



Reform of summary criminal legal assistance: consultation

To: All criminal legal aid solicitors

21 December 2007

Reform of summary criminal legal assistance - consultation period

On Thursday 6 December 2007, the Cabinet Secretary for Justice Kenny McAskill MSP announced an extension to the current consultation period to 31 January 2008. This followed Mr McAskill's recent meeting with representatives from local Bar Associations, the Law Society and the Board.

Mr McAskill has confirmed that he is happy to look at possible changes to the legal aid proposals provided they support the summary justice reform System Model, are affordable within the very tight financial constraints that are faced and are achievable through secondary legislation. In the longer term the Cabinet Secretary will be prepared to consider primary legislative changes to criminal legal assistance if these prove necessary. He has agreed to extend the current consultation period to the end of January to allow further discussions to take place on possible revisions to the legal aid proposals.

As a result of this, the Criminal Justice Directorate of the Scottish Government and the Board have already had discussions with representatives from the local Bar Associations and the Law Society at which detailed changes to the legal aid proposals have been made and are being actively considered. These discussions will continue throughout the extended consultation period.

It would however still be helpful to receive written submissions on the proposals as early as possible in order to inform these further discussions.

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Issues raised during the consultation process so far

We have now held 11 regional roadshows with colleagues from the Scottish Government, the Crown Office and Procurator Fiscal Service. Around 465 solicitors from about 200 firms have attended along with representatives from other justice sector organisations.

The seminars have been a very useful part of the consultation process. All the issues raised have been noted, and will be considered along with the formal written responses. However, it is clear that there are some common misunderstandings or inaccurate interpretations of some of the reform proposals.

These have come to light not only from the issues raised at the seminars and the Society's Legal Aid Conference but also more recently from publicity in the press and the Journal and from follow-up meetings held with representatives of the profession.

We thought it would be helpful to comment on these issues. In so doing, our intention is to clarify the proposals with a view to informing the ongoing discussions, as referred to, and the wider consultation process.

ABWOR

"There is concern among solicitors that ABWOR will be much more difficult to obtain because of the tests, financial and "interests of justice" that will apply, and may be refused even where work has already been done. - The Journal, November 2007 edition.

It is proposed that Board approval is obtained before giving ABWOR in certain circumstances (eg. in a cited case or in an undertaking case where either the Crown has provided a courtesy copy complaint in advance of the hearing or it is intended to continue the case without plea). Work done in such circumstances can only be paid for from the Fund where prior approval has been given by the Board.

However, where ABWOR has already been provided by the solicitor (eg. in an undertaking case) and it is then intended to seek approval for ABWOR to continue the case without plea, and that approval is refused, this will not affect payment for the work done under the initial grant of ABWOR made by the solicitor.

It is proposed that the solicitor will continue to determine whether the client is financially

eligible to receive ABWOR. It is also proposed to consolidate and simplify the different merits criteria which solicitors currently have to apply when granting ABWOR. In so doing it is not intended that the consolidated tests will have a higher threshold than those that currently apply. ABWOR will not therefore be more difficult to obtain than at present.

It has been suggested that the new ABWOR arrangements will increase bureaucracy for the profession.

We do not consider this to be so. The consultation document proposes that the Board takes over responsibility for the merits test in cited cases and in undertaking cases where there is a continuation without plea or where the Crown issue a courtesy copy of the complaint in advance of the hearing.

In essence, this will mean the Board approving the provision of ABWOR in these cases. It is proposed that this is done by the solicitor making a single request to the Board for approval to provide ABWOR to a "templated" level of authorised expenditure which will be sufficient to cover all the work

which needs to be done including continuations without pleas and deferred sentences etc. At present, solicitors have to make a number of requests for increases in authorised expenditure. This will greatly reduce the number of times a solicitor needs to make contact with the Board.

Additionally, the application for ABWOR will in many cases simply replace the application that would have previously been made for summary criminal legal aid. It is also worth bearing in mind that the grant of ABWOR to a client appearing on an undertaking, where there is no continuation without plea or where the Crown has not provided a courtesy copy of the complaint remains, as now, a matter for the solicitor to determine as does a grant of ABWOR from a solicitor of choice representing a client appearing from custody.

It has been suggested that a change of plea at whatever stage will result at best in a lower ABWOR payment

This is not the case. Where summary criminal legal aid is granted, the core fixed payment is unaffected and will be paid irrespective of any subsequent change of plea or indeed any decision to withdraw legal aid.

The consultation proposes that each grant of legal aid will have standard conditions attached. These will enable the Board in appropriate cases to withdraw legal aid where there has been a material change in circumstances affecting either the “undue hardship” or the “interests of justice” test. However, such a decision to withdraw legal aid can only affect any subsequent legal aid payments eg. the first, second or third day payments and not the core fee.

The Board’s role

It has been suggested that SLAB will be relying on summary statements which are one-sided, untested, lacking in detail and often inaccurate and effectively operating in a quasi judicial role.

The consultation indicates that a disclosable summary of evidence should be submitted with the complaint in an application for ABWOR or summary criminal legal aid. The Board is tasked with applying the current interests of justice test in applications for legal aid. The proposals cannot alter the way in which the interests of justice test is applied in summary criminal legal aid. This is because the test is contained within the primary legislation. As mentioned above, the reforms can only be effected through regulatory change.

What information the Board requires to support an application will remain for the Board to determine. However, in proposing that a disclosable summary is produced and in considering the content of that summary as part of its decision making process, the Board will not be adopting a “quasi judicial” role. To do so would usurp the role of the court. Rather the intention is to have as complete a picture as the defence has and on which the application is based. The client may well dispute the contents of the summary. This is recognised and where this is the case the Board expects the defence agent to draw this to the Board’s attention in the application by addressing the issue in the context of the particular interests of justice factor affected.

In short, the summary will facilitate the submission of better focussed applications and help agents to identify matters present in a case on which the interests of justice may be prayed in aid. The summary will not be considered in isolation. The Board will still be required to consider the application against the statutory tests existing or proposed and, in legal aid applications, will continue to *identify* a defence, not *judge* it.

Day three payment

It has been suggested the day three payment for trials is to be removed.

The consultation does not propose removing the day three trial payment of £400. The proposal is that this payment will be kept under review because it is felt that this payment arrangement has been largely superseded by the ability to award exceptional status and time and lime accounting for more complex cases. Depending on the outcome of the monitoring exercise, the level of the payment for third and subsequent days may change. There are, however, no proposals to remove payments for these days.

Eligibility

It has been suggested that the proposed capital threshold is absolute and that where applicants have capital in excess of the threshold they will be ineligible to receive legal aid

The financial test in summary criminal legal aid remains one in which the Board must consider whether there is undue hardship to the applicant and his dependents. Under the proposals the new threshold for disposable capital will be £1,502, the same as in advice and assistance. However, unlike advice and assistance, it is not an absolute threshold leading to an automatic refusal in every case where an applicant has capital above that limit. The Board will retain its discretionary power to consider other aspects of the case and the applicant's circumstances in determining whether the costs of a case can be met without undue hardship to the applicant or his dependents.

Costings

A common issue raised by solicitors at the summary reform seminars was the provision of information on the likely impact of the summary reforms, both in terms of expected business levels and legal aid payments to solicitors.

As a result of this, the Criminal Justice Directorate of the Scottish Government provided information on the assumptions and projections considered as to what could happen to summary business and how it might look once the reform has bedded in. This allowed the Board to release information on the range of costings using the proposed legal aid changes in the consultation document which are based on the Scottish Government's figures. This information was sent to all local Faculties on 15 November 2007, and is also available on the Board's website, www.slab.org.uk. However, for ease of reference, a copy of the costings is enclosed.

It was clear from the modelling work which we have carried out that estimating the impact on the Legal Aid Fund is difficult and subject to many variables including Crown Office and Defence Agent practices and the approach accused persons will take. We tried to model the likely impacts on firms as best we could by applying the assumptions to sample firms with differing mixes of summary criminal legal assistance business.

We are also able to run individual firm's figures against our model (and assumptions) to see what the impact of the various reforms in individual firms could be. To date we have provided around 40 firms with this information.

If you would like to make use of this facility, please either e-mail, phone or write to Iain Shaw, Accounts Specialist at the Board (shawia@slab.org.uk - 0131 240 2087). We will need details of your legal aid firm code, and we will do our best to produce figures very quickly.