideration of the notes of evidence or any other information which may have been provided by the Crown with the complaint.
- 5.23 To assist solicitors in seeking increases in authorised expenditure to cover the work needed, consideration can also be given to introducing a system of "templating" as in civil advice and assistance. That is in specific types of case levels of increase could be agreed in advance for different types of work. This would reduce bureaucracy by reducing the number of requests made (because the amounts granted would be higher), by reducing scope for reconsiderations and by speeding up the process of granting requests. Solicitors should have more confidence in such a system as a result.
- 5.24 In non-templated areas of work, the solicitor will have to apply to the Board for authority to do further work, as at present. Work done either under templates or authorised by the Board would be paid at a higher rate than the proposed diagnostic stage. Where advice progresses to the next stage, it is proposed that the fee for the next stage, whether a plea or preparation for trial, will subsume the work done at this investigation stage.
- 5.25 A more detailed means test would also be required at this stage than at the diagnostic stage because the work is more complicated and, by its nature, more expensive.

Guilty plea following investigation

- 5.26 Significant numbers of cases can be resolved without the need for a trial, but in some cases following extra work carried out by the solicitor after the pleading diet. We need the facility to pay for this extra work, but without the need to grant full legal aid for a trial.
- 5.27 Figures produced by the Scottish Executive show that in the five years since the introduction of fixed payments the percentage of cases in which trials were disposed of at the

intermediate diet by way of plea of guilty accepted, plea of not guilty and desertion have ranged from 23% in 1998/1999 to 25% in 2002/03.

- 5.28 Our analysis of case outcomes indicates that about 4% of all cases where summary criminal legal aid was granted were resolved before the intermediate diet and 40% were resolved between the intermediate diet and the trial, that is, either by way of letter or before evidence was lead at the trial. (A full breakdown is shown in Appendix 2, Para 13.)
- 5.29 In future, we expect that solicitors should have access to more information about the case at the outset than at present, so we would need to be satisfied that further investigations are needed. We have to be clear what work needs to be done over and above consideration of the notes of evidence, or any other information which may have already been provided by the Crown with the complaint.
- 5.30 Having carried out investigatory work, this stage would cover a guilty plea. This work could perhaps be subsumed within the investigation stage but is restricted to cases which have met the initial ABWOR criteria and where the Board has authorised further investigation. A distinct stage could allow for an increase in authorised expenditure to be sought for the guilty plea itself.
- 5.31 A more detailed means test would be applied at this stage than at the diagnostic stage. As the work carried out at this stage is similar in nature to that which might be carried out under legal aid the means test should be brought closer in scope and level of detail to that of summary criminal legal aid.

Preparing for and conducting the trial

- 5.32 Representation of the accused must remain available for the 17% or so cases which actually go to trial. In reality there may well be a proportion of cases which intend to go to trial, but are dropped at the last minute by a procurator fiscal. This should not be allowed to disadvantage assisted persons nor defence agents. Although the current 14 day rule should be scrapped, we do recognise that there will need to be some other time limit for submission of requests to cover the costs of such work, such as applying 14 days before the trial diet. Further consideration needs to be given to this following consultation.
- 5.33 This work is currently covered by a full summary criminal legal aid certificate, paid for by a separate fixed fee. In the new system, the initial grant of criminal legal assistance would continue, but we would need to give authority for preparing and conducting the trial. In order to do this, the solicitor would apply for a further extension, and in doing so would need to satisfy us that it would be in the interests of justice for legal aid to be made available for the trial proceedings. Similar interests of justice factors would be considered here; however, this should also include the requirement for there to be a meaningful defence to the charge, as opposed to the current “non frivolous” defence. This would be a more robust test than at present, which would be needed to ensure that legal aid is only extended in cases where there is a reasonable prospect of running a successful defence at the trial. This “defence” factor should therefore be weighted accordingly.
- 5.34 5.34 At the same time, there should also be the requirement that the assisted person needs to satisfy us that he remains financially eligible to continue to receive criminal legal assistance for the trial. Although the financial test would be based on that which the solicitor used to determine initial eligibility, it does seem reasonable and appropriate that we check the financial eligibility of the client, at some stage, before confirming that he can

continue to receive criminal legal assistance for the trial. In addition, we would need to be satisfied that the assisted person did not have other rights and facilities available to fund the work.

- 5.35 Where we are satisfied that it is in the interests of justice for the client to receive assistance at the trial, and that he is still financially eligible, this would mean that the solicitor would be entitled to claim an additional fixed fee for the case. This could continue to be different for sheriff and district court cases, assuming the distinction continues. An appropriate level would also have to be looked at in the light of the changed system where preparation, at least to the extent of precognosing the witnesses, has been carried out at an earlier stage.
- 5.36 These fixed fees should subsume earlier work in the same case including investigations and these investigations have led to the case proceeding to trial. The bulk of the work done under the criminal legal assistance provisions should be remunerated by fixed fees to accommodate this provision. Trials would continue to be paid on a daily rate. A much reduced fixed fee would be required to prevent all cases going to trial being paid at the current levels (£500/£300) in addition to earlier payments for investigations. Payments for this stage should only be made if the trial actually commenced, although this needs to be done in such a way as to prevent trials starting solely for financial reasons.
- 5.37 Where full cover for the trial is granted, the opportunity to apply for sanctions for expert witnesses and counsel would still apply. Similarly, there would still be the opportunity to apply for exceptional case status as at present but would probably be less common given the greater number of fixed payments in the scheme, spread over the case and the greater flexibility built into the system. Transfers of agency could also be considered at this stage.
- 5.38 We also recognise that proper arrangements will be needed to deal with changes of pleas at the trial diet, which do not remove the client's right to change plea at this stage, but do not simultaneously also encourage more trials to be set which do not proceed.

Safety Net

- 5.39 We have been advised that magistrates and district court clerks would prefer accused persons to be legally represented at court for trials, and that most sheriffs would also want to see representation provided in these circumstances. In addition, the Crown Office advised that procurator fiscals do not wish to encounter unrepresented accused persons at trial too often. Parliament has not legislated for summary criminal legal aid to be available for every criminal case. However, the application of the interests of justice test should normally result in grants of legal aid for cases being prosecuted in the summary sheriff court, where the applicant is shown to be unable to afford to pay the legal costs and has been shown to have a meaningful defence to the charge. The proposals made by Sheriff Principal McInnes that could divert minor matters from court would more than likely be just those cases which are refused summary criminal legal aid because of the interests of justice factors.
- 5.40 We recognise that there does need to be some form of safety net so that assistance and/or representation can be provided for some clients who appear unrepresented at courts. Currently, the court has limited powers to make summary criminal legal aid available in circumstances where the accused has been convicted and is facing his first custodial sentence. In addition, the court has power to adjourn a trial in which an accused is unrepresented to enable an application for summary criminal legal aid to be made or resubmitted.

5.41 We feel that a more immediate process is needed than the current remedies available so that the interests of the accused can be protected where appropriate and cases can proceed more smoothly. We have the power to employ solicitors to provide criminal legal assistance. There would also be merit in considering extending the duty solicitor provisions to allow the duty solicitor to be available to provide this representation where the court perhaps did not wish to adjourn the case and felt that representation was nonetheless appropriate.

Post Conviction hearings

5.42 The structure and feeing provisions for post conviction hearings such as breach of probation hearings need to be rationalised. Presently different feeing arrangements apply, for example time and line under ABWOR, and fixed payment under legal aid. In addition, disputes still continue whether payments should be per hearing or per case when a number of cases are brought together. Post conviction work has increased dramatically in recent years, and a unified approach is needed.

Appeals

5.43 5.43 The single system approach could also be extended to cover appellate proceedings, where the grant of criminal legal assistance could be further extended to cover marking, preparing for and appearing at any appeal against conviction, conviction and sentence or sentence only, or other disposal. Appeals during the course of proceedings e.g. bail appeals and reviews, and appeals in relation to a defective warrant could be similarly covered.

Impact on the rest of the criminal justice system

5.44 The fact that these proposals will remove the encouragement to apply prematurely for summary criminal legal aid, promote the tendering of guilty pleas, appropriately remunerate solicitors for the work they do and better assess eligibility to receive and continue to receive advice and representation from public funds, the impact on the rest of the criminal justice system is likely to be that:

- cases will be resolved at an earlier stage;
- those that proceed will take less time;
- fewer diets will be needed;
- fewer witnesses will be inconvenienced;
- court and prosecution costs ought to be less;
- there will be potential legal aid (and thus taxpayer) costs;
- there will be increased controls and balances; but
- earlier resolution of cases may lead to a small increase in conviction rates.

Appendix 1 - List of respondents

- Crown Office and Procurator Fiscal Service
- Scottish Consumer Council
- Scottish Court Service
- Glasgow District Court
- Policy Group Scottish Executive
- Naftalin Duncan & Co
- Edinburgh District Court
- Sheriff Frank Crowe
- Society of Solicitors and Procurators for the District of Fife
- Drummond Cook Mackintosh
- West Lothian District Council
- Gilfedder & McInnes
- The Law Society of Scotland
- Cairns brown
- Harley & Co. S.S.C.
- South Lanarkshire Council
- Glasgow Bar Association
- The Scottish Law Agents Society
- City of Edinburgh Council

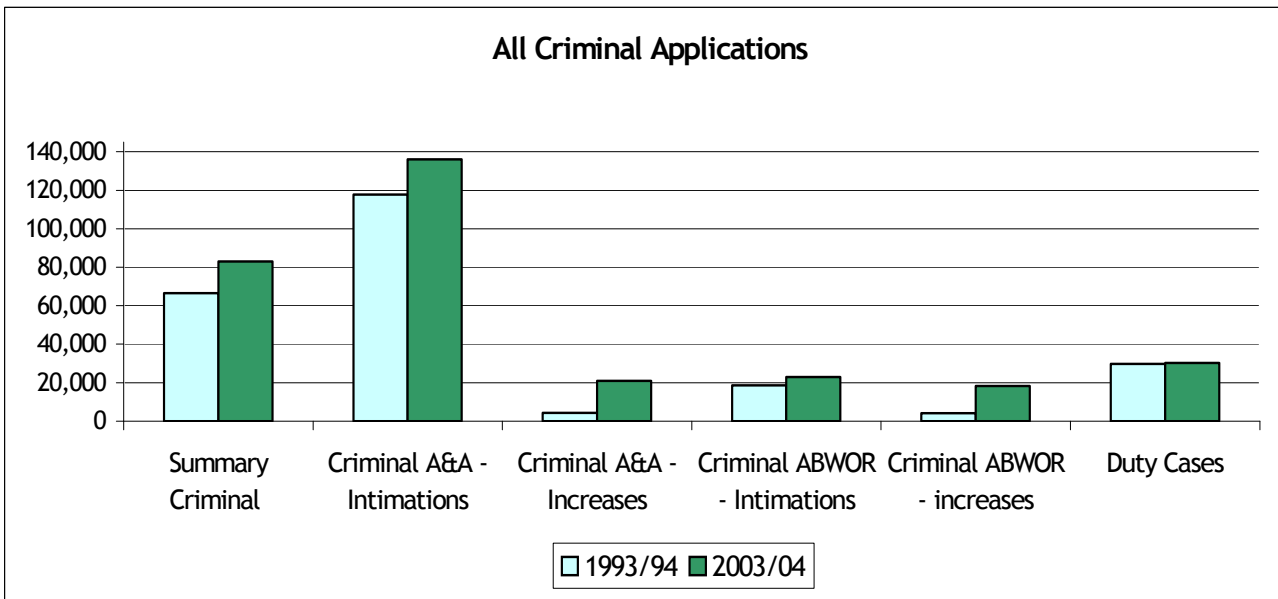
Appendix 2 - Main findings of the statistical analysis of criminal cases

1. An important feature of this review was the statistical analysis that was conducted on criminal cases. In short, this analysis concentrated on the following areas;
 - Analysis of trends in the applications received by types of case
 - Comparison of SLAB grant rates by case category and court type
 - Detailed analysis of system information
 - Comparison of Granted Legal Aid Cases with case outcomes
 - Reasons for Refusal of Summary Criminal Legal Aid Cases

Analysis of trends in the applications received by types of case

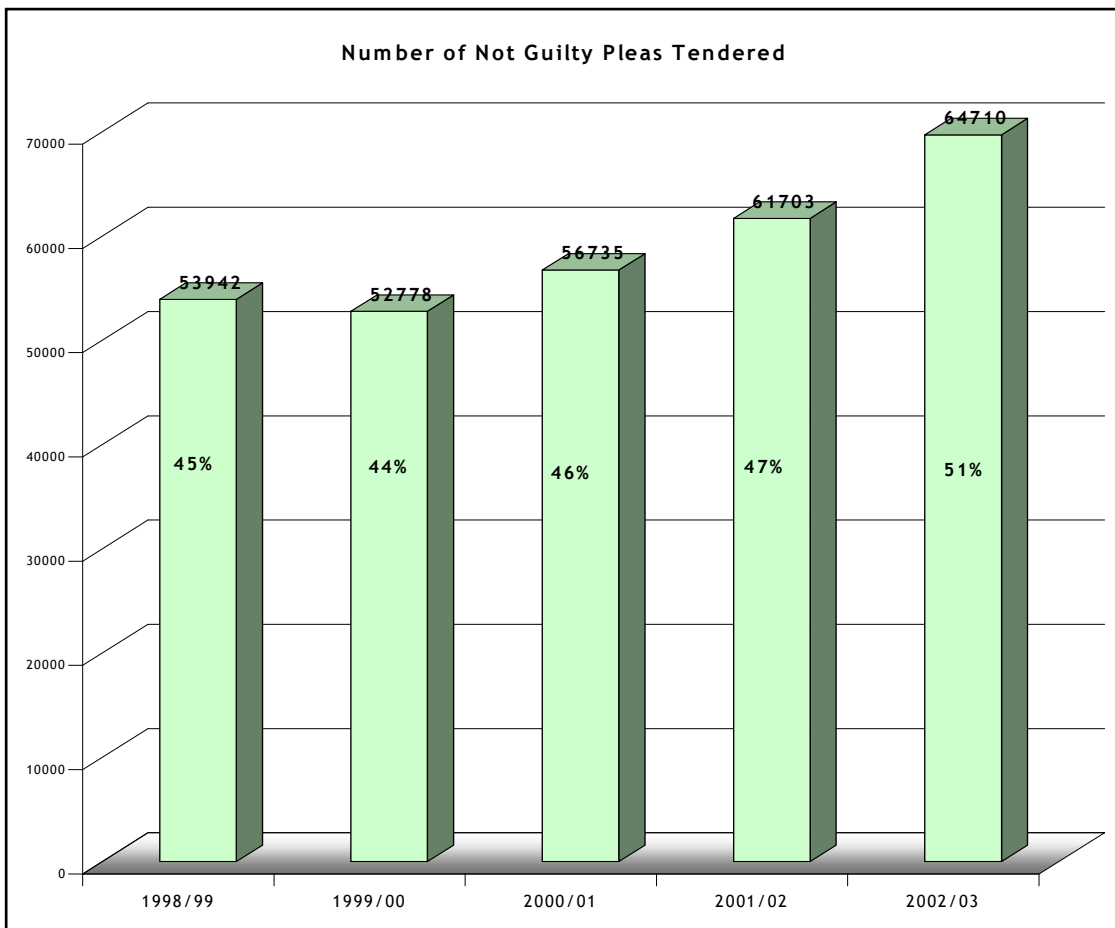
2. Summary criminal receipts have increased by 20% over the past ten years, with applications rising from 66,529 in 1993/94 to 79,927 in 2002/03. There is now evidence to show that figures elsewhere in the Justice System were also showing increases. Our grant rates have remained about constant during this period at around 92% for all cases, although this did fall to 87%/88% during the 2 year period 1996/7 and 1997/8. In sheriff court cases the grant rate was 93% in 1993/4, and 94% in 2002/3. In district court cases, the grant rate was 82% in both years.
3. The following table shows how the increases in summary criminal applications compare with the change in other criminal legal aid types over the same period.

	1993/1994	2003/2004	% Change
Summary Criminal	66,529	82,999	+ 25%
Criminal A&A - intimations	117,672	136,102	+ 16%
- increases	4,252	20,964	+ 393%
Criminal ABWOR - intimations	18,710	22,931	+ 23%
- increases	4,080	18,140	+ 345%
Duty Solicitor Cases	29,701	30,233	+ 2%
Total	240,944	311,369	+ 29%



- In relation to the 16% growth in ABWOR cases, it should be noted that about 25% of all criminal ABWOR cases are for breach proceedings, and other matters which can only be covered by ABWOR. Changes in the legislation over the years have added to the cases dealt with under ABWOR in this way.

Numbers and Percentages of Accused Pleading Not Guilty in Sheriff Court Cases



5. Figures supplied by the Scottish Executive have shown that, over the past 5 years there has been a 20% increase in the number of accused persons pleading not guilty in the first instance in sheriff court cases. In 1998/99, 53,942 not guilty pleas were tendered. This had risen to 64,710 not guilty pleas in 2002/03.

Comparison of SLAB grant rates by case category and court type

6. Our summary criminal grant rates have been fairly consistent over this ten-year period. The following table shows the grant rates broken down by case category in the Sheriff Court, the District Court with a stipendiary (Stip) magistrate and the District with a lay magistrate.

Case Categories	Total Grant Rate		Sheriff & Stip Grant Rate		District Grant Rate	
	03/04	93/94	03/04	93/94	03/04	93/94
Assault	97%	98%	97%	96%	97%	97%
Theft/Housebreaking/ Robbery	97%	96%	98%	97%	91%	94%
Road Traffic Offences	78%	79%	81%	84%	46%	53%
Offensive Weapons/ Vandalism/ Breach of the Peace	92%	94%	96%	96%	80%	91%
Drugs	96%	96%	97%	96%	92%	100%
Embezzlement/Fraud	93%	94%	96%	94%	70%	94%
Sexual Offences	95%	94%	95%	94%	83%	-
Other	82%	86%	87%	91%	57%	46%
Total	91%	92%	93%	95%	81%	82%

Analysis of the Interest of Justice Factors presented by solicitors in support of applications for summary criminal legal aid

7. The loss of liberty factor has become more prominent as a factor presented to us for representation. In 1997, likely loss of liberty was a factor in 28% of grants. This had risen to 41% in 2002. Complex evidence had reduced from 27% to 13%. In District Court cases loss of liberty had increased from 25% to 37%.

8. Statutory factors taken into account by us when granting legal aid.

All Cases Statutory Factor	Taken Into Account 1997	Taken Into Account 2002	Increase / Decrease
Loss of Liberty	28%	41%	+ 13%
Loss of Livelihood	3%	1%	- 2%
Complex Evidence	27%	13%	- 14%
Inabilities of Applicant	4%	5%	+ 1%
Interests of Others	14%	14%	-
Non Frivolous Defence	23%	26%	+3%

- This table shows how some of the factors, which we take into account when granting applications, have changed over the years. The potential loss of liberty is now the most common factor, increasing by 13% between 1997 and 2002. Complex evidence has decreased over the same period by 14%.

9. Statutory factors taken into account by us when granting legal aid in sheriff court cases:

Sheriff Court Cases Statutory Factor	Taken Into Account 1997	Taken Into Account 2002	Increase/Decrease
Loss of Liberty	30%	42%	+ 12%
Loss of Livelihood	3%	1%	- 2%
Complex Evidence	28%	14%	- 14%
Inabilities of Applicant	4%	4%	-
Interests of Others	14%	14%	-
Non Frivolous Defence	23%	25%	+2%

- The changes in the sheriff court factors over the years are very similar to the total cases. The potential loss of liberty is still the most common factor, increasing by 12% between 1997 and 2002. Complex evidence has also decreased over the same period by 14%.

10. Statutory factors taken into account by us when granting legal aid in stipendiary magistrate cases:

Stipendiary Magistrate Cases Statutory Factor	Taken Into Account 1998	Taken Into Account 2002	Increase / Decrease
Loss of Liberty	30%	45%	+ 15%
Loss of Livelihood	3%	1%	- 2%
Complex Evidence	27%	11%	- 16%
Inabilities of Applicant	6%	5%	- 1%
Interests of Others	12%	11%	- 1%
Non Frivolous Defence	21%	26%	+5%

- We only started to keep limited information on stipendiary magistrates cases in 1998. The potential loss of liberty is the most common factor, increasing by 15% between 1998 and 2002. It is interesting to note that this factor is even more relevant here than in sheriff court cases (now 45% as compared to 42% in sheriff court cases).

11. Statutory factors taken into account by us when granting legal aid in district court cases:

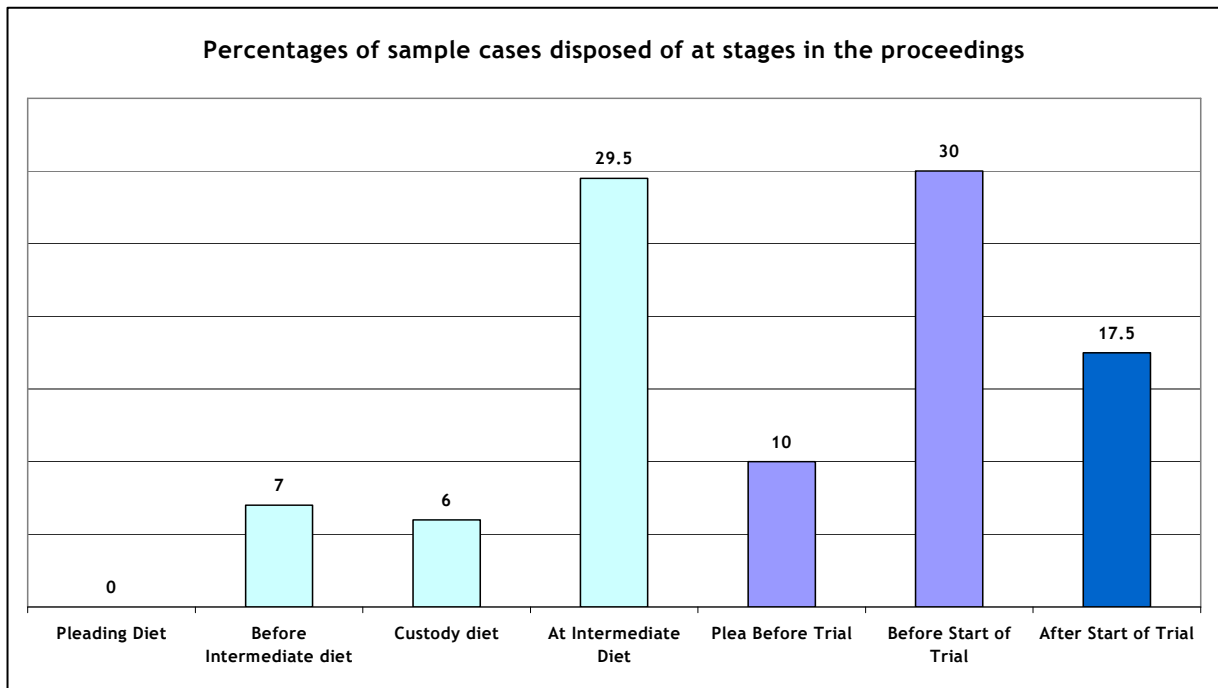
District Court Cases Statutory Factor	Taken Into Account 1997	Taken Into Account 2002	Increase / Decrease
Loss of Liberty	25%	37%	+ 12%
Loss of Livelihood	1%	1%	-
Complex Evidence	26%	11%	- 15%
Inabilities of Applicant	5%	6%	+ 1%
Interests of Others	17%	16%	- 1%
Non Frivolous Defence	26%	28%	+2%

12. Again, the potential loss of liberty is still the most common factor, increasing by 12% between 1997 and 2002. This needs to be looked at in context of the number of actual cases where a custodial sentence is passed by the district courts. We have been advised that a custodial disposal is only passed in about 1% of district court cases. In 1999, this equated to about 500 disposals (with about 250 of these cases being in the Glasgow Stipendiary Magistrate Court). That year, we received over 10, 000 district court applications where it was indicated to us that, in the event of a conviction, the court was likely to pass a custodial sentence.

Case Outcomes

13. From a random sample of cases in which summary criminal legal aid had been granted, it was found that only 17.5% of these cases actually went to trial. 42.5% were resolved before or at the intermediate diet, with 40% resolved before the trial. The following chart illustrates the

percentage of cases disposed of at each stage.



- Custody Diet refers to cases after the pleading diet where the client has appeared from custody on a warrant, usually following a failure to appear at a previous diet.
- Before start of trial refers to the day of the trial before any evidence has been lead.
- Plea before trial refers to pleas made by letter.

14. The disposal of these cases were further broken down by the method of disposal at each stage in the proceedings. The following table illustrates the percentage of cases dealt with by each method of disposal.

Percentage of sample cases disposed of by each method

Stage case disposed of:	Disposal					
	Pled Guilty	Not Guilty	Found not Guilty	Found Guilty	Charge Deserted	Non Appearance
Pleading diet	-	-	-	-	-	-
Before intermediate diet	2	0.5	-	-	4.5	-
At intermediate diet	25	4	-	-	-	0.5
Custody diet	5.5	0.5	-	-	-	-
Plea before trial	8	1.5	-	-	0.5	-
Before start of trial	19.5	8	-	-	2.5	-
After start of Trial	3.5	0.5	5	8.5	-	-
Totals	63.5	15	5	8.5	7.5	0.5

- Pled guilty includes pleading under deletion of part of the charge as well as pleading to a lesser charge.
- Found guilty includes found guilty under deletion of part of the charge.

15. The analysis of the disposals, and the stage at which these disposals were reached seems to suggest that the current summary criminal legal aid system may be encouraging more not guilty pleas. Based on this sample, trials were only taking place in 17.5% of all cases where legal aid applications had followed the tendering of a not guilty plea. In 63.5% of these cases, the client changed the plea to guilty at a later stage in the proceedings.

Refusals

16. The main reasons given for refusing applications were the comparatively straight forward nature of the case followed by our view that the applicant should be able to understand the proceedings and state his/her own case.
17. 40 refused cases were analysed. We were particularly interested in what happened to the case once legal aid had been refused, so we contacted the solicitors involved. Most were quite happy to share with us the case outcomes. The most common outcomes were:
- Solicitor continued to act for the client in a pro bono basis
 - A second legal aid application was subsequently made and granted
 - An increase in authorised expenditure under A&A was granted to £150 to allow further advice to be given to the client about the case
 - Charges were subsequently dropped
 - Client failed to appear in court.