

SPICe Briefing

Legal Aid

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Abigail Bremner

Legal aid is help towards the cost of legal advice and representation so that people on low and moderate incomes can gain access to the legal system. It is paid for out of public funds and administered by the Scottish Legal Aid Board. This briefing looks at:

- the wider policy landscape in which legal aid operates
- statistics showing trends in awards, and the costs, of legal aid
- the advantages of being awarded legal aid
- the legislative framework supporting legal aid delivery
- the different types of legal aid and how they operate
- future developments for legal aid



CONTENTS

EXECUTIVE SUMMARY	3
INTRODUCTION	5
WIDER POLICY CONTEXT	5
DEVELOPMENTS IN RELATION TO DELIVERY	5
PUBLICLY FUNDED LEGAL ADVICE	5
BUDGET	6
LEGAL AID STATISTICS	7
THE ADVANTAGES OF BEING AWARDED LEGAL AID	9
THE RIGHT TO A FAIR TRIAL	9
ADVANTAGES OF CIVIL LEGAL AID	10
<i>Modification of expenses</i>	10
<i>Payment in instalments</i>	10
<i>Extension of eligibility for Civil Legal Aid</i>	11
LEGISLATIVE FRAMEWORK	11
LEGAL AID (SCOTLAND) ACT 1986	11
LEGAL PROFESSION AND LEGAL AID (SCOTLAND) ACT 2007	12
LEGAL SERVICES (SCOTLAND) ACT 2010	12
THE DIFFERENT TYPES OF LEGAL AID	13
GENERAL	13
CRIMINAL LEGAL ASSISTANCE	13
<i>Background information</i>	13
<i>Automatic Legal Aid</i>	14
<i>Duty solicitor</i>	15
<i>Advice and Assistance</i>	16
<i>Assistance By Way of Representation</i>	17
<i>Criminal Legal Aid</i>	18
<i>Public Defence Solicitors' Office</i>	19
CIVIL LEGAL ASSISTANCE	20
<i>Background information</i>	20
<i>Clawback</i>	20
<i>Advice and Assistance</i>	21
<i>Assistance By Way of Representation</i>	22
<i>Civil Legal Aid</i>	23
<i>Civil Legal Assistance Office</i>	24
<i>Grant funding</i>	24
SPECIAL CIRCUMSTANCES IN WHICH LEGAL AID IS AVAILABLE	25
<i>Contempt of court</i>	25
<i>Children's Legal Aid</i>	25
FUTURE DEVELOPMENTS FOR LEGAL AID	26
CARLOWAY REVIEW	26
INTRODUCTION OF CONTRIBUTIONS FOR CRIMINAL LEGAL AID	26
SCOTTISH PARLIAMENT	27
SOURCES	28
RELATED BRIEFINGS	31

EXECUTIVE SUMMARY

Background

Legal aid provides financial assistance to enable those on low and moderate incomes to access legal services. Recent changes to the courts system in Scotland – such as summary justice reforms – have impacted on the way legal aid is delivered. Other factors influencing the policy environment in which legal aid operates include the continued development of a system of publicly funded legal advice (covering solicitors and other organisations such as advice agencies) and a significantly reducing budget.

Statistics show that overall expenditure on legal aid has remained relatively static, at around £150 million, over the past five years. Behind this is a decrease in criminal legal assistance expenditure (mainly as a result of summary justice reforms) and an increase in civil legal assistance expenditure.

The existence of legal aid is a vital tool in ensuring the right to a fair trial, enshrined in both common law and human rights legislation. The award of Civil Legal Aid confers certain additional advantages on an applicant, such as (limited) protection from court-awarded expenses should the applicant lose the case and the ability to pay for the cost of legal action in instalments rather than in a lump sum.

Legislative framework

The Legal Aid (Scotland) Act 1986 provides the statutory framework underpinning the current legal aid system and its administrator, SLAB. The 1986 Act also lays out the statutory framework for Criminal Legal Aid, Civil Legal Aid and Advice and Assistance, including Assistance By Way of Representation.

The Legal Profession and Legal Aid (Scotland) Act 2007 made changes to the way the legal aid budget is administered by SLAB. It transferred authority to grant Criminal Legal Aid in cases heard under solemn procedure from the courts to SLAB. It also enabled SLAB to provide grant-funding to advice-giving organisations. In addition, it extended eligibility for civil Advice and Assistance payments to non-solicitor advisers, such as those found in advice agencies. Finally, the Legal Services (Scotland) Act 2010 extended SLAB's responsibilities to include monitoring the availability and accessibility of legal services, as well as providing advice to Scottish Ministers on these matters.

The different types of legal aid

Legal aid is divided into criminal legal assistance and civil legal assistance. Criminal legal assistance supports those accused of a crime by the state. Civil legal assistance enables people to enforce legal rights and obligations under civil law.

Criminal legal assistance is divided into the following categories:

- **Automatic Legal Aid** is available without the application of any means or merits tests in a limited number of situations where there is a significant risk that the interests of the defendant will be prejudiced
- the **Duty Solicitor** is available to act in certain circumstances where Automatic Legal Aid is available
- **Advice and Assistance** is available to provide advice, although not representation in court, in relation to any aspect of Scots law. Advice and Assistance is the only form of legal aid available in a straight-forward summary case
- **Assistance by way of Representation** is a form of Advice and Assistance. It allows solicitors to represent their clients in certain forums, including where a client pleads guilty in a complex summary case
- **Criminal Legal Aid** is available to those facing charges under solemn procedure or to those who plead not guilty in complex summary cases
- the **Public Defence Solicitors' Office** uses solicitors directly employed by SLAB to provide criminal legal assistance. Only those who qualify for legal aid can use the service

The different aspects of civil legal assistance are summarised below:

- **Advice and Assistance** allows for advice, but not representation in court, to be given across a wide range of civil justice issues
- **Assistance By Way of Representation** allows for representation in a number of quasi-judicial forums such as employment and immigration tribunals
- **Civil Legal Aid** enables representation in relation to court action in the sheriff courts (excluding small claims), the Court of Session and the UK Supreme Court
- the **Civil Legal Assistance Offices** use solicitors directly employed by SLAB to provide legal services in areas where there are difficulties accessing legally-aided advice
- SLAB can also use **grant funding** to support advice agencies directly

Legal aid is also available in relation to contempt of court and certain hearings under the children's hearing system. A mechanism known as "clawback" enables costs to the legal aid budget to be recovered from money or property awarded to a legally-aided person by the court.

Future developments for legal aid

Several ongoing issues impact on legal aid delivery. The Carloway Review, looking at the law in relation to police questioning of suspects, will impact on the controversial police station duty scheme (which is designed to provide suspects with access to legal advice when being questioned at police stations). The Scottish Government has also consulted on proposals to require financial contributions from those awarded Criminal Legal Aid. The Cabinet Secretary for Justice has stated that legislation in relation to legal aid will be brought forward during this parliamentary session.

INTRODUCTION

Legal aid is help towards the cost of legal advice and representation so that people on low and moderate incomes can gain access to the legal system. It is paid for out of public funds and administered by the [Scottish Legal Aid Board](#) (SLAB). This briefing looks at:

- the wider policy landscape in which legal aid operates
- statistics showing trends in awards, and the costs, of legal aid
- the advantages of being awarded legal aid
- the legislative framework supporting legal aid delivery
- the different types of legal aid and how they operate
- future developments for legal aid

The phrase “legal aid” is used in this briefing as a collective term for all types of assistance which are available through the legal aid scheme, reflecting popular usage by the general public. The phrase “criminal legal assistance” is used to refer to all types of legal aid available in criminal cases and, similarly, the phrase “civil legal assistance” is used to refer to all types of legal aid available in civil cases. The terms are not to be confused with “Criminal Legal Aid” and “Civil Legal Aid” which are two specific forms of legal aid discussed in more detail below.

WIDER POLICY CONTEXT

DEVELOPMENTS IN RELATION TO DELIVERY

It has been a time of unprecedented change in the legal aid system. Structural changes to the criminal justice system through summary justice reforms have had a significant impact on the way criminal legal assistance operates¹. Similar structural reform of the civil justice system is either underway (for example, the introduction of a [Scottish Tribunal Service](#)) or envisaged (in the form of the recommendations of Lord Gill’s [Civil Courts Review](#)).

SLAB’s role has also been evolving in recent years, from administrator of the legal aid budget into a body with more strategic powers to monitor and influence patterns of advice provision. To match this enhanced role, SLAB is able to deliver legal aid in new ways, for example through the direct employment of solicitors or by grant-funding advice-giving organisations. These developments are discussed in more detail below.

PUBLICLY FUNDED LEGAL ADVICE

It is increasingly being recognised that lawyers do not operate alone in providing legal advice. Independent solicitors are still the predominate source of advice in relation to criminal matters. However, a number of other publicly funded organisations provide advice on aspects of civil law, although those providing the advice may not be qualified lawyers. These include advice

¹ More information on the scope and impact of recent summary justice reforms is available in the SPICe briefing [Summary Criminal Justice Reform](#) (McCallum 2009)

agencies (such as [Citizens Advice Bureaux](#)), local authority staff (eg. welfare rights or trading standards officers) and campaigning organisations (such as [Shelter](#)). In addition, government bodies (such as the [Equality and Human Rights Commission](#)) and government-sponsored telephone helplines (for example, [National Debtline](#) and [Consumer Direct](#)) are increasing their role. Together with legal aid, these organisations form a wider landscape of “publicly funded legal advice”.

In 2004, the then Scottish Executive conducted a “[Strategic Review on the Delivery of Legal Aid, Advice and Information](#)”. The review recognised that Scotland already benefited from a range of advice services and service providers which reached a wide variety of service users: however, there was often little co-ordination between different services. Particular problems were that service provision was not always matched to need and that there was a lack of co-ordination between services provided by solicitors (paid for through legal aid) and services provided by non-legally qualified advisers (often funded by local authorities).

The review recommended that a more strategic approach be taken, encompassing the development of a national and local framework for planning advice provision and the introduction of over-arching quality assurance mechanisms. It was envisaged that a new SLAB, with enhanced and more flexible powers, could take on the role of developing publicly funded legal advice at a national level. Local authorities, working in partnership with other providers and funders, would retain responsibility for planning and delivery at a local level.

Some of the report’s recommendations have been taken forward by the Legal Profession and Legal Aid (Scotland) Act 2007 (see below). Others, such as an extension in the financial eligibility criteria for Civil Legal Aid, have been taken forward through regulatory and administrative changes. However, action is still required to deliver the review’s vision of a system of publicly funded legal advice which is strategically planned at a national and local level. The Scottish Government is currently working with SLAB and the Convention of Scottish Local Authorities to take this forward as part of the “[Making Justice Work](#)” programme of work.

BUDGET

One of the biggest factors influencing legal aid policy in the current financial climate is a reducing budget. The Scottish Government cut the overall budget for legal aid by 8.2% in 2011/12 (from £154.5 million in 2010/11 to £141.9 million in 2011/12 in cash terms) (Scottish Government 2011a). Unlike most Government budgets, the budget for legal aid expenditure is demand-led rather than cash limited – ie. the Scottish Government is required to meet all costs provided for in legal aid legislation. The administration budget for SLAB (£12.1million in 2011/12) is cash limited and has been reducing at a time when SLAB has been taking on additional responsibilities.

Because of the statutory obligation to make legal aid available where the legislative requirements are met, reducing legal aid expenditure is not something that is in the direct control of SLAB or the Scottish Government. There are ways to limit the upwards pressure on spending – for example, block fees² for certain aspects of legal aid work allow SLAB to control costs and better predict future spending. However, significant reductions to legal aid expenditure are likely to require one (or more) of the following: a reduction in payments made to

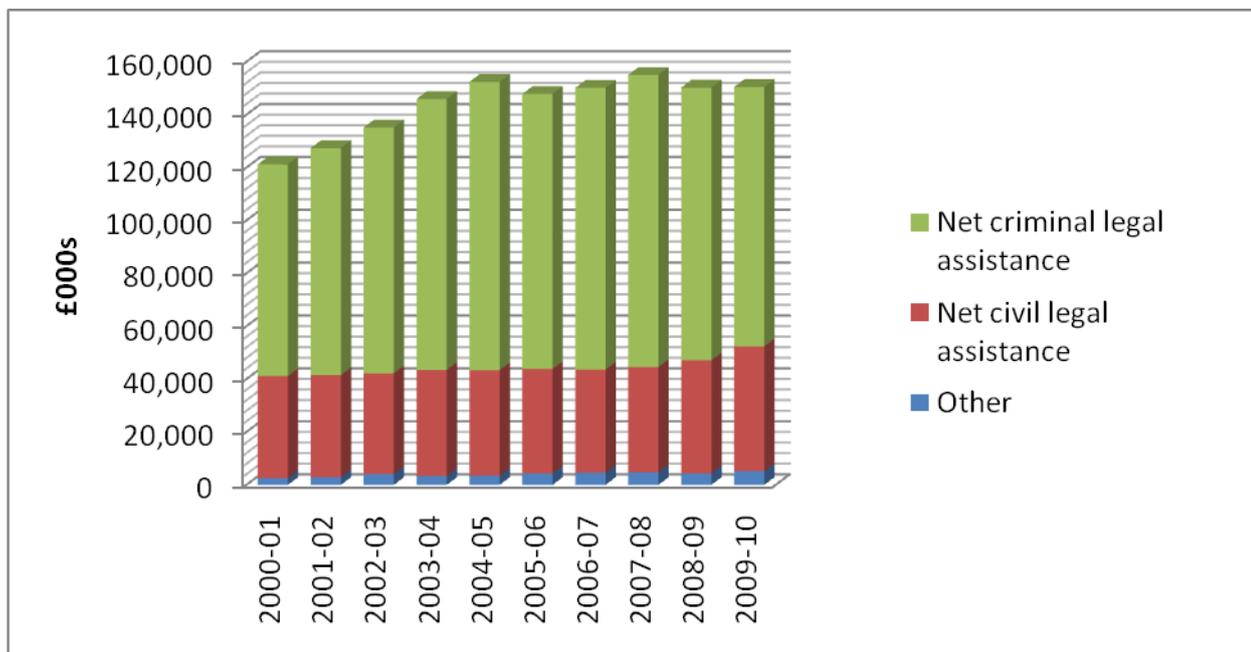
² Block fees describe a situation where a fixed payment is laid down in legislation for a piece of work, for example concluding a summary case in the sheriff court. The solicitor will be paid this fee regardless of the amount of work actually put into a case. SLAB states (Scottish Legal Aid Handbook) that the block fee system is meant to encompass a degree of flexibility in that some cases may be more expensive than the allowable fee but others will be less expensive, so that the overall remuneration, it is claimed, is fair.

lawyers; limiting the situations in which legal aid is available; or decreasing the number of people who qualify for legal aid payments. These changes would require legislation and are therefore a matter for the Scottish Government.

LEGAL AID STATISTICS

The figures below look at trends in expenditure on legal aid over the past 10 years as well as the number of awards of legal aid made by SLAB.

Figure 1: Total legal aid expenditure 2000/01 to 2009/10



Source: Scottish Legal Aid Board 2006 and 2010a

Figure 1 shows net expenditure on legal aid – that is total expenditure minus income in the form of contributions from recipients, court-awarded expenses and property kept as a result of legal action. Such contributions significantly offset expenditure on civil legal assistance (£11 million from total gross expenditure of £58 million in 2009/10). Contributions in relation to criminal legal assistance (paid to solicitors for Advice and Assistance³) were recorded for the first time in 2008/09. Criminal legal assistance contributions amounted to £11,000 in 2009/10 from a total gross expenditure of £98 million. Net costs in relation to grant-funded projects and directly employed solicitors are also included in the totals above. SLAB’s own administrative costs are not included.

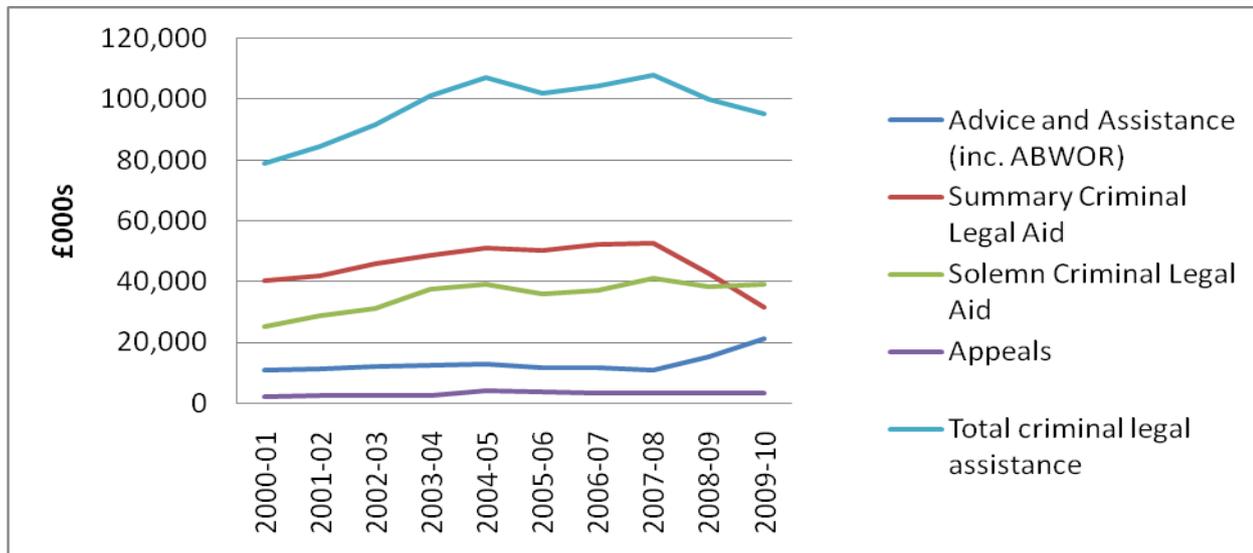
The graph shows that total expenditure on legal aid rose each year from 2000/01, reaching £152 million in 2004/05. It has remained relatively static at around the £150 million mark since then, with a peak of £155 million in 2007/08.

Expenditure on criminal legal assistance has followed a broadly similar pattern, although it appears to tail off in 2009/10 to £98million. The reduction is mainly due to the impact of reforms to the summary justice system discussed in more detail below, coupled with a reduction of

³ See below for information on the Scottish Government’s consultation on the introduction of financial contributions in Criminal Legal Aid.

Value Added Tax (VAT) to 15%⁴ which took place in December 2008. Conversely, expenditure on civil legal assistance remained static until 2008/09, rising to £47million in 2009/10. This can mainly be attributed to an increase in the average case cost, partly due to a backdated fee increase for solicitors

Figure 2: Criminal legal assistance expenditure 2000/01 to 2009/10

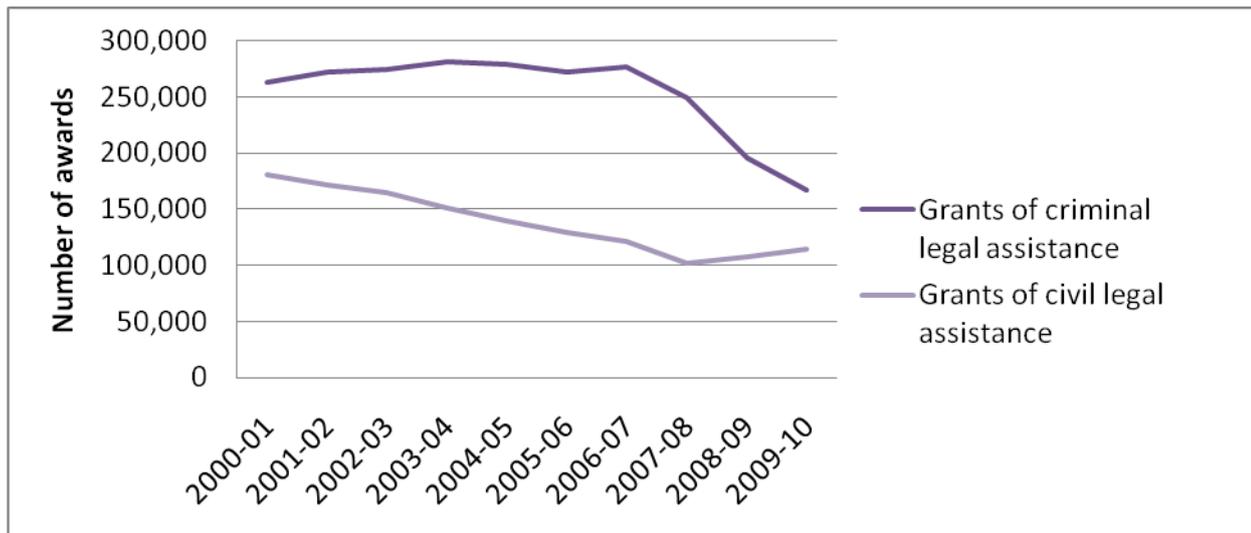


Source: Scottish Legal Aid Board 2006 and 2010a

Figure 2 highlights the different strands of expenditure on criminal legal assistance in more detail. Note that it does not include expenditure on directly-employed solicitors or the court duty solicitor scheme. It shows an increase in Advice and Assistance expenditure from 2007/08, with a similar decrease on expenditure on Summary Criminal Legal Aid. This reflects reforms to the summary justice system, matched by changes in the way legal aid is paid, which aimed to encourage guilty pleas at an earlier stage in the process. Those who qualify for legal representation in relation to a guilty plea are funded through Assistance By Way of Representation (ABWOR), creating the increase shown on the graph. As a result, expenditure on Summary Criminal Legal Aid (used in relation to not-guilty pleas) has decreased.

⁴ The work of solicitors and advocates constitute services and are therefore liable for VAT.

Figure 3: Grants of legal aid 2000/01 to 2009/10



Source: Scottish Legal Aid Board 2006 and 2010a

Figure 3 shows the number of awards of criminal and civil legal assistance between 2000/01 and 2009/10. Grants of criminal legal assistance peaked in 2006/07 at 277,000. There has been a sharp decline since. This can be attributed to a decrease in awards for criminal Advice and Assistance. Advice and Assistance grants (not including Assistance by Way of Representation) dropped from 123,000 in 2006/07 to 28,000 in 2009/10. This is largely due to changes to the legal aid system which mean that the cost of Advice and Assistance is subsumed into a later grant of Assistance By Way of Representation or Criminal Legal Aid. Thus, solicitors no longer make separate awards of Advice and Assistance.

Awards of civil legal assistance were in decline, reaching a low of 102,000 in 2007/08. However, there has been a year-on-year increase since then. The types of case for which the increase has been most notable are family cases (for example, child contact), compensation (mainly in relation to prisoners) and applications under Adults with Incapacity legislation. Increases in awards of Advice and Assistance (including Assistance by Way of Representation) reflect, in part, recession-related topics such as social security benefits and family matters.

THE ADVANTAGES OF BEING AWARDED LEGAL AID

THE RIGHT TO A FAIR TRIAL

In relation to criminal cases, criminal legal assistance allows those who would not otherwise be able to afford it to secure legal advice in relation to the accusations which have been made against them. Such support is considered to be vital in securing a fair trial. The right to a fair trial is a legal tradition in Scots law: it is also a requirement of the Human Rights Act 1998 (c. 42) and the European Convention on Human Rights⁵. It applies not only to those who wish to

⁵ Article 6 of the Convention covers the right to a fair trial and states:

“Everyone charged with a criminal offence has the following minimum rights:

[. . .]

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;”

defend themselves against accusations of criminal conduct, but also to those who wish to plead guilty as they too may benefit from legal help in stating their case (for example, in highlighting to the court any factors which might result in consideration of a more lenient sentence).

In relation to civil cases, civil legal assistance is also important in enabling people to protect or defend their legal rights (the outcome of which can have significant consequences for their finances and status – for example whether the law considers them to be legally married or legally occupying their home). The right to a fair trial enshrined in human rights legislation encompasses an ability to pursue or defend civil law rights in court.

ADVANTAGES OF CIVIL LEGAL AID

An award of Civil Legal Aid also confers other advantages on an applicant above and beyond any financial assistance. This can mean that it is worthwhile applying for Civil Legal Aid even where someone may have to pay a significant financial contribution towards the cost of their case.

Modification of expenses

If someone is party to a civil court case and the judge decides against them, the judge will also usually decide that they are liable to pay their opponent's legal costs (such as the cost of being represented by a solicitor). However, where they are in receipt of an award of Civil Legal Aid, section 18 of the 1986 Act allows the court to reduce any expenses awarded against them. This is known as modification of expenses. The court can consider what it would be reasonable to ask the legally-aided party to pay, taking into consideration the means of all the parties and the way they have chosen to conduct their cases.

The legally-aided party remains liable for whatever the court orders them to pay. However, it is not uncommon for a judge to reduce their liability to nothing. It is also possible for the judge to order expenses to be paid from the legal aid budget, where the legally-assisted person does not have the means to pay themselves and where the unassisted party would suffer if no payment was made.

The ability to apply for modification of expenses is an important advantage of being in receipt of Civil Legal Aid, although it should be noted that it does not guarantee that the court will indeed reduce the award.

Payment in instalments

In addition, if SLAB grants Civil Legal Aid and has calculated that the assisted person is liable to pay a financial contribution towards the cost of their case, they are able to pay back their contribution in instalments. Making payments in instalments rather than a large one-off sum can increase the affordability of legal action for those on limited monthly budgets, even where the sum to be repaid is substantial. The length of time SLAB gives to pay back a contribution varies depending on the size of the contribution. SLAB currently allows contributions of more than £2,000 to be paid back over 48 months (it is possible to negotiate even longer periods where there are special circumstances) (SLAB 2010a). Note that SLAB can also recover a Civil Legal Aid award from any legal costs paid by an opponent and any property/money won or kept as a result of the legal action. This is discussed below.

Extension of eligibility for Civil Legal Aid

In April 2009, the Scottish Government extended eligibility for Civil Legal Aid to those with a disposable income of up to £25,000⁶ (assuming their disposable capital was also within the required limit, then £12,439). This was a significant increase on the previous limit of £10,306, and the Scottish Government estimated it extended potential eligibility to 74% of Scottish households (Scottish Government 2009).

It should be noted that those with disposable incomes at the higher end of the scale will still be required to make a significant financial contribution to the cost of any legal action. For example, an assisted person with disposable income of between £3,356 and £10,995 will be expected to contribute one third of it towards their legal aid bill. This rises to half of disposable income between £10,996 and £15,000, and 100% of disposable income between £15,001 and £25,000. This means that someone with a disposable income of £18,000 will be expected to contribute £7,547 of it towards their legal aid bill. However, for the reasons discussed above, the measures are still likely to increase the affordability of legal action for those on modest incomes.

LEGISLATIVE FRAMEWORK

LEGAL AID (SCOTLAND) ACT 1986

The Legal Aid (Scotland) Act 1986 (c. 47) (as amended) provides the statutory framework underpinning the current legal aid system and its administrator, SLAB. Previously, legal aid payments were administered by the Law Society of Scotland. SLAB is a non-departmental public body responsible to the Scottish Government. SLAB's work is overseen by a board of at least eleven but not more than fifteen members – a specified number of whom are required to be legally qualified.

References to “the 1986 Act” in the rest of this briefing refer to the Legal Aid (Scotland) Act 1986.

SLAB's responsibilities include the following:

- advising Scottish Ministers on how legal aid is working and ways to develop it
- deciding whether to grant applications for legal aid
- assessing whether people have to pay towards the cost of Civil Legal Aid, then collecting these amounts
- assessing solicitors' and advocates' accounts for legal aid work, and paying them for the work they have done
- registering firms and solicitors who do legal aid work and supporting quality assurance systems
- developing a network of SLAB-employed solicitors who offer criminal legal advice and representation

⁶ This figure has been updated and currently stands at £26,239 (Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011/217, regulation 4(5)).

- developing advice services on civil matters using SLAB-employed solicitors
- grant-funding advice services, including in-court advisers
- investigating and tackling fraud and abuse of legal aid

It is important to note that SLAB does not decide how lawyers are paid or the rates they are paid for providing legal assistance. These decisions are taken by the Scottish Government, which then brings forward regulations to the Scottish Parliament.

The 1986 Act also lays out the statutory framework for Criminal Legal Aid (sections 21 to 25AB), Civil Legal Aid (sections 13 to 15) and Advice and Assistance, including Assistance By Way of Representation (sections 6 to 12).

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) ACT 2007

The Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) makes important changes to the way the legal aid budget is administered by SLAB. Section 64 amends the 1986 Act to empower SLAB, rather than the courts, to award criminal legal aid in solemn cases⁷. This sees SLAB taking over a significant additional area of administration. It was argued by the then Scottish Executive that transferring responsibility to SLAB would improve the consistency and transparency of the decision-making process (Legal Profession and Legal Aid (Scotland) Bill – Policy Memorandum). This transfer of responsibility came into effect in November 2010.

Section 67 (inserting amendments to the 1986 Act) enables Advice and Assistance payments to be made to non-solicitor advisers in relation to civil matters. The legislation sets up a mechanism for registering and monitoring suitable advice-giving organisations and empowers Scottish Ministers to make Advice and Assistance payments available to them (via subordinate legislation) on a category by category basis. No statutory instruments have yet been tabled in relation to these powers.

Section 68 amends the 1986 Act to enable SLAB to make grant payments from the legal aid fund to support the provision of legal advice on civil matters. Such grant payments can be made to both lawyer and non-lawyer advice organisations. In addition, payments can be made without the requirements for means-testing and clawback⁸ which normally apply to legal aid payments. The Scottish Government must set a limit to the budget which can be used in this manner, and SLAB must submit to Scottish Ministers for approval the criteria it intends to use when considering applications. SLAB currently grant-funds 16 projects as well as the in-court advisers available in sheriff courts across Scotland. These are discussed in more detail below.

LEGAL SERVICES (SCOTLAND) ACT 2010

The Legal Services (Scotland) Act 2010 (asp 16) extended SLAB's responsibilities to include monitoring the availability and accessibility of legal services, as well as providing advice to Scottish Ministers on these matters. This duty came into force in May 2011. SLAB has set up the Access to Legal Services Reference Group, made up of bodies with an active interest in the provision or use of legal services, to assist with the new duty.

⁷ Solemn court procedure and Criminal Legal Aid are discussed in more detail below.

⁸ "Clawback" – or recovery from property recovered or preserved – is discussed in more detail in the section dealing with different types of legal aid.

THE DIFFERENT TYPES OF LEGAL AID

GENERAL

Legal aid is divided into criminal legal assistance and civil legal assistance, reflecting a distinction in Scots law between “criminal” and “civil” legal matters. Criminal legal assistance supports those accused of a crime by the state. The penalties for those found guilty of a crime include fines, a requirement to do work for the good of the community (community payback) and, for more serious offences, imprisonment. Civil legal assistance supports people to enforce legal rights and obligations under civil law in relation to their dealings with other people and organisations. Examples of matters which are covered by the civil law include contracts, personal injury, divorce and inheritance.

There are some rules which are common to all types of legal aid.

- **Rights and facilities** – applicants for legal aid must not have access to “other rights or facilities” which would make the granting of legal aid unnecessary – such as access to help with legal costs from an insurance policy or trade union. Where they do, legal aid may still be awarded where they agree to hand any payment made over to SLAB.
- **Review procedure** – where SLAB rejects an application for any type of legal aid, they must have in place a procedure to allow a review of their decision. This applies to a number of other decisions made by SLAB too.

In addition, solicitors who wish to provide legal aid must be registered with SLAB and have certain quality assurance systems in place.

CRIMINAL LEGAL ASSISTANCE

Background information

Within the criminal legal system, legal assistance is divided between summary criminal legal assistance and solemn criminal legal assistance. Summary criminal legal assistance is available to those whose alleged offence will be dealt with under summary procedure. Summary procedure is used for less serious crimes (typically those punishable with a fine of up to £10,000 or a sentence of up to one year). Summary procedure is used in justice of the peace courts and sheriff courts.

Solemn procedure is used for more serious offences including, but not limited to, murder, rape and treason. Cases dealt with under solemn procedure can be heard in the sheriff courts or the High Court of Justiciary. A jury sits with the judge in such cases.

Note that a number of criminal charges will be dealt with without recourse to the courts, such as through police warnings, fiscal fines or on-the-spot penalties. Advice and Assistance is available if the help of a solicitor is sought in relation to such matters.

There are a number of different types of criminal legal assistance. They are summarised below and described in more detail in the following paragraphs:

- **Automatic Legal Aid** is available without the application of any means or merits tests in a limited number of situations where there is a significant risk that the interests of the defendant will be prejudiced, for example, because of the serious nature of the charges against them or their inability to instruct a defence
- the **Duty Solicitor** is available to act in certain circumstances where Automatic Legal Aid is available. Note that free representation from the court duty solicitor is only available to those who appear directly from police custody (or on an undertaking to appear in summary cases)
- **Advice and Assistance** is available to provide advice, although not representation in court, in relation to any aspect of Scots law. Advice and Assistance is the only form of legal aid available in a straight-forward summary case
- **Assistance By Way of Representation** is a form of Advice and Assistance. It allows solicitors to represent their clients in certain forums, including where a client pleads guilty in a complex summary case
- **Criminal Legal Aid** is available to those who face charges under solemn procedure or to those who plead not guilty in complex summary cases
- the **Public Defence Solicitors' Office** uses solicitors directly employed by SLAB to provide criminal legal assistance. Only those who qualify for legal aid can use the service

Automatic Legal Aid

There are certain circumstances in which Criminal Legal Aid is available automatically – ie. without the application of any financial eligibility or “interests of justice” tests. Broadly speaking, these are:

- where the accused is asked to take part in an identification parade
- where the accused is prosecuted under solemn procedure until either an application for legal aid is determined by SLAB or they are bailed or committed to custody
- where the accused is prosecuted under summary procedure and they appear directly from police custody⁹ until the end of the first hearing where they make a plea and, where that plea is guilty, until the matter is concluded
- where the accused is prosecuted under summary procedure, and they have pleaded not guilty and submitted an application for legal aid, until the application is determined by SLAB
- any hearing where the accused’s fitness to stand trial on grounds of insanity is being determined
- where a solicitor has been appointed by the court because a defendant is accused of certain sexual offences and is therefore prohibited from conducting their own defence

⁹ This includes where they have been released from custody “on an undertaking” to appear in court at a specific time.

- where a solicitor has been appointed by the court because a trial is taking place in the absence of the accused
- where a new trial on the same or similar offences has been ordered by the High Court

In most cases, the accused can use their own solicitor, who will be paid by SLAB. However, there are some circumstances where only the duty solicitor can be used. These are explained in more detail below. In other situations, the court appoints a solicitor to act on behalf of the accused.

Duty solicitor

Subordinate legislation requires that SLAB has in place arrangements for a duty solicitor to provide advice and/or representation in certain circumstances. There are two systems: the police station duty solicitor scheme and the court duty solicitor scheme. These cover a number of situations where automatic legal aid is available, as described above. A duty solicitor is available to attend at a police station where someone is required to take part in an identification parade or where someone has been charged with murder, attempted murder or culpable homicide.

A duty solicitor is also available to represent someone in court in certain circumstances. Where a case will be heard under solemn procedure and the accused has been in police custody directly before their appearance in court, the duty solicitor can act until the accused has been granted bail or committed to custody.

Where a case will be heard under summary procedure, a duty solicitor can act where the accused has been in police custody directly before their appearance in court¹⁰. The duty solicitor can continue to act until the end of the first hearing where the accused makes a plea in relation to the charge. Where the accused pleads guilty at such a hearing, the duty solicitor can represent them until the matter is concluded.

The new Police Station Duty Scheme

The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15) makes provision for a suspect to have access to a solicitor where they have been detained, or attend voluntarily, at a police station for the purpose of being questioned in relation to an offence. A suspect is legally entitled to consult with a solicitor before being questioned and at any time during questioning, although the consultation may be by means of telephone. These rights follow from the ruling in the case of *Cadder v. HMA* [2010] UKSC 43¹¹.

New regulations (which came into force in July 2011) place a duty on SLAB to arrange for solicitors to be available, under the police station duty scheme, to provide such advice as may be required. In order to fulfil its new duty, SLAB has set up a solicitor contact line which operates 24 hours a day. It provides a single contact point for the police to use to indicate that a suspect has requested advice.

¹⁰ See note 8 above.

¹¹ In the *Cadder* case, the court held that it was a breach of a suspect's human rights (the right to a fair trial) to be questioned by police without the opportunity to consult with a lawyer. There had previously been no legal requirement under Scots law for the police to arrange for a solicitor to attend prior to questioning where a suspect had not been arrested. The decision has therefore had significant implications for the police, solicitors and the legal aid system.

Helpline staff will attempt to contact a suspect's solicitor of choice (where they have one). Otherwise, advice is provided by telephone from SLAB-employed solicitors. If advice is required in person, a private practice solicitor, PDSO solicitor or SLAB-employed solicitor may attend. SLAB states that use of the helpline provides greater certainty of contact with named solicitors and access to timely telephone advice for those suspects who do not have a solicitor, or where their named solicitor is unavailable (Journal Online 2011a).

However, the scheme has proved controversial with the legal profession, resulting in a boycott by some solicitors. They have argued that their fees for initial advice are often subsumed into a later award of legal aid, meaning that in many cases they do not get paid for attendance at a police station (The Herald 2011). They have also raised objections to the way the solicitor contact line operates (Journal Online 2011b) and the fact that they are compelled to join the police station duty scheme if they wish to access legal aid for clients facing police questioning (The Herald 2011). SLAB has stressed that the scheme was intended to have significant private solicitor involvement and was developed in consultation with other organisations, including the Law Society of Scotland (SLAB 2011a).

In response to solicitors' concerns, the Cabinet Secretary for Justice has agreed to change the way solicitors are paid, so that initial fees are not subsumed into a later legal aid award. He has also agreed to give consideration, with ACPOS and SLAB, as to whether arrangements can be made for the police to contact a named solicitor directly rather than through the solicitor contact line. He emphasised that the new duty scheme is intended to be an interim measure, until Lord Carloway has published his report¹² giving fuller consideration to the impact of the Cadder case (Scottish Government 2011b).

At the time of writing, discussions were ongoing.

Eligibility

Legal aid is available automatically in the circumstances described above, without the need to apply any means or merits tests. In certain circumstances, an accused can choose to use their own solicitor. However, in relation to court appearances under summary procedure, Automatic Legal Aid is only available if the court duty solicitor is used¹³.

Where a solicitor gives advice to a suspect being questioned by the police, Advice and Assistance can be provided without reference to the usual financial eligibility criteria. However, only solicitors who have applied to be part of the police station duty scheme are able to grant Advice and Assistance in these circumstances.

Advice and Assistance

Advice and Assistance is available for both criminal and civil legal issues. This section focusses on Advice and Assistance for criminal legal issues. Criminal Advice and Assistance is available from a solicitor on any aspect of Scottish criminal law. It covers advice on any steps a person may appropriately take having regard to the application of Scots law to their circumstances. Examples include advising a client on how to challenge a fixed penalty fine issued in relation to an alleged offence, or how to respond to a citation to appear at a justice of the peace court in relation to having been charged with an offence.

¹² Discussed further below.

¹³ Advice and Assistance or Assistance By Way of Representation may be available if the accused wishes to use their own solicitor and they meet the eligibility criteria.

Note that Advice and Assistance cannot be used to enable representation by a solicitor in court. Therefore in situations where only Advice and Assistance is available – such as in straight-forward summary cases – applicants who cannot afford to pay privately must represent themselves.

Eligibility

Solicitors are responsible for assessing eligibility and granting Advice and Assistance and, where the client has to make a financial contribution, this is paid to the solicitor. To receive Advice and Assistance, a person must meet a financial eligibility test. Someone is financially eligible to receive Advice and Assistance if their income and capital, as assessed in the week before the application is made, is within certain limits. These limits are prescribed in secondary legislation and updated regularly.

Currently, Advice and Assistance is available where disposable income (net income minus certain allowances¹⁴) is not more than £245 per week and disposable capital is not more than £1,716¹⁵. Those with disposable weekly incomes between £106 and £245 are required to make a contribution towards the cost of Advice and Assistance. People in receipt of certain means-tested social security benefits can receive Advice and Assistance regardless of their income.

In addition, a person applying for Advice and Assistance must not have received Advice and Assistance on the same matter from another solicitor.

Assistance By Way of Representation

Advice and assistance does not include representation (taking any steps on the client's behalf in relation to court proceedings, such as lodging a defence). However, Advice and Assistance rules do allow a solicitor to represent their client in certain, limited circumstances – known as Assistance By Way of Representation. Assistance By Way of Representation is a type of Advice and Assistance so the same general definition and eligibility criteria apply.

Broadly speaking, Assistance By Way of Representation can be provided in the following situations:

- representation in relation to specified statutory hearings, such as a hearing under road traffic legislation for the removal of a disqualification
- representation in a number of post-conviction hearings, such as in relation to a failure to comply with a probation order
- representation in relation to certain proceedings under proceeds of crime legislation
- representation of a client in summary proceedings (where the client is not appearing from custody) where no plea has been made in relation to the charge(s) or where a plea of guilty has been made

¹⁴ A number of social security benefits are excluded from the definition of income.

¹⁵ There are more generous capital allowances for those over pensionable age.

Eligibility

Applicants must meet the financial eligibility criteria described above for Advice and Assistance. If the Assistance By Way of Representation relates to summary criminal proceedings then the solicitor must apply an additional “interests of justice” test. The factors to be taken into consideration are as follows:

- whether the sentence is likely to lead to a loss of liberty or livelihood
- whether the case is going to be complex to present in court
- whether the accused may be unable to understand proceedings or state his own case

Criminal Legal Aid

Criminal Legal Aid is available in relation to criminal proceedings before the High Court of Justiciary, sheriff courts or district (now justice of the peace) courts and the stipendiary magistrate court in Glasgow. It is also available for the UK Supreme Court in relation to challenges to the competency of Scottish Government/Parliament actions under the Scotland Act 1998 (c. 46)¹⁶. It is not usually available in summary proceedings until after the first hearing at which the accused pleads not guilty. Criminal Legal Aid must be provided by a solicitor.

Note that, up until November 2010, applications for Criminal Legal Aid in solemn cases were decided by the courts rather than SLAB.

Eligibility

Applications for Criminal Legal Aid are determined by SLAB¹⁷. In relation to Criminal Legal Aid in summary cases, an applicant must pass a financial eligibility test and an “interests of justice” test. Decisions on Criminal Legal Aid in solemn cases require a financial eligibility test only.

Summary legal aid

In order to receive Criminal Legal Aid in summary cases, an accused must pass a financial eligibility test. This considers whether the expenses of the case can be met without undue hardship to the accused or their dependants.

If an applicant’s income is below a threshold set by SLAB (currently £222 per week), and they have disposable capital of not more than the capital limit for Advice and Assistance (currently £1,716), then they will be considered eligible for summary Criminal Legal Aid on undue hardship grounds. If the applicant’s disposable income or capital are above these figures then SLAB will consider the likely expense of the case (such as whether expert evidence is required) before reaching a decision.

In addition, SLAB must decide that it is in the interests of justice to award summary Criminal Legal Aid. The factors to be considered include:

¹⁶ It can also cover certain parole hearings and assistance to someone who is in police custody.

¹⁷ The courts have the power to award legal aid where someone is convicted under summary proceedings for the first time and the court is considering a sentence of imprisonment, or imprisonment for failure to pay a fine where no time to pay is allowed (section 23). A hearing can also be adjourned for a (new) legal aid application to be made if the court believes it is in the interests of justice to do so (section 24).

- whether the sentence is likely to lead to a loss of liberty or livelihood
- whether the case is going to be complex to present to the court
- whether the accused may be unable to understand proceedings or state his own case
- whether it is in the interests of someone else that the accused is legally represented
- whether the accused has a defence which does not appear to be frivolous
- whether the accused has been remanded in custody pending trial

Solemn legal aid

An applicant for solemn Criminal Legal Aid must pass an “undue hardship” test. An applicant whose disposable income is £215 per week or less and whose disposable capital is at or below the threshold for Advice and Assistance (currently £1,716) will receive Criminal Legal Aid on the grounds of undue hardship. Where income and/or capital exceed these thresholds, then SLAB considers whether the excess is sufficient to cover the likely costs of the case¹⁸. Where it is not, then Criminal Legal Aid will be granted. Otherwise it will be refused.

It should be noted that the figures above are used by SLAB to aid consistent and transparent decision-making. They are not based on any legislative authority.

Public Defence Solicitors’ Office

SLAB employs solicitors directly to provide criminal legal assistance through the [Public Defence Solicitors’ Office](#) (PDSO). The scheme was originally set up as a pilot in Edinburgh in 1998. It trialled the concept of public defenders, whereby salaried SLAB solicitors – rather than solicitors in private practice being paid fees from the legal aid fund – acted for those facing criminal charges. Scottish Ministers decided to extend the PDSO, and there are now offices in Edinburgh, Glasgow, Inverness, Dundee, Falkirk, Ayr and Kirkwall. PDSO solicitors can act for anyone facing criminal sanctions anywhere in Scotland as long as they qualify for legal aid.

Initially, in order to facilitate research into the effectiveness of the scheme, clients applying for legal aid in Edinburgh were directed to the PDSO on the basis of their date of birth. Those born in January or February were required to use the PDSO: others could choose a solicitor in private practice. However, this system of allocation ended in July 2000. Offices opening after this date have been allocated a share of the duty solicitor rota in order to build up their client base.

The most recent research into the work of the PDSO found high levels of client satisfaction, with 90% rating the PDSO as good or very good (Scottish Government 2008). It also found that PDSO solicitors were well-regarded by other stakeholders and that relationships with other organisations were generally positive. It noted that any analysis of cost-effectiveness would be complex.

One particular factor that the report commented on was a previous finding that PDSO solicitors tend to resolve cases at an earlier stage than solicitors in private practice. This results in savings in terms of the legal aid budget and court time. However, it has been used by others in

¹⁸ SLAB calculates the likely cost of a defence using information it has on average case costs to the legal aid budget. The initial assumption is that the case will not proceed to trial. SLAB looks at how much excess income would be available over 26 weeks to decide whether an accused can proceed without legal aid.

the legal profession to allege that the PDSO provides a poorer service to clients than solicitors in private practice (Journal Online 2011c). SLAB disputes this claim.

CIVIL LEGAL ASSISTANCE

Background information

The civil courts are the sheriff courts, the Court of Session and, for appeals, the UK Supreme Court. There are differences in court procedure across the civil courts which can affect access to civil legal assistance. Small claims procedure is used in the sheriff courts only and is available for cases with a value of up to £3,000. It is intended to be informal and user-friendly so that people can, if they choose, pursue cases without using a solicitor. Civil Legal Aid is not available for small claims cases, although Advice and Assistance can be used to receive advice on how to conduct a case.

Summary cause procedure is also used only in the sheriff courts. It applies to cases with a value more than £3,000 up to £5,000. Ordinary cause procedure is used in the sheriff court for cases with a value of more than £5,000. Civil Legal Aid is generally available for cases under summary and ordinary cause procedure. The Court of Session can deal with any case, although in practice it tends to deal with more serious or complex matters (such as judicial review), as well as with appeals from sheriff court decisions. The UK Supreme Court deals with appeals from Court of Session decisions. Civil Legal Aid is available for Court of Session and UK Supreme Court cases.

The different types of civil legal assistance are summarised below and described in more detail in the following paragraphs.

- **Advice and Assistance** allows for advice, but not representation in court, to be given across a wide range of civil justice issues
- **Assistance By Way of Representation** allows for representation in a number of quasi-judicial forums such as employment and immigration tribunals
- **Civil Legal Aid** enables representation in relation to court action in the sheriff courts (excluding small claims), the Court of Session and the UK Supreme Court
- the **Civil Legal Assistance Offices** use solicitors directly employed by SLAB, working closely with local solicitors and advice agencies, to provide legal services in areas where there are difficulties accessing legally-aided advice
- SLAB can also use **grant funding** to support advice agencies directly

Clawback

One important factor to consider in relation to all forms of civil legal assistance is the operation of “clawback”. Legal aid legislation enables outstanding costs for legally aided cases to be recovered from any property “recovered or preserved” as a result of the court action¹⁹ - also known as “clawback”. In relation to Civil Legal Aid, this power is given to SLAB. The same

¹⁹ Note that this power also applies to any extra-judicial agreement or arrangement negotiated to avoid court proceedings or to end them.

power exists for solicitors in relation to outstanding fees for Advice and Assistance and Assistance By Way of Representation.

Clawback applies where contributions from the client and any expenses awarded by the court are insufficient to cover the costs to the legal aid budget of the court action. Where an ongoing liability remains, SLAB can look to property awarded as a result of the court action – such as money awarded to compensate for damages, or the value of a home preserved as a result of successfully defending a claim on divorce – to cover its costs. In 2009/10 the amount of income generated by clawback was £1 million (SLAB 2010b). More information about how clawback operates is available in the SLAB leaflet “[A Guide to Civil Legal Aid](#)” (SLAB 2010c)

Certain awards are protected from clawback, including various family law-related maintenance payments, awards relating to many social security benefits and half of any statutory redundancy payment. Until April 2011, certain awards under divorce legislation, from employment tribunals and in relation to an applicant’s home were also protected from clawback up to a certain limit. However, the Scottish Government has now removed this protection.

In Advice and Assistance cases (including Assistance By Way of Representation), SLAB can authorise payment out of the legal aid budget instead of using clawback where payment out of property would cause “grave hardship or distress to the client”. This is also the case where a solicitor would be unable to get payment out of the property without unreasonable difficulty or delay.

There is no power for SLAB to waive payment on hardship grounds under the Civil Legal Aid rules. SLAB can take a mortgage on land or houses to recover payment, rather than force their sale – with interest charged at the judicial rate (currently 8%). Other forms of property – such as rights to pensions which will not mature for years – can also be tricky to deal with. There are no special statutory provisions in these circumstances.

Advice and Assistance

Advice and Assistance in relation to criminal matters is described above. This section focuses on Advice and Assistance in relation to civil matters. The definition of Advice and Assistance covers advice on any steps a person may appropriately take having regard to the application of Scots law to their circumstances. It does not allow for representation in court. SLAB’s leaflet “[A Guide to Civil Legal Aid](#)” (SLAB 2010c) provides more information about eligibility for Advice and Assistance in civil cases.

Legislation allows for Advice and Assistance to be provided by solicitors and non-legally qualified advisers registered with SLAB. However, the legal provisions enabling legally-aided advice from advisers have not yet been used.

There are two types of civil Advice and Assistance: standard and diagnostic.

Standard Advice and Assistance

Standard Advice and Assistance is available in relation to topics listed in SLAB’s “[Category Codes Card](#)²⁰” (2011b). Examples include divorce, immigration, breach of contract, employment and landlord and tenant law. Fees for standard Advice and Assistance have a cap of £95, which can be increased on application by the solicitor to SLAB.

²⁰ SLAB can add further categories to its list on the basis of suggestions from solicitors and others. However, to remove a category requires the consent of Scottish Ministers.

Diagnostic Advice and Assistance

Diagnostic Advice and Assistance has a limit of £35 and covers situations where the subject matter of the advice is not listed in the “Category Codes Card”, or is listed specifically as a diagnostic category. Examples include freedom of information legislation, advice on general social security benefits issues, housing and prison rules.

Under diagnostic Advice and Assistance, a solicitor is able to conduct an initial interview with the client to determine whether standard Advice and Assistance is required, or to refer them to another agency if appropriate. Where a need for standard Advice and Assistance is identified, a solicitor can apply to SLAB to have the matter treated as if it were a standard category.

Eligibility

The eligibility criteria for civil Advice and Assistance are the same as those described above for criminal Advice and Assistance.

Assistance By Way of Representation

Assistance By Way of Representation is a form of Advice and Assistance which can be used, in certain, limited circumstances, to enable representation by a solicitor. Assistance By Way of Representation in relation to criminal matters is discussed above.

Broadly speaking, the situations in which Assistance By Way of Representation is available for civil cases are:

- the appointment of an executor for a deceased person’s estate
- appearances before the Mental Health Tribunal for Scotland
- a debtor’s petition for their own bankruptcy
- civil proceedings in relation to failure to pay a fine or to obey a court order
- certain hearings of the Additional Support Needs Tribunal
- certain appearances before an employment tribunal
- client court appearances from police custody in relation to breach of interdict (for example under the Protection from Abuse (Scotland) Act 2001 (asp 14))
- certain appearances before first tier and upper tribunals administered by Her Majesty’s Courts and Tribunals Service

Eligibility

The eligibility criteria for Assistance By Way of Representation vary depending on the forum the representation will take place in. The financial eligibility criteria are waived for court appearances from police custody and appearances before the Mental Health Tribunal for Scotland. Merits tests in relation to the strength and complexity of the case, the seriousness of the consequences and the reasonableness of proceeding may also apply.

Civil Legal Aid

Civil Legal Aid must be provided by a solicitor and covers proceedings, and related work, in the sheriff court, the Court of Session and the UK Supreme Court. Civil Legal Aid covers the costs of using advocates where they are required. It also covers proceedings in a number of other forums, such as the lands tribunal and the employment appeal tribunal.

There are some exceptions to this broad definition, covering situations dealt with by these courts where Civil Legal Aid is not available. These are generally situations where simplified procedures apply and are designed to enable an individual to represent themselves, such as cases under the simplified divorce procedure or certain actions under debt legislation.

Defamation used to be on the list of excluded proceedings (except to defend a counterclaim issued as part of other proceedings). However, the courts have held the UK's approach to be incompatible with citizens' rights under the European Convention on Human Rights. As a result, Civil Legal Aid is now available in certain, limited circumstances where there is a wider public interest and where the applicant would be unable to bring or defend proceedings effectively on their own.

SLAB, rather than the applicant's solicitor, assesses eligibility for Civil Legal Aid. SLAB's leaflet "[A Guide to Civil Legal Aid](#)" (SLAB 2010c) provides more information about eligibility for Civil Legal Aid.

Eligibility

In order to receive Civil Legal Aid, an applicant:

- must satisfy SLAB that there is "probable cause"– ie. that there is a plausible legal basis for the case
- must satisfy SLAB that "it is reasonable in the particular circumstances of the case" that the applicant should receive legal aid – this covers consideration of the costs and likely benefits of the action, as well as the likelihood of success²¹
- where acting in an representative capacity, must not be entitled to have their costs paid by a third party – for example, a group or association which they are representing
- must meet the financial eligibility requirements

The financial eligibility criteria for Civil Legal Aid are different from those for Advice and Assistance or Criminal Legal Aid. Income is assessed over the twelve months following an application for legal aid, and an applicant is obliged to inform SLAB of any changes in their financial circumstances. The figures used in the assessment are updated regularly through secondary legislation.

Disposable income covers income after a number of allowances and essential outgoings have been deducted. The current lower disposable income limit is £3,521. Applicants with an income on or below this figure, who qualify in relation to disposable capital, pay no contribution. The upper disposable income limit is £26,239. Applicants with disposable income above this figure do not qualify for Civil Legal Aid. Contributions towards the cost of legal aid are required from

²¹ An example of a situation where the reasonableness test might not be met is where the cost of taking legal action significantly outweighs the likely financial return – eg. pursuing an appeal to the Court of Session over a faulty washing machine

applicants with disposable incomes between these two limits, for example, half of all disposable income between £11,540 and £15,743 and 100% of disposable income from £15,744 to the upper limit of £26,239.

Currently an applicant with disposable capital²² of £7,853 or less will not have to pay a contribution from capital. An applicant with disposable capital between £7,854 and £13,017 will have to make a contribution of 100% of the capital above the lower limit. Where an applicant has capital of more than £13,017, SLAB may refuse Civil Legal Aid. SLAB will refuse legal aid where it considers that the applicant can afford to proceed without it: however, this will depend on the likely costs of the case.

Civil Legal Assistance Office

SLAB has powers, under Part V of the 1986 Act, to directly employ solicitors to undertake civil legal work. Projects (often referred to as “Part V projects”) involving the direct employment of solicitors were first piloted in 2001. Their focus was supporting access to justice for vulnerable groups – for example, homeless people in Edinburgh and asylum seekers in Glasgow. SLAB-employed solicitors worked closely with local advice agencies to improve their ability to provide advice and to make appropriate referrals to solicitors.

These projects have developed into the four Civil Legal Assistance Offices (CLAO) in operation today, in Inverness, Aberdeen, Edinburgh and Lochgilphead. The offices are set up in areas where problems accessing legally-aided legal services have been identified. The Aberdeen and Edinburgh offices have a focus on problems related to the recession, such as employment and repossession.

SLAB states that the remit of CLAO solicitors is only to act where a solicitor in private practice is not available to take the case (Journal Online 2010b). Offices will, in the first instance, refer clients to local solicitors who have stated they have an interest in the area of work the client requires. Only where a solicitor in private practice cannot be found will a CLAO solicitor take the case on.

CLAO solicitors access legal aid for their clients in the same way as solicitors in private practice: however, they receive a salary instead of fees from the legal aid budget. CLAO solicitors can only act for clients who qualify for legal aid – they cannot accept private paying clients or cases supported by insurance companies. According to SLAB, CLAO solicitors also retain close links to advice agencies in the local area, and this enhances access to justice (Journal Online 2010b). For example, in Inverness, CLAO solicitors work closely with Citizens Advice Bureau advisers to support them in handling more complex legal enquiries. They also work with Women’s Aid organisations, providing a single referral point for victims of domestic abuse seeking legal advice.

Grant funding

The Legal Aid and Legal Profession (Scotland) Act 2007 amended the 1986 Act to give SLAB powers to grand-fund advice-giving organisations. Grants are available for facilitating, supporting and developing legal assistance and advice in relation to civil matters. Importantly, in terms of broadening SLAB’s scope to support advice-giving work, the grants can be made to fund the work of people who are not legally qualified. They can also be made without the requirements for means-testing and clawback which normally apply to civil legal assistance

²² Unlike Advice and Assistance, there are no allowances for dependants when assessing capital.

payments. This provides a mechanism for funding advice-giving organisations which provide their services free. It also means that advisers are released from the administrative burden of assessing income and checking supporting documents which, it has been argued, is not cost effective in relation to simple enquiries.

The first tranche of funding, made available in 2009, focussed specifically on projects which provided advice on recession-related topics such as repossession and debt. SLAB also uses grant funding to support “in-court advisers”, who are situated in court buildings and provide people who are not represented by a solicitor with advice on their court case. Funding for these activities has been extended to 2011/12 (SLAB 2011c). Often, the projects make use of SLAB’s power to directly employ solicitors as well as its ability to grant-fund advice provision so that local advice organisations can benefit from the support of a solicitor. More information about the projects which receive grant funding is available on SLAB’s [“advice sector”](#) webpage.

SPECIAL CIRCUMSTANCES IN WHICH LEGAL AID IS AVAILABLE

Contempt of court

Legal aid is available for contempt of court actions in relation to criminal matters and for civil proceedings resulting from breach of interdict (such as failure to comply with an order excluding someone from the marital home) and failure to obey a court order. Applications for legal aid are made to the court in initial proceedings. However, if the matter goes to appeal, then a separate application must be made to SLAB. The court also has the power to appoint any lawyer within the court buildings to represent the accused. The tests for legal aid eligibility are:

- whether the expenses of the case cannot be met without undue hardship to the applicant or their family
- that it is in the interests of justice to award legal aid

Children’s Legal Aid

Children can qualify for criminal or civil legal assistance in the same way as adults if they are charged with a crime or wish to protect their legal rights (although, as of January 2011, the resources of their parents are taken into account when calculating eligibility).

Separately, the term “Children’s Legal Aid” is used specifically to refer to legal aid for certain hearings under the children’s hearing system. Children’s hearings deal with issues of criminal conduct and/or care and protection in relation to children.

Legal aid does not currently cover the cost of representation by a solicitor before a children’s panel, although local authorities may cover the costs of a solicitor appointed to represent children’s or parents’ interests. Legal aid, including representation from a solicitor, is available for hearings before a sheriff. Applications for Children’s Legal Aid are made to the sheriff. Applications for Children’s Legal Aid for appeals against the decision of a sheriff are made to SLAB.

The Children’s Hearings (Scotland) Act 2011 (asp 1) (not yet in force) will enable legally-aided representation before a children’s panel in certain circumstances. Children’s Legal Aid will be available to the child who is the subject of the hearing and/or a person with parental responsibilities for that child. It will also transfer responsibility for assessing all applications for

Children's Legal Aid from the courts to SLAB. The 2011 Act introduces three tests to be applied before Children's Legal Aid can be made available to a child:

- that it is in the best interests of the child to grant legal aid
- that it is reasonable in the particular circumstances of the case to grant legal aid
- that the expenses of the case cannot be met without undue hardship to the child

Where Children's Legal Aid is to be made available to a person with parental responsibilities for a child, they will have to meet a reasonableness test and undue hardship test similar to those outlined above. Where Children's Legal Aid is for an appeal to the Sheriff Principal or Court of Session, an additional test of whether there are substantial grounds for making or responding to the appeal will be applied.

FUTURE DEVELOPMENTS FOR LEGAL AID

CARLOWAY REVIEW

Lord Carloway has been asked by the Scottish Government to head a review of law and practice in relation to police questioning of suspects in Scotland in light of recent court decisions, including *Cadder v. HMA* [2010] UKSC 43²³. This decision has had significant implications for SLAB and the legal profession in terms of meeting an increased demand for legal advice from those in police detention.

The Carloway Review will look at the operation in practice of emergency legislation passed by the Scottish Parliament to deal with *Cadder*, as well as other procedural changes following on from the case. The Cabinet Secretary for Justice has promised that the operation of the police station duty scheme will be reviewed once Lord Carloway has published his report (Scottish Parliament Justice Committee 2011).

INTRODUCTION OF CONTRIBUTIONS FOR CRIMINAL LEGAL AID

The Scottish Government has recently consulted on the introduction of financial contributions from those awarded criminal legal aid. The consultation argues that those who receive Advice and Assistance or Assistance By Way of Representation in relation to a criminal matter already have to pay a contribution where their income exceeds a certain amount. It is also proposed to harmonise the financial eligibility tests for criminal Assistance By Way of Representation and Criminal Legal Aid to remove any perverse incentive to plead not guilty to benefit from the slightly more generous assessment available under Criminal Legal Aid.

The consultation notes that the introduction of contributions for Criminal Legal Aid would offset some of the current costs to the legal aid budget. However, it is accepted that collecting contributions will increase administration and may prove to be difficult as the client group is predominantly low income.

²³ See note 9 above.

The consultation period ended in June 2011, and it is expected that the Scottish Government will announce its intended way forward in due course. Any changes to the way Criminal Legal Aid is currently administered will require legislation.

SCOTTISH PARLIAMENT

The Scottish Government intends to bring forward legislation in relation to legal aid during this parliamentary session. When speaking to the Justice Committee about the Scottish Government's justice priorities, Kenny MacAskill MSP, Cabinet Secretary for Justice, stated:

“ . . .our legal aid scheme depends upon our court structures and as we change court structures—civil or criminal—the scheme will have to change, because there are financial challenges. The one assurance that I can give you is that we will not be prepared to follow the path that has been taken south of the border, which has led almost to the abolition of legal aid as we know it in my lifetime. However, there will have to be changes, some of which will have to be more immediate than others, especially in criminal law. Some of the changes in civil law will be longer term.” (Scottish Parliament Justice Committee 2011)

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