

THE SCOTTISH LEGAL AID BOARD

SUMMARY CRIMINAL LEGAL ASSISTANCE REFORM

SUMMARY OF COSTINGS IMPACT OF CONSULTATION PROPOSALS

This paper provides information on costings carried out by the Board on the potential financial consequences for legal aid of the Summary Justice Reforms and proposed criminal legal assistance reforms. These are not hard estimates of what will happen but rather based on what might take place once the reforms to summary justice bed in. The costing model was developed by the Board and reviewed by a Scottish Government economist. The costings for the proposed legal aid reforms are based on the figures and assumptions which underpin the consultation document, including the fee proposals signed off by the Cabinet Secretary for Justice.

1. ASSUMPTIONS USED IN THE COSTING WORK

Our projected costing of the reforms to summary criminal legal assistance are based on the assumptions of what might happen to court business once the summary justice reforms have been implemented. These assumptions were provided by the System Model Group of the Scottish Government's Summary Justice Reform programme. They took into account the following:

- 2005/06 figures showing that 364,000 accused were the subject of Standard Prosecution Reports, were received by Procurators Fiscal. Cases involving 45,000 accused persons were marked No Action, and 135,000 accused were dealt with by direct measures.
- 149,000 accused persons were thereafter prosecuted in the summary courts broken down into 110,000 (sheriff), and 39,000 (district).

The System Model Group's assumptions for the projected levels of business post summary justice reform are based on the starting point that detected crime and therefore the number of crimes dealt with by the criminal justice system is assumed to remain static. On this basis, the following was estimated:

- A 10% reduction in the number of accused reported to the Procurator Fiscal due to increased use of police direct measures such as fixed penalty notices (36,000 cases fewer accused reported)
- A 15% increase in accused issued with direct measures by the Procurator Fiscal (an additional 20,000 accused)
- 8,500 accused prosecuted in the JP instead of the sheriff courts (including those affected by the forthcoming change in RTA legislation regarding discretionary disqualification)
- 550 accused prosecuted at sheriff summary level instead of on indictment (as a result of changes to sheriff summary sentencing powers).
- 10% of persons offered a direct measure opting for prosecution in court. (We also show in Part 2 of this note, (section 3 onwards) the possible impact based on levels of 5% and 20%.)

For the purposes of our costings, the impact of 10% of persons offered a direct measure by the Procurator Fiscal opting for prosecution in court is assumed to bring 16,000 accused back to the district courts. This represents 10% of all accused who might be offered a direct measure and not just the additional 20,000 accused expected to be dealt with in this way. This is expected to

leave 145,000 accused to be prosecuted in the summary courts broken down into 102,000 in the sheriff, and 43,000 in the district courts.

A fuller explanation of the Scottish Government's assumptions is set out in a letter dated 9 November 2007 from Roma Menlowe, Deputy Director, Criminal Procedure Division to Gerry Considine, President of the Glasgow Bar Association, a copy of which is attached to this note.

The following costings are based on 2005/2006 figures because the System Model assumptions were developed from that year's summary justice figures.

2. CHANGES TO THE SYSTEM OF SUMMARY CRIMINAL LEGAL ASSISTANCE BEING PROPOSED IN THE CONSULTATION PAPER

Advice and Assistance

- New lower level of initial authorised expenditure (£35) for initial advice, for example given pre complaint, payable on a time and line basis. We assumed that 10,000 of the expected new direct measure cases would receive advice at this level.
- Removal of minimum fees. We assumed that 50% of the current minimum fee cases would be paid within £35.
- Standard initial level of authorised expenditure (£95) for cases where complaint issued, including direct measures where the client insists on a hearing.
- All A&A included in any subsequent grants of ABWOR or subsumed within Summary Criminal.
- The fees payable for criminal advice and assistance increased by 21%. This increase is intended to apply to all criminal advice and assistance including that for solemn cases. However, the costings below have excluded an element of criminal advice and assistance attributable to solemn cases.

Duty Scheme

- Inflationary (since 1992) increases in duty payments for
 - initial appearances (£47.95 to £63),
 - additional cases (£6.48 to £9) and
 - capped follow up work (£121.91 to £150).

Advice by Way of Representation (ABWOR)

- Solicitor can apply to the Board for ABWOR for cited cases. Substantially increased block fee (from £70 to £300 - Sheriff Court, £200 - District court) to cover all work up to and including the tendering of a guilty plea, including 1 Continuation without Plea. Additional block fees for further CWPs. These fees will be £50 for the 2nd CWP and £25 for each subsequent CWP. We have assumed that the impact of these additional fees will mean that the average block payments will be £325 for Sheriff Court cases, and £225 for District Court cases. These figures have been used in the costings.
- Solicitor of choice can provide ABWOR (payments equivalent to the duty regime) for clients appearing from custody.
- Solicitor of choice can provide ABWOR under a lower payment (£70) for clients appearing on undertakings for same day plea of guilty. We have assumed that this will bring a 25% shift from Duty Scheme cases to ABWOR on this basis.

- Solicitor can apply to the Board for ABWOR in a CWP situation. All work at the initial appearance will be included in the ABWOR block if this is granted.
- Exceptional status will be introduced in ABWOR similar to that currently available under summary criminal legal aid whereby work falling within that category will be paid on a time and line basis as opposed to a block fee. We have estimated that 5% of ABWOR cases would qualify for this. We have estimated that these exceptional cases will be paid at an average payment of £400 in Sheriff Court cases, and £250 in District Court cases, on a detailed time and line basis.
- Block fee (£50) for deferred sentences. No need for the solicitor to apply to the Board for cover for deferred sentences (to be included in template). We have assumed that each ABWOR case will have 2 deferred sentences on average.

Summary Criminal

- Retention of single fixed payments of £525 for Sheriff Court cases, and £325 for District Court cases.
- Retention of existing payments for the first day (also the first 30 minutes) (£50/£100), and the second day (£50/£200) but reviewing the £400 for third and subsequent days.
- Retention of exceptional status.

3. POTENTIAL OVERALL IMPACT OF EXPECTED CRIMINAL BUSINESS LEVEL CHANGES NOT TAKING INTO ACCOUNT ANY CHANGES IN SUMMARY CRIMINAL LEGAL ASSISTANCE

If no changes were made to the structure and payment regime for summary criminal legal assistance, the wider summary justice reforms could have a range of impacts on criminal legal aid expenditure levels. Before we looked at the impact on summary criminal legal assistance payments made to solicitors as a result of any changes both to the structure and to the payment regime, we considered what impact the changes in business levels could have. We looked at a two different scenarios here, and compared each to the total summary criminal legal assistance payments made to solicitors in 2005/2006. This included duty scheme, criminal advice and assistance, criminal ABWOR, and summary criminal expenditure, including VAT payments, but excluding outlays, and an element of criminal advice and assistance given in relation to solemn cases.

We looked at two different scenarios here:

- Scenario One

We have assumed that the reduction in cases being prosecuted in the courts will lead to a corresponding reduction in legal aid applications. We have also assumed that we will receive the same proportion of applications against this reduced level of court cases as we received in 2005/06, and that the proportion of grants of legal aid will also remain the same. On this basis, we estimated that the expected change in summary criminal business would reduce payments made to solicitors by the following, depending on the percentage of persons who are offered a direct measure, but opt for a court appearance instead:

% of persons offered a direct measure who opt for a court hearing	Impact on Summary Criminal Legal Assistance payments made to Solicitors (against 2005/06 figures)
5%	- 7.86%
10%	- 6.10%
20%	- 2.79%

These reductions are caused by the reductions in court business and corresponding reductions in legal aid applications. A higher % of persons opting for a court hearing brings more cases back to the district courts thereby mitigating the effects of the reduction in payments to solicitors.

- Scenario Two

The expected change in summary criminal business levels also needs to be seen in the context of the wider summary justice reforms such as the new disclosable summaries now being issued with complaints, the wider availability of Fiscals to discuss cases at earlier stages, and sentence discounting. These new measures could all combine to further reduce the applications for summary criminal legal aid in the first place. In addition to the reduction in applications brought about as a result of the reduced court business, we assumed that there could be a further 5% reduction in summary criminal applications, with 50% of these cases being dealt with by grants of advice and assistance and 50 % dealt with by grants of ABWOR. We estimate that this change in summary criminal business would reduce payments made to solicitors by the following, depending on the number of persons who are offered a direct measure, but opt for a court appearance instead:

% of persons offered a direct measure who opt for a court hearing	Impact on Summary Criminal Legal Assistance payments made to Solicitors (against 2005/06 figures)
5%	- 10.88%
10%	- 9.17%
20%	- 5.97%

These reductions are caused by the reductions in court business and corresponding reductions in legal aid applications, together with an additional 5% reduction in applications for full legal aid which are dealt with by A&A or ABWOR under the current payment arrangements. As above, a higher % of persons opting for a court hearing brings more cases back to the district courts thereby mitigating the effects of the reduction in payments to solicitors.

4. OVERALL IMPACT OF EXPECTED CRIMINAL BUSINESS LEVELS, ALSO TAKING INTO ACCOUNT THE REFORMS OF SUMMARY CRIMINAL LEGAL ASSISTANCE

In terms of the proposed new legal assistance structure and payment regime, our costing work used the same court business assumptions as detailed above. We then looked at the likely impact of the changes to the system of summary criminal legal assistance, as proposed in the recent consultation paper.

We considered that the impact of the wider justice reforms and the substantial increase in the ABWOR block fee is likely to result in a shift of grants of summary criminal legal aid to grants of ABWOR. We looked at a range of different scenarios, including shifts of 10%, 20%, and 40% from summary criminal to ABWOR, all at varying levels of persons being offered a direct measure who opt for a court hearing.

- 10% shift from summary criminal to ABWOR

If 10% of summary criminal grants shift to grants of ABWOR, we estimated that the expected change in summary criminal business would reduce payments made to solicitors by the following, depending on the level of persons who are offered a direct measure, but opt for a court appearance instead:

% of persons offered a direct measure who opt for a court hearing	Impact on Summary Criminal Legal Assistance payments made to Solicitors (against 2005/06 figures)
5%	- 6.85%
10%	- 4.77%
20%	- 0.87%

- 20% shift from summary criminal to ABWOR

If 20% of summary criminal grants shift to grants of ABWOR, we estimated that the expected change in summary criminal business would reduce payments made to solicitors by the following, depending on the level of persons who are offered a direct measure, but opt for a court appearance instead:

% of persons offered a direct measure who opt for a court hearing	Impact on Summary Criminal Legal Assistance payments made to Solicitors (against 2005/06 figures)
5%	- 8.78%
10%	- 6.72%
20%	- 2.84%

- 40% shift from summary criminal to ABWOR

If 40% of summary criminal grants shift to grants of ABWOR, we estimated that the expected change in summary criminal business would reduce payments made to solicitors by the following, depending on the level of persons who are offered a direct measure, but opt for a court appearance instead:

% of persons offered a direct measure who opt for a court hearing	Impact on Summary Criminal Legal Assistance payments made to Solicitors (against 2005/06 figures)
5%	- 12.64%
10%	- 10.60%
20%	- 6.76%

5. IMPACT OF EXPECTED CRIMINAL BUSINESS LEVELS, AND THE REFORMS OF SUMMARY CRIMINAL LEGAL ASSISTANCE ON SIX SAMPLE FIRMS

The following tables show the varying impact of both the proposed reduction in court business, and the changes to criminal legal assistance. The changes will affect firms differently depending on their current business model and approach. The profile of all firms' summary criminal legal assistance business varies significantly. Our costing model (based on the case numbers and levels of income in 2005/06) shows that firms which are likely to have a higher level of income under the new proposals will have a lower level of advice and assistance, and summary criminal and a higher proportion of ABWOR cases. By contrast, firms with a higher level of advice and assistance and summary criminal cases, with a lower proportion of ABWOR cases are likely to have a lower level of income under the new proposals. Other variables which would have an impact on this would be the proportion of summary criminal cases in the sheriff and district courts, as well as travelling time.

The examples below show 6 firms with different balances of summary criminal business during 2005/2006. We estimated what their likely earnings would be as a result of both the expected changes to business levels, and the proposed summary criminal legal assistance reforms. However, this does not take into account behavioural and business shifts which may happen as a result of the reforms.

In relation to the likely impact on payments to Solicitors as a result of summary business changes only, we assumed that grants of summary criminal legal aid would remain at the same levels as in 2005/06. (The first scenario looked at in Section 3 above.) In relation to the reforms of summary criminal legal assistance, we looked at the 10%, 20%, and 40% options for shifts from summary criminal legal aid to ABWOR, using the assumption that there would be 10% of persons who were offered a direct measure, but who opted for a court hearing. For the 20% shift from legal aid to ABWOR we also looked at levels of 5% and 20% of persons who were offered a direct measure, but who opted for a court hearing.

These tables show the likely impact of the summary justice reform business projections with, and without, the changes in summary criminal legal assistance as proposed in the current consultation paper.

The total impact of both changes ought to be seen against the tables in section 4 above, where, for example there could be a reduction on the total payments made to solicitors of 6.71%, assuming 10% of persons offered a direct measure opt for a court hearing, and there is a 20% shift from summary criminal legal aid to ABWOR. Using this set of assumptions, the following tables show that, compared to the average 6.71% reduction:

- Firm 1's income increases by 16.99%
- Firm 2's income increases by 3.84%
- Firm 3's income reduces by 4.93%
- Firm 4's income reduces by 11.90%
- Firm 5's income reduces by 13.24%
- Firm 6's income reduces by 22.79%

Firm 1 – Single Partner – Rural Practice

Business Profile During 2005/06

Duty Cases	Grants of Advice and Assistance (including minimum fee cases)	Grants of ABWOR	Grants of Summary Criminal
2 (1%)	54 (32%)	30 (18%)	83 (49 %)

Expected Impacts of SJR and Summary Legal Assistance Changes (against 2005/06 figures)

% of persons offered a direct measure who opt for a court hearing	Impact on Legal Aid payments to Solicitors as a result of SJR business changes only	Expected % of shift from summary criminal to ABWOR as a result of Legal Aid changes	Impact on Legal Aid payments to Solicitors as a result of SJR and Legal Aid changes
10%	+ 5.82%	10%	+ 19.35%
10%	+ 5.82%	20%	+ 16.99%
10%	+ 5.82%	40%	+12.29%
5%	+3.85%	20%	+ 14.57%
20%	+ 9.52%	20%	+21.54%

Firm 2 – Two Partners – Rural Practice

Business Profile During 2005/06

Duty Cases	Grants of Advice and Assistance (including minimum fee cases)	Grants of ABWOR	Grants of Summary Criminal
185 (19 %)	384 (40 %)	84 (9 %)	304 (32 %)

Expected Impacts of SJR and Summary Legal Assistance Changes (against 2005/06 figures)

% of persons offered a direct measure who opt for a court hearing	Impact on Legal Aid payments to Solicitors as a result of SJR business changes only	Expected % of shift from summary criminal to ABWOR as a result of Legal Aid changes	Impact on Legal Aid payments to Solicitors as a result of SJR and Legal Aid changes
10%	- 2.75%	10%	+ 5.94%
10%	- 2.75%	20%	+ 3.84%
10%	- 2.75%	40%	- 0.37%
5%	- 4.32 %	20%	+ 1.88%
20%	+ 0.21%	20%	+ 7.53%

Firm 3 – One Partner – Town Practice

Business Profile During 2005/06

Duty Cases	Grants of Advice and Assistance (including minimum fee cases)	Grants of ABWOR	Grants of Summary Criminal
14 (3%)	61(15 %)	0 (0 %)	344 (82 %)

Expected Impacts of SJR and Summary Legal Assistance Changes (against 2005/06 figures)

% of persons offered a direct measure who opt for a court hearing	Impact on Legal Aid payments to Solicitors as a result of SJR business changes only	Expected % of shift from summary criminal to ABWOR as a result of Legal Aid changes	Impact on Legal Aid payments to Solicitors as a result of SJR and Legal Aid changes
10%	- 4.91%	10%	- 2.74%
10%	- 4.91%	20%	- 4.93%
10%	- 4.91%	40%	- 9.32%
5%	- 8.83%	20%	- 9.10%
20%	+ 2.44%	20%	+ 2.88%

Firm 4 – Two Partners – Town Practice

Business Profile During 2005/06

Duty Cases	Grants of Advice and Assistance (including minimum fee cases)	Grants of ABWOR	Grants of Summary Criminal
62 (3 %)	1,333 (60 %)	156 (7 %)	659 (30 %)

Expected Impacts of SJR and Summary Legal Assistance Changes (against 2005/06 figures)

% of persons offered a direct measure who opt for a court hearing	Impact on Legal Aid payments to Solicitors as a result of SJR business changes only	Expected % of shift from summary criminal to ABWOR as a result of Legal Aid changes	Impact on Legal Aid payments to Solicitors as a result of SJR and Legal Aid changes
10%	- 8.74%	10%	- 10.09%
10%	- 8.74%	20%	- 11.90%
10%	- 8.74%	40%	- 15.52%
5%	- 10.49%	20%	- 13.94%
20%	- 5.46%	20%	- 8.07%

Firm 5 – Four Partners – City Practice

Business Profile During 2005/06

Duty Cases	Grants of Advice and Assistance (including minimum fee cases)	Grants of ABWOR	Grants of Summary Criminal
335 (23 %)	647 (45%)	38 (3 %)	418 (29 %)

Expected Impacts of SJR and Summary Legal Assistance Changes (against 2005/06 figures)

% of persons offered a direct measure who opt for a court hearing	Impact on Legal Aid payments to Solicitors as a result of SJR business changes only	Expected % of shift from summary criminal to ABWOR as a result of Legal Aid changes	Impact on Legal Aid payments to Solicitors as a result of SJR and Legal Aid changes
10%	- 7.47%	10%	- 11.46%
10%	- 7.47%	20%	- 13.24%
10%	- 7.47%	40%	- 16.79%
5%	- 10.10%	20%	- 16.18%
20%	- 2.54%	20%	- 7.71%

Firm 6 – Single Partner – City Practice

Business Profile During 2005/06

Duty Cases	Grants of Advice and Assistance (including minimum fee cases)	Grants of ABWOR	Grants of Summary Criminal
0 (0%)	831 (73%)	10 (1%)	290 (26%)

Expected Impacts of SJR and Summary Legal Assistance Changes (against 2005/06 figures)

% of persons offered a direct measure who opt for a court hearing	Impact on Legal Aid payments to Solicitors as a result of SJR business changes only	Expected % of shift from summary criminal to ABWOR as a result of Legal Aid changes	Impact on Legal Aid payments to Solicitors as a result of SJR and Legal Aid changes
10%	- 7.87%	10%	- 20.99%
10%	- 7.87%	20%	- 22.79%
10%	- 7.87%	40%	- 26.38%
5%	- 9.39%	20%	- 24.43%
20%	- 5.02%	20%	- 19.72%

6. CONCLUSION

The proposed reforms of summary criminal legal assistance as detailed in the consultation paper are designed to support the aims of the wider summary criminal justice reforms by helping to encourage early investigations, the early resolution of cases where this is appropriate and by taking cases out of the courts.

It is difficult to estimate accurately what will happen to legal aid expenditure because there are so many variables. However, if the number of cases going through the court reduces and more cases are concluded earlier then legal aid expenditure would seem likely to reduce. The proposed changes to legal aid will better remunerate solicitors for earlier work in the process than is currently the case. The precise impact on individual firms is dependent not only on the changes to the justice system but also on this current mix of criminal legal assistance and any changes they may make to how they operate in the future.