INTRODUCTION

1. This document relates to the Scottish Civil Justice and Criminal Legal Assistance Bill introduced in the Scottish Parliament on 2 May 2012. It has been prepared by the Scottish Government to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 13–EN.

OVERVIEW OF THE BILL

2. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as Scottish Government priorities:

   - The establishment of a Scottish Civil Justice Council to replace the Court of Session Rules Council and Sheriff Court Rules Council. The new Council will also have a wider policy role to advise and make recommendations on improving the civil justice system in Scotland.
   - Introducing financial contributions in criminal legal aid to ensure those who are able to pay towards the cost of their defence do so and making changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.

BACKGROUND- PART 1 OF THE BILL – SCOTTISH CIVIL JUSTICE COUNCIL

Overview

3. The *Scottish Civil Courts Review*¹ (“the Review”), chaired by Lord Gill, reported in 2009 and made a total of 206 recommendations for reform of the civil court system. The Scottish Government has accepted the majority of these in principle.²

4. A combination of legislative and administrative measures is needed to implement the Review’s recommendations in full. To assist delivery, implementation is being taken forward in

phases under the Scottish Government’s Making Justice Work programme, representing the largest programme of Scottish civil courts reform in a century.

5. Many of the Review’s recommendations will need new rules of court. To prepare those, the Review recommended a new, single body should be established with oversight of the entire civil justice system.

6. The Scottish Government agrees. This Bill will therefore establish a new body, the Scottish Civil Justice Council, which will replace the Court of Session and Sheriff Court Rules Councils. In line with the Scottish Government’s phased approach under Making Justice Work, the Bill will establish the Scottish Civil Justice Council before later court reform legislation is introduced – in order that the Council can be up and running and able to consider, then help to implement, that later legislation as soon as possible.

7. However, the Review envisaged the new Council should ultimately do more than draft rules of court to implement the Review’s recommendations. The Bill is intended to give effect to that vision: giving the Council a wider function of contributing to the ongoing improvement of the civil justice system, making it more adaptive and fostering a culture of continuous improvement. Therefore, once implementation of the Review’s court reform recommendations is complete, the intention is that the Council will take on the new functions of keeping the civil justice system under review and advising and making recommendations for future change.

POLICY OBJECTIVES – PART 1 OF THE BILL – SCOTTISH CIVIL JUSTICE COUNCIL

8. The Scottish Civil Justice Council will replace and expand upon the functions of the Sheriff Court and Court of Session Rules Councils, under the direction and oversight of the Lord President and with secretariat support from the Scottish Court Service.

9. Their current functions may be summarised as follows:

- **Sheriff Court Rules Council** – under section 34 of the Sheriff Courts (Scotland) Act 1971, the Council has the function of reviewing the procedure and practice followed in civil proceedings in the sheriff court and of preparing draft rules to govern them. These draft rules are then submitted to the Court of Session to be made as an act of sederunt, subject to the Court's approval, and with such modifications, if any, that the Court considers appropriate. The Court of Session can also act without draft rules having been submitted, under section 32(3) of the 1971 Act, but in such a case, must consult with the Sheriff Court Rules Council and take into consideration any views expressed by it.

- **Court of Session Rules Council** – performs a similar function to the Sheriff Court Rules Council and, under section 8 of the Court of Session Act 1988, can formulate new rules of court, which are submitted to the Court of Session to be passed as an act of sederunt, subject to the Court's approval.

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4 Originally established under section 18 of the Administration of Justice Act 1933 and continuing under section 8 of the Court of Session Act 1988.

5 Established under section 33 of the Sheriff Court (Scotland) Act 1971.
Functions of the Scottish Civil Justice Council

10. The new Council’s functions will be as follows:

- to keep the civil justice system under review;
- to review the practice and procedure followed in the Court of Session and in civil proceedings in the sheriff court;
- to prepare draft civil procedure rules and submit them to the Court of Session;
- to provide advice and make recommendations to the Lord President on the development of and changes to the civil justice system; and
- to provide advice on any matter relating to the civil justice system as the Lord President may request.

11. In carrying out these functions the Council must have regard to any guidance issued by the Lord President and to the following principles (which have been developed with the principles which the Review considered fundamental to the civil justice system in mind):

- the civil justice system should be fair, accessible and efficient;
- rules relating to practice and procedure should be as clear and easy to understand as possible;
- practice and procedure in the civil courts should be as similar as possible, where appropriate; and
- alternative methods of dispute resolution should be promoted.

12. The Council will be able to take such action as it considers necessary or desirable to pursue its functions. This includes being able to:

- have regard to proposals for reform which may affect the civil justice system;
- prepare draft civil procedure rules, before the law changes, to allow the Court of Session to make rules on the changes proposed to the civil justice system (the Court will only make the rules once the law changes, however);
- consult such persons as it considers appropriate; and
- co-operate with, and seek the assistance and advice of, such persons or bodies as it considers appropriate.

Status

13. The Lord President, as head of the Scottish judiciary and Chair of the Scottish Court Service, already has various statutory responsibilities in relation to the efficient disposal of business in the Scottish courts. The responsibility in terms of governance, accountability, appointments and direction of the Council, will largely rest with the Lord President rather than Ministers. The Council (which will be a statutory advisory body) will not therefore fall to be classified as a non-departmental public body (NDPB).

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6 Ch. 1, para. 5, Report and Recommendations of the Scottish Civil Courts Review (2009), Ibid.
7 Section 2 Judiciary and Courts (Scotland) Act 2008.
Membership

14. Membership of the Council will include at a minimum:
   - The Lord President;
   - the Chief Executive of the Scottish Court Service;
   - the Chief Executive of the Scottish Legal Aid Board (“the Board”);
   - a person appointed by the Scottish Ministers;
   - four members of the judiciary;
   - two advocates;
   - two solicitors; and
   - two consumer representative members.

15. The Scottish Government believes it is necessary to keep the Council membership to a workable limit and that there should be flexibility in the membership in order that it may reflect the Council’s changing priorities. That flexibility is achieved by allowing the Lord President up to six further discretionary appointments.

16. It is anticipated that others will contribute to the Council’s work through its committees, which the Scottish Government would expect to reflect the full range of interests across Scotland’s civil justice system.

17. In order to ensure that the most suitable individuals are appointed to the Council, the Lord President is to set up an appointments process for the non-judicial members that the Lord President appoints.

18. The Lord President currently chairs the Court of Session Rules Council and may chair the new Council or designate a judge of the Court of Session as chair. The Lord Justice Clerk, whether or not a member, may deputise for the Lord President at Council meetings, including chairing duties. It is expected that, especially during the period of civil courts reform, chairing duties will be particularly onerous and that delegation may therefore be necessary.

19. The Scottish Court Service will be able to pay such expenses as it thinks fit to members of the Council or persons serving on committees. However, it is envisaged that members and those serving on committees would normally be unpaid. It may nevertheless be appropriate in some circumstances to pay remuneration. However, members of the Civil Justice Council and the Civil Procedure Rules Committee in England and Wales are not remunerated and it is envisaged that volunteers would generally be recruited to the Scottish Council on the same basis.

Reporting Arrangements

20. The Council is to prepare an annual report and business programme and, as soon after 31 March as is reasonably practicable, lay copies before the Scottish Parliament. This is a standard requirement of transparency and accountability for many public bodies and it is considered that it would also provide a good opportunity for the Council to promote and publicise its work.
Alternative approaches considered

21. Arguably, the changes required to implement civil courts reform could be taken forward by the existing civil rules councils. However, the Review argued that they were not well placed to do this. To provide the necessary overview and to achieve harmonisation of the rules, Lord Gill recommended the establishment of a Civil Justice Council for Scotland, with a remit similar to that of the civil Justice Council in England and Wales alongside responsibility for drafting rules of court.\(^8\)

22. The Scottish Government agrees that a new body is required to take all of this work forward.

23. Consideration was given to adopting in Scotland a model similar to that in England and Wales, with a policy body separate and distinct from the technical rule-making body. However, the Scottish Government considers, given the scale of the Scottish jurisdiction and the need for a co-ordinated package of major reforms, that a single body should be responsible both for the strategic overview and for taking forward the technical changes to achieve their strategic aims.

24. The Scottish Government considered whether some, or all, of the Council’s proposed functions should be conferred on a different body. The Scottish Government considered in particular conferring additional functions on the Scottish Law Commission (“the SLC”).\(^9\)

25. The Scottish Government, however, favours conferring new functions on the Council only. Although the SLC’s functions include keeping “under review all the law with which they are respectively concerned with a view to its systematic development and reform”, the SLC is required to report to Ministers.\(^10\) The Scottish Government considers the more effective line of accountability for taking forward reforms to the civil justice system, including procedural reforms, is to have a body accountable to the Lord President. It may be appropriate, however, for the Council and the SLC to work together on particular projects.

26. The Scottish Government also considered whether it would be appropriate to set up a non-statutory body. However, a formal statutory basis and remit will give the necessary authority and direction to drive forward civil court reform and other changes needed to the civil justice system.

Consultation

27. A public consultation on proposals for the new Council closed on 22 December. There was overwhelming support for the creation of a single body to create a more coherent rules structure and to implement civil courts reform, with respondents generally in favour of a Council with a rules function, a policy remit and a role to play in administrative justice and rule making functions for tribunals. However, opinion varied as to when the Council should take on the additional functions and to what extent. Almost all responses offered views on alternatives to

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\(^8\) Recommendation 206, Report and Recommendations of the Scottish Civil Courts Review (2009), Ibid.
\(^9\) Established by section 2 of the Law Commissions Act 1965.
\(^10\) Under section 3 of the 1965 Act.
the membership proposed - mainly for better representation of the particular interest or the group for which the respondents speak.

28. Most respondents were in favour of giving the Council a degree of policy capacity, the main points of contention being as to when it should take on that function, and what the Council’s primary role should be (i.e. rulemaking or policy). The Lord President, pointing out that the focus in the early years will be on rules changes for civil courts reform, was of the view that the Council should have only a rules-based remit at first. Also, some respondents indicated that rule making for tribunals should come at a later stage.

29. Respondents generally supported transferring the functions of the Scottish Committee of the Administrative Justice and Tribunal Council. The Scottish Committee itself was supportive in principle, but expressed concerns that the proposed focus of the Council was weighted too heavily towards issues of the civil courts and of rule-making. The judiciary generally took the opposite view, having concerns about conferring this responsibility on a body which will initially concentrate on civil rules revision. It is therefore proposed that the Council should take over functions in this regard, once judicial leadership for tribunals is transferred to the Lord President.11

30. It is considered appropriate that, in addition to the originally proposed membership, a representative of the Scottish Legal Aid Board should sit on the Council. It is not considered necessary to extend the membership further, given that the Lord President will have a number of discretionary appointments. That will provide sufficient flexibility to ensure that the membership reflects an appropriate cross-section of interests in the civil justice system in light of the Council’s priorities at any given time, and will keep the number of members at a workable level.

BACKGROUND - PART 2 OF THE BILL – CONTRIBUTIONS FOR CRIMINAL LEGAL ASSISTANCE AND CHANGES TO FINANCIAL ELIGIBILITY

Overview

31. The Scottish Government set out its intention to legislate for the introduction of contributions in criminal legal aid in the paper A Sustainable Future for Legal Aid, which was published on 5 October 2011.12 The paper argued that in a time of reduced expenditure, those who are able to pay for at least some of their costs should do so, so that legal aid can then be focused on those who need it most and funds still available for legal aid can be better targeted.

32. Contributions are already payable in Scotland in civil legal aid and across advice and assistance, including in a fairly narrow range in criminal cases involving legal assistance in the

11 Further information, including how to contribute to the Scottish Government’s Consultation on the Scottish Government’s Proposals for a New Tribunal System for Scotland (which closes on 15 June 2012) are available at: http://www.scotland.gov.uk/Topics/Justice/legal/Civil/TribunalReform
12 http://www.scotland.gov.uk/Publications/2011/10/04161029/1
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

form of Assistance By Way of Representation (ABWOR). Where ABWOR is available the level of contribution is assessed and collected by the solicitor.

33. Introducing contributions into criminal legal aid will, therefore, both ensure parity between the different aid types and, by delivering savings, help to maintain as much as possible existing levels of access to justice in economically challenging times.

The current cost of legal aid in Scotland

34. The total cost of the legal aid fund in Scotland in 2010-11, the last full year for which figures are currently available, was £161.4m. This is £10.9m more than in 2009-10. The rise in expenditure was due to a number of factors including the increases in value added tax, a larger numbers of cases paid in summary criminal legal aid and an increase in the gross cost of civil legal aid as a result of the 20% increase in applications received in the previous two years and a large rise in payments on account claimed by solicitors.

35. Total grants relating to summary criminal cases (including ABWOR and legal aid grants by the Board and the courts) fell by 9% in 2010-11 to 85,481. Grants by the Board of summary criminal legal aid fell by 9% to 50,603. ABWOR grants fell by 9% to 42,853. The decrease in grants is in the main due to fewer cases being brought through the courts. During 2010-11 there were 6% fewer summary complaints registered by the Scottish Court Service. Criminal advice and assistance fell by 1.1% to 27,545, representing a levelling off following the steep decline associated with the summary justice reforms. Grants of solemn legal aid (made by the courts and by the Board from November 2010) fell by 2.8% to 11,724. Grants for all types of criminal legal assistance fell by 8% to 153,962.

36. The total cost of criminal legal assistance increased by £5.9 million (6%) in 2010-11 to £104 million. Expenditure on criminal advice and assistance fell by £0.1 million (10%) to £1 million. The cost of ABWOR remained virtually the same as the previous year at £20.1 million. Summary criminal legal aid increased by £3.6 million (12%) to £35.3 million as a result of an increased volume of summary accounts processed. Solemn criminal legal aid costs increased by £1.7 million (4.4%) to £40.8 million, largely as a result of fee increases introduced by the Scottish Government. £2.1 million of the increase in expenditure was due to the UK’s increases in VAT.

Moving to a sustainable future for legal aid

37. The scale of the financial challenge facing the legal aid system in Scotland was set out in A Sustainable Future for Legal Aid. Reflecting the drop in Scotland’s overall budget as a result of the UK Government’s Comprehensive Spending Review in 2010, the outcome of the Scottish Government Spending Review 2011 will be extremely challenging for all areas of government expenditure. The budget for legal aid will fall to £132.1m in 2014-15. The financial challenge would have been much greater and the savings that need to be made now would have been much deeper and more difficult if the Government had not acted quickly in 2010 to make immediate reforms to legal aid.

ABWOR is a form of advice and assistance, involving taking on a person’s behalf any step in instituting, conducting or defending certain proceedings (and in criminal cases is most commonly used where a plea of guilty is made).
38. However, the challenge is clear. We need to arrive at a sustainable level of legal aid spending within the next two to three years. This is all the more difficult given the underlying increase in civil and criminal expenditure, driven by factors including the continued high demand for civil legal assistance resulting from the economic downturn. Further pressures are likely to arise on legal aid.

39. The Scottish Government has not approached this challenge by proposing major changes to the scope of legal aid. The Government’s view remains that wholesale reductions to scope can have a damaging impact on access to justice and can have adverse consequences for other parts of the justice system as well as wider society.

40. The legal aid reforms that the Government has taken forward so far have been designed to preserve access to justice as much as possible. The reforms have included reductions in fees for summary criminal cases in a number of areas, the reduction by half of the fees for solicitors’ travelling time, a limited expansion of the Public Defence Solicitors’ Office and the updating of the existing table of fees for counsel acting in civil legal aid cases in the Court of Session and the introduction, for the first time, of a table of fees for counsel acting in civil legal aid cases in the sheriff court. Some changes were made to financial eligibility and verification, in order to obtain best value and protect the taxpayer. The Board also undertook a wide ranging and thorough programme of best value reviews of different areas of its work in this period, including in the fields of mental health, immigration and asylum and in its approach to child contact cases. Finally, the Board’s grant in aid was cut by £1.1m in 2011-12, a bigger percentage cut than for the fund. The Board’s grant in aid will be cut further over the course of the spending review period.

41. A Sustainable Future for Legal Aid sets out details of a second package of legal aid reforms under a series of four themes. The introduction of contributions in criminal legal aid comes under the first theme, which is ‘focussing legal aid on those who need it most’.

Contributions: practice in other jurisdictions

42. Many other jurisdictions already have contribution regimes in place in their systems of criminal legal aid:

- In England and Wales, a contributory system has operated for more serious cases (those held in the Crown Court) for a number of years now. Those on certain benefits are “passported” and those with an income and assets below certain levels are assessed with a nil contribution, with disposable income and capital thresholds above which applicants are not eligible for legal aid. The criminal contribution is paid monthly and for the length of the case, or six months, whichever is the lesser.

- In New Zealand, criminal legal aid is usually only available for those facing a sentence of six months or more. All grants of legal aid are subject to a contribution, although this may be nil depending on the financial circumstances of the applicant. Income repayments can be collected in instalments (weekly, fortnightly or monthly), starting once legal aid has been granted.

- In Finland, legal aid can be given both in court proceedings and in other matters. All those who have contributory legal aid are charged a small (about £30) fee in addition to any contribution. For more serious criminal proceedings (where conviction would result
in a sentence of four months or more), the defendant is usually entitled to request a public
defender regardless of his or her financial situation. The State covers the costs of this. However, if the defendant is convicted he or she is obliged to pay for or contribute to the costs.

- In the Netherlands, free legal assistance is provided for more serious crimes (where
defendants are detained in police custody). For other defendants eligibility is assessed on
the same financial criteria as civil legal aid. There are both upper income limits, above
which applicants are ineligible for legal aid, and lower income limits, below which
applicants are entitled to non-contributory legal aid.

**Availability of criminal legal assistance**

43. The forms of criminal legal assistance currently available in Scotland in different
situations are as follows:

- Advice and assistance or ABWOR may be available subject to two tests: financial
eligibility and whether the issue is a matter of Scots law. Solicitors initially grant advice
and assistance or ABWOR. A financial contribution may be payable to the solicitor.
ABWOR is available in criminal proceedings where the applicant pleads guilty or for
some particular categories of court proceedings. For some types of ABWOR there are
other more detailed tests to be applied.\(^{14}\)

- Summary criminal legal aid is granted by the Board and is used in summary cases in the
Justice of the Peace Courts, Stipendiary Magistrates’ Courts and Sheriff Courts. The
applicant must be eligible under a test based on undue financial hardship and the interests
of justice. No financial contribution is currently due.

- Solemn legal aid is available only in solemn cases in the Sheriff Court and High Court.
The power to grant it was transferred from the courts to the Board in November 2010
(although the courts may still make it available in some circumstances in summary and
contempt of court cases). Granting solemn legal aid is subject to an eligibility test based
on undue financial hardship. No financial contribution is currently due.

- Criminal legal aid for appeals is also granted by the Board. If legal aid had been granted
for the first instance proceedings, a financial eligibility test is not applied in respect of the
appeal. For other applications, depending on the type of appeal, an eligibility test based
on undue hardship may be applied. In some types of appeal, leave to appeal must also
have been granted by the courts and in others the Board must consider if it is in the
interests of justice that legal aid is made available.

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\(^{14}\) More detailed information on the tests applied in ABWOR cases can be found in Part III of the Criminal Legal
Assistance Handbook published on the Board’s website:
wwhelp.htm
Governing principles for contributions for criminal legal assistance and changes to financial eligibility

44. In its ‘Consultation on the introduction of Financial Contributions in Criminal Legal Aid and Changes to Financial Eligibility’, the Scottish Government set out the following governing principles which should guide the proposed changes:

- **Practicality of application** - the financial eligibility tests should be straightforward and easy to apply and minimise differences between different aid types. The collection of contributions should be straightforward and efficient.

- **Fairness to the accused and the taxpayer** - the interests of the taxpayer and the accused must be balanced to provide value for money and access to justice. Applicants who are able to pay a contribution should do so but they should be able to spread payments of contributions across the likely lifetime of a case or have access to a system of graduated contributions.

- **Supporting the efficient operation of the justice system** - it is essential that there are no perverse incentives which damage the efficient and effective operation of the justice system; and the legal aid process should fit the timescales set for the summary justice process.

- **Minimising complexity for solicitors, applicants and the Board** - the system should be streamlined and easy to apply. The system should be designed to be easily processed using Legal Aid Online.

- **Proportionality** - the system will need to balance the likely savings to be made from collecting contributions against the cost of collection and the systemic changes that will need to be introduced.

45. The Government believes that the system for collecting contributions in criminal cases that will be introduced by this Bill is in accordance with these governing principles.

**POLICY OBJECTIVES OF PART 2 OF THE BILL – CRIMINAL LEGAL ASSISTANCE**

46. The main policy objectives of introducing contributions for criminal legal aid and making changes to financial eligibility in criminal legal assistance are as follows:

- It will contribute to focussing criminal legal assistance on those who need it most by ensuring that those who can afford to pay a contribution to the costs of their criminal case do so, without compromising an accused’s rights under article 6 ECHR to a fair trial and free representation where he/she cannot afford it.

- It will provide for a more equitable system that no longer, as at present, obtains contributions in civil cases but not in criminal cases.

- It will contribute to making the justice system more efficient by removing the current anomaly in criminal cases whereby applicants can be liable to pay a contribution when they plead guilty to a charge (because they are in receipt of ABWOR) but they do not

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have to pay a contribution if they plead not guilty (because they are in receipt of criminal legal aid).

Assessing financial eligibility for criminal legal assistance and the level of any contribution payable from disposable income

47. In order to put in place a single streamlined system for the collection of contributions in criminal legal assistance (i.e. both criminal legal aid and ABWOR), section 18 of the Bill will align the financial eligibility test for ABWOR in relation to criminal matters with the existing eligibility test for criminal legal aid, by making amendments to section 9 of the Legal Aid (Scotland) Act 1986 ("the 1986 Act"). The existing test for summary and solemn legal aid applications is based on ‘undue hardship’. As regards the aim of alignment, the Scottish Government has been developing and implementing a policy for a number of years of moving towards greater consistency, where appropriate, across the legal aid system in order to simplify its operation.

48. There is currently a difference in summary cases between eligibility for ABWOR for guilty pleas and for criminal legal aid for not guilty pleas. A solicitor who assesses eligibility for ABWOR uses the figures that are set by Scottish Ministers and contained in the Board’s Advice and Assistance Keycard assessment, which takes into account the income of the applicant and any spouse or partner and only gives allowances for dependants.16 This assessment can result in a one-off contribution towards the cost of the case. The contribution is collected by the solicitor. Summary criminal legal aid requires tests of undue hardship and the interests of justice to be applied, the former of which does not aggregate the resources of a spouse or partner but can take into account essential household outgoings. If a client is eligible under this test, no contribution is payable. As a result, summary criminal legal aid can be easier to obtain than ABWOR for applicants with a reasonable income (and/or with a spouse or partner with a reasonable income) and outgoings such as a mortgage. The Board has estimated that about 6% of applicants who received summary criminal legal aid would not have been eligible for criminal ABWOR, thereby creating a perverse incentive which could be seen to encourage not guilty pleas.

49. The Bill ensures that consistent financial eligibility tests based on undue hardship will be applied across the aid types of ABWOR, summary criminal and solemn criminal legal aid. Sections 23A, 24 and 25 of the 1986 Act already set out that in relation to legal aid for summary, solemn and appeal cases, the assessment of the applicant’s financial means is based on ‘undue hardship’ – that is, that after consideration of the financial circumstances of the accused person, that the expenses of the case cannot be met without undue hardship to him/her or his/her dependants. Aligning the assessment of the financial means of applicants across all of the criminal legal assistance aid types will ensure consistency in the assessment of disposable income and capital and the levels of contributions that applicants may be assessed to pay. The solicitor will continue to assess eligibility and contributions payable for criminal ABWOR cases and the Board will continue to assess eligibility, and will begin to assess contributions payable, for summary and solemn criminal legal aid.

50. Although the aim is alignment, in relation to criminal ABWOR only the Bill provides that a person may be granted it in two ways. This is necessary both to ensure that solicitors are

16 The Keycard can be found at: http://www.slab.org.uk/profession/index.html
granting ABWOR in a uniform manner and so that, if any discretion is required to ensure no undue hardship is caused to the applicant, then it is the Board that exercises it. Summary and solemn criminal legal aid will continue to be granted by the Board in accordance with guidance which it publishes in its Criminal Legal Assistance Handbook.  

51. There are two ways in which criminal ABWOR will be granted by the solicitor. First, if the solicitor assesses the person’s financial circumstances and considers that criteria are met including whether, according to a scheme of eligibility, undue hardship would be caused if ABWOR were not granted. Second, if the Board exercises its discretion to grant criminal ABWOR to the person. The Bill also provides that the Board must set up a mechanism to allow a person to apply to the Board to consider making a grant, where the solicitor has not granted the person criminal ABWOR.

52. The scheme of eligibility, created by section 18 of the Bill, will be prepared and published by the Board. The Board has to show a draft of the scheme to Scottish Ministers and Scottish Ministers must approve it. The scheme of eligibility, although having to be approved by Scottish Ministers, does not in any way impinge on the Board’s independence in determining applications for legal assistance under section 3 of the 1986 Act”.

53. As at present, the Bill, by virtue of sections 19 and 20, will ensure that an applicant in receipt of “passported” benefits (currently income support, income-related jobseeker’s allowance and income based employment and support allowance) will be eligible for criminal ABWOR or criminal legal aid with no contribution from income. However, a contribution might still be required from any disposable capital.

54. In applying the eligibility test, the solicitor and the Board will calculate disposable income by making subtractions from eligible income for a set of unavoidable expenditures such as rent, board and lodgings, mortgage payments, council tax and child care and maintenance payments, loan repayments, contribution payments being made in other cases and regular payments made associated with a disability. An allowance will be given for each dependant, expected to be at the rates given in the current Advice and Assistance Keycard. Non-passported benefits will be taken into account as income although they may well be cancelled out as being used for unavoidable expenditure. The resources of spouses and partners will be taken into account when assessing financial eligibility except where the spouse or partner has a contrary interest in the case (for example where they are a co-accused, complainer or Crown witness in the case) or where the parties are living separately and apart. Regulations will specify precisely which items of income and which weekly outgoings can be taken into account in the assessment of disposable income.

55. The Bill, at sections 19 and 20, specifies that the threshold for disposable income at or above which contributions are payable, is £68 per week. This is the weekly equivalent of the lower income threshold in civil legal aid. The equivalent annual threshold for criminal contributions in England and Wales is £3,398, which would give a rounded weekly equivalent of £65. If the applicant’s disposable income is less than £68, then he or she will be eligible for

17 The handbook can be found on the Board’s website: http://www.slab.org.uk/profession/index.html
ABWOR or criminal legal aid with no contribution. The threshold is effectively designed to cover other living expenses, as allowances are already made for spouse or partner and children.

56. If the applicant has net disposable income of £68 or more, but less than £222, (the weekly equivalent of the middle income threshold in civil legal aid cases and the current upper weekly income figure used as a guide in summary criminal and solemn criminal cases), the applicant will be liable to pay a contribution from his/her weekly excess disposable income. It is intended that the upper limit in respects of ABWOR will be set out in the scheme of eligibility prepared by the Board. The upper limit for criminal legal aid, which will be closely aligned with that for ABWOR, is set out in the Board’s existing published guidance.

57. Once an applicant is eligible for criminal legal assistance the amount of contribution payable, if any, will be determined by a combination of factors, including the applicant’s disposable income and the typical length and cost of the type of cases he/she is paying towards. Broadly speaking, this means that the longer a case is likely to last and/or the higher the likely cost, the longer the period of assessment for liability for a contribution and the higher the total assessed amount.

58. For the purposes of calculating the contribution to be paid, it is intended that cases will be grouped into several broad categories based on the type of case and type of legal aid, which broadly determines the length and cost. Within each category, contributions will be calculated by reference to an assessment period (in effect a weekly multiplier) and a series of contribution rates. The contribution rates will be graduated so that the more disposable income the applicant has, the higher the rate of contribution they would have to pay. In other words, different percentage rates will apply to different slices of income with the highest rates applying only to the highest levels of income.

59. If the applicant’s weekly disposable income exceeds £222 then legal assistance would only be offered (with a contribution payable) if the Board considered that it still would cause undue hardship to expect the applicant to pay for his/her own legal costs. In criminal ABWOR and criminal legal aid cases a number of factors could make the case more expensive than average including the number of witnesses involved, the likelihood that expert evidence would be required, the legal complexities involved and any aspects of the case likely to lead to the requirement for significant preparation time. In ABWOR cases, the solicitor would need to ask the Board to apply this discretion to make legal assistance available in line with the scheme of eligibility.

60. Table 1 below shows an example of the different contributing factors that could be used to determine the overall level of contribution assessed. For example, a person being prosecuted under solemn proceedings and with a disposable income of between £68 and £100 would pay a contribution assessed as 5% of that part of his/her weekly disposable income above £68, multiplied by 52. A person receiving ABWOR in relation to a Justice of the Peace Court case ("JP Court") with a disposable income of £110 would pay 20% of his/her income between £68 and £100 plus 40% of their income between £100 and their actual disposable income of £110, with the total amount multiplied by eight. Where the case turns out to cost less than the assessed contribution, the applicant would either stop paying and/or be refunded any excess. The
maximum contribution that will be paid is, therefore, either the assessed contribution or the cost of the case, whichever is lower.

Table 1: Showing the different contributing factors that determine the overall level of contribution assessed

<table>
<thead>
<tr>
<th>Assessment periods and contribution rates</th>
<th>Justice of the Peace Court ABWOR</th>
<th>Justice of the Peace Court Legal Aid</th>
<th>Stipendiary Magistrates’ Court ABWOR</th>
<th>Stipendiary Magistrates’ Court Legal Aid or Sheriff Court ABWOR</th>
<th>Sheriff’s Court Summary Criminal Legal Aid</th>
<th>Solemn Legal Aid</th>
<th>Appeals Legal Aid</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assessment Period (weeks)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>10</td>
<td>13</td>
<td>20</td>
<td>26</td>
<td>52</td>
<td>52</td>
<td></td>
</tr>
</tbody>
</table>

Note: the bands are effectively based on £68.00 to £100.00 and then £100.01 to £130.00 and so on to ensure there are no gaps.

Note for both table 1 and table 2: if disposable income exceeds £222 the applicant will normally be ineligible for assistance, unless the circumstances of the case suggest that its costs could not be met without undue hardship. In such circumstances, an additional contribution will be payable from disposable income above the £222 threshold, resulting in a higher maximum contribution.

61. Table 2 below details the likely level of total contributions that could be due from a person, depending on their weekly disposable income and the type of case. These contributions levels, again, will be set out in regulations rather than on the face of the Bill as they are likely to be subject to change from year to year and perhaps even on a more regular basis. The applicant will be able to pay the contribution in a number of instalments depending on the type of case and total contribution. For example, in a solemn case the contribution could be paid in up to 12 monthly instalments.
Assessing financial eligibility for criminal legal assistance and the level of any contribution payable from disposable capital

62. Contributions could also be due from capital although this is likely to affect only a very small percentage of applicants in criminal cases. Capital includes savings and anything else of value owned by the client including money in the bank, investments, money due from a trust fund and redundancy payments. However, there will be several exclusions including the home in which the client and their partner lives, household furniture and clothing and the value of the client’s car unless it is of high net value. As with disposable income, an allowance will be given for each dependant at the rates given by the current Advice and Assistance Keycard. If the client is of a pensionable age then various additional disregards will be allowed.

63. The capital threshold is set on the face of the Bill at £750. An applicant with disposable capital below £750 will not pay a contribution from capital.
64. If the applicant has disposable capital at or over the threshold then the level of the capital and the nature of the case involved will need to be looked at before the solicitor or the Board can determine whether or not it would cause undue hardship to expect the applicant to pay either for her or his own legal costs or a contribution to those costs. The amount of any contribution is likely to be graduated so that the more disposable capital the applicant has the higher the rate of contribution they would have to pay. Where a contribution is assessed from disposable capital, the Board will normally expect this to be paid in one instalment. However, if the capital assets are not fully liquid, the Board may extend this period depending on the length of time taken to liquidate those assets.

Assessing financial eligibility for criminal legal assistance and the level of any contribution payable in cases where disposable income and capital is available

65. If contributions are due from capital and income, the capital will be used to defray the contribution liability first, with any remainder of the contribution due being collected from income. The income element of the contribution could be made in a series of monthly instalments, depending on the type of case.

Percentage of individuals who may have to pay a contribution

66. Those on passported benefits and those who have less than £68 disposable weekly income will not be liable to pay a contribution. The table below sets out the estimated percentage of individuals who will not be liable to pay a contribution, based on an analysis of all the cases which the Board dealt with in the year up to November 2011.

<table>
<thead>
<tr>
<th>ABWOR</th>
<th>Summary</th>
<th>Solemn</th>
</tr>
</thead>
<tbody>
<tr>
<td>40030</td>
<td>54040</td>
<td>11874</td>
</tr>
<tr>
<td>82%</td>
<td>82%</td>
<td>84%</td>
</tr>
</tbody>
</table>

Level of contribution assessed potentially causing undue hardship

67. It is intended that the system for calculating disposable income and capital and the graduated table of contributions should ensure that no-one should be asked to pay a contribution that would cause them undue hardship. However, the Bill gives Ministers a regulation making power at section 22 to make provision in case instances are foreseen in which the level of contribution determined could cause undue hardship.

Process for assessing eligibility and contribution payable

68. All applications for legal aid (civil and criminal) are made on-line through the Board’s online system. For the solicitor, it will be crucial that the system can accommodate the changes. It is envisaged that once all financial details are registered the online system will calculate the contribution due to be collected from the applicant.
Multiple cases

69. Regulations will make provision for determining appropriate contributions where the person is in receipt of criminal legal assistance in respect of two or more distinct proceedings. The intention is that where the individual has more than one case the liability to pay a contribution will be assessed on the first case. In determining any contribution which may be payable under the second case, regard will be had to the first contribution – i.e. this will be considered an outgoing for the purposes of calculation. The same method will be used to assess any further liability on any subsequent cases.

Contributions payable under Advice and Assistance

70. Currently an individual may be assessed as liable to pay a contribution where receiving advice and assistance. Where the advice is in relation to a criminal matter, and the case then proceeds and a grant of ABWOR or summary criminal legal aid is made, any work done by the solicitor under the initial advice and assistance is subsumed into a fixed payment to the solicitor for the overall case. In these circumstances any contribution assessed and paid under advice and assistance will be deducted from the contribution due for the criminal ABWOR or criminal legal aid. For example, where an individual is assessed as being liable to pay a contribution of £20 under advice and assistance and then assessed as being liable to pay a contribution of £100 under a grant of criminal ABWOR or summary criminal legal aid, only £100 in total will fall to be collected.

Payment of fees or outlays otherwise than through contributions

71. Section 20 inserts section 25AD into the 1986 Act which makes provision for the order in which the solicitor is paid any fees and outlays due. This mirrors the provisions in section 12 of the 1986 Act in respect of A&A. First, the solicitor must seek any fees and outlays from any contribution which is due; second, the solicitor must seek to recover any fees due from expenses, although it is acknowledged that it is extremely rare for expenses to be awarded in criminal cases. If the first two are insufficie nt to meet the full fees and outlays of the solicitor, the solicitor is then entitled to seek to recover any amount due from the legal aid fund. This is consistent with the operation of other contributions regimes in the 1986 Act.

Contributions for appeals where appellant deceased

72. Section 21 of the Bill provides that where an individual has died after being convicted of an offence it is open to a person, under section 303A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”), to apply to the High Court for an order to allow that person to either institute an appeal, or if an appeal was ongoing, to effectively “step into the deceased’s shoes”. They can also apply for legal aid in order to allow them to carry on or raise the appeal. In that situation, the Bill provides that the Board may require the payment of a contribution in respect of the expenses of the criminal legal aid of such amount as the Board may determine and that the Board may also require either the estate of the deceased person or the authorised person to pay the contribution. This allows for the individual circumstances of what are likely to be rare and complicated cases to be taken into account by the Board.
Outcome of the case

73. The Bill ensures that contributions are to be paid for criminal legal assistance regardless of the outcome of the case. This reflects the fact that those who currently pay privately do not get their legal expenses refunded if they are acquitted. Unlike in England and Wales, the refunding of expenses of acquitted persons has never formed part of the Scottish criminal law system. If contributions paid in criminal legal assistance cases were to be refunded in the event of acquittal, this would mean that those who received criminal legal assistance would be treated preferentially in comparison to those who paid privately. Also, it is felt to be fair that those who can afford to pay a contribution to their criminal legal assistance costs do so.

Exceptions to the contributions regime

74. There will continue to be some criminal cases in which contributions are not due regardless of the means of the accused. Contributions will not be levied where criminal legal aid is granted under section 22 of 1986 Act (automatic criminal legal aid) or in the limited situations where the courts have the power to grant legal aid. To introduce contributions into these areas would cause practical problems. Criminal legal aid in these cases is most commonly used for those appearing from custody at court. Custody courts are very busy and introducing an eligibility test involving assessment of the applicant’s financial resources and contribution due might cause unacceptable delay in the court process. Most accused who may be eligible for criminal legal assistance will in any case, following an appearance from custody, go on either to apply for criminal ABWOR, or summary or solemn criminal legal aid and at that point they can be assessed for their ability to pay a contribution.

75. Section 17 of the Bill will also provide a regulation making power to allow Scottish Ministers to disapply contributions, should they need to do so, in relation to police station advice. Section 8A was inserted into the 1986 Act by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. The 2010 Act followed the Supreme Court’s ruling in the case of Cadder v HMA.\textsuperscript{18} The purpose of section 8A of the 1986 Act is to allow for advice and assistance to be made available without reference to the financial limits in section 8 of the 1986 Act to a person to whom section 15A of the 1995 Act applies, in such circumstances as may be provided in regulations. This regulation-making power was used in the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations in April last year in order to facilitate the provision of legal advice in police stations. The Bill takes a similar regulation making power in respect of contributions in these circumstances in order to give the Scottish Ministers the flexibility to respond to future developments in the provision of police station advice following the Cadder v HMA case.

Collection of contributions

76. Currently solicitors collect contributions for advice and assistance (including ABWOR). This will not change. Where a contribution is levied in respect of a summary criminal matter, section 20 (which inserts section 25AC(4)(b) into the 1986 Act) will require the solicitor, after the Board has assessed the amount of the contribution, to collect it. The solicitor has a direct solicitor/client relationship, which can in some cases allow for potentially easier collection of contributions. Solicitors employed by the Board under sections 26, 27 or 28A of the Act will also collect contributions and then pay them to the Board.

\textsuperscript{18} [2010] UKSC 43
Where a contribution is levied in respect of a solemn case, or in respect of a criminal appeal, section 20 of the Bill (which inserts section 25AC into the 1986 Act) will require the Board to collect any contribution due. The Board already collects contributions in civil cases. Contributions in solemn and appeals cases are likely to be higher than the contributions collected in summary cases – reflecting the enhanced ability of the Board to handle these risks in comparison to smaller criminal firms. This splitting of the responsibility for collecting contributions between solicitors and the Board spreads the burden of collection.

Section 20 of the Bill also allows for contributions collected by the solicitor to be treated as fees and as such they will be able to be banked straight away, thereby helping cash-flow for solicitors’ firms. Being able to treat contributions as fees also means that firms do not have to set up separate client accounts, which can increase insurance premiums paid by firms.

Consideration has been given as to whether or not the Board would require new powers of recovery in order to maximise the potential savings. However, given that the Board already collects contributions in civil cases using its existing powers with considerable success and that the Board will only be collecting contributions in solemn criminal and appeal cases. The Government has concluded that special powers of recovery are not justified.

Issues for the wider justice system

Officials have consulted with the Crown Office and Procurator Fiscal Service and the Scottish Court Service in preparing these proposals. The main issue raised was the possibility that introducing contributions into criminal legal aid might in some way result in delays to the system. However, in the latter half of last year the majority of summary criminal applications were being received via the Board’s online system and were processed within 4 days. The Board will ensure that applications are processed as quickly as possible. The Scottish Court Service will provide guidance to clerks and provide contact details for the Board so that enquiries can be made during court proceedings to establish the position of any pending legal aid applications.

Alternative approaches

One option the Scottish Government considered was to maintain the status quo and do nothing. However, this would not address the perceived unfairness that contributions are already liable to be paid in civil legal aid cases and across advice and assistance, and will soon be liable to be paid in children’s legal aid cases (which is a distinct category of legal aid), but no contribution is liable to be paid in criminal legal aid cases. Without legislative change the operation of criminal legal aid would continue as it is. However, given the current economic climate and the need to make savings, the aim of the Scottish Government to extend the principle of ‘those who can afford to pay, should pay’, and the desire to maintain the current broad scope of the legal aid system in Scotland, this was discounted as an option. The inevitable consequence of doing nothing would have been that it would have been necessary either to make further reductions in the fees paid to solicitors or to dramatically reduce the scope of the legal aid system in Scotland.
CONSULTATION

82. The Scottish Government carried out a public consultation on the introduction of contributions into criminal legal aid and changes to financial eligibility in March 2011. The majority of the responses to the consultation were broadly in favour of the principle that those who can afford to pay towards the cost of their case should do so. There was also wide support for aligning the financial eligibility tests, if contributions were introduced. The consultation responses were published on 6 July 2011 and the consultation report was published on 20 April 2012.

83. The Faculty of Advocates (“the Faculty”) raised concerns that an applicant for legal aid would not, on acquittal, receive a refund of any contribution they may have made. This issue was subsequently discussed with the Faculty. The rationale is that, considering that those who currently pay privately for their criminal case do not get their expenses refunded if they are acquitted, refunding contributions in legally aided cases would mean that those receiving legal aid would be receiving preferential treatment to those paying privately.

84. Following the consultation the Scottish Government issued a ‘key principles’ paper to certain stakeholders, including the Law Society of Scotland (“the Society”) and the Faculty. Officials met with both organisations. At meetings with the Society’s criminal legal aid negotiating team in October 2011 and February 2012 it became clear that a key issue for the profession was who was to collect the contributions. As a result of these meetings a compromise was proposed involving solicitors collecting contributions in ABWOR (as they do already) and summary cases (which will be new) and the Board collecting contributions in the more expensive solemn and appeals cases.

85. In addition, the Scottish Government also discussed a range of issues in relation to the Bill with the Crown Office and Procurator Fiscal Service and the Scottish Court Service.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

86. The Bill’s provisions do not discriminate on the basis of age, gender, race, disability, marital status, religion or sexual orientation.

87. In carrying out its functions, the Council must have regard to certain principles, including that the civil justice system should be “fair, accessible and efficient”. The Scottish Civil Justice Council will therefore aim for the development of a fairer, more accessible civil justice system for all types of person, from across Scotland. It is envisaged that the membership where possible would therefore be drawn appropriately to help foster and protect those interests.

19 http://www.scotland.gov.uk/Publications/2011/07/06111349/0
20 http://www.scotland.gov.uk/Publications/2012/04/2519
88. The provisions of Part 1 requiring the Lord President to set out an appointments process for the non-judicial members appointed by the Lord President are intended to ensure that appointments are made on merit and that the process is transparent and independent.

89. It is expected that organisations and individuals representing the interests of disabled people and others with characteristics protected under the Equality Act 2010 will be able to contribute to the Council’s work through its committees, which we would expect to reflect the full range of interests across Scotland’s civil justice system.

90. The Council’s programme of work - particularly in relation to implementation of civil courts reform but also in advising and making recommendations in relation to developments to the civil justice system – will include consultation of a wide variety of individuals and representative bodies with an interest in Scotland’s civil justice system.

91. An Equality Impact Assessment will be published in relation to both aspects of the Bill.

Human Rights

92. The introduction of contributions into criminal legal assistance is relevant to Article 6 of the European Convention on Human Rights. Article 6 guarantees the right to a fair trial and in particular Article 6(3)(c) provides that everyone charged with a criminal offence is entitled to defend himself or herself in person or through legal assistance of his or her own choosing, or if he or she does not have sufficient means to apply for legal assistance to be given it free when the interests of justice so require. There is nothing in the provisions of the Bill which has a practical effect on the extent and quality of the preparations for the trial and the right of the accused to have effective legal assistance. There is nothing which puts the fairness of the trial at risk. The introduction of contributions is compatible with Article 6 of the Convention because an individual receives free legal assistance to the extent that he or she cannot afford it. An individual will contribute to the cost of legal assistance if he or she can afford to do so. Some relevant cases are M v UK (1983) 6 EHRR 345, Pakelli v Germany (1983) 6 EHRR 1, Melin v France (1993) 17 EHRR 1, In Artico v Italy (1980) 3 EHRR 1, Croissant v Germany (1992) 16 EHRR 135, Granger v UK (1990) 12 EHRR 469 and Maxwell v UK (1995) 19 EHRR 97.

Islands and rural communities

93. The Bill has no differential impact upon island or rural communities. The provisions of the Bill apply equally to all communities in Scotland.

Local Government

94. The Bill has no detrimental impact on local authorities.

Sustainable development

95. The Bill will have no negative impact on sustainable development.
Business and Regulatory Impact Assessment

96. A Business and Regulatory Impact Assessment is being carried out in relation to the criminal legal assistance provisions.

97. The creation of the Scottish Civil Justice Council is not expected to have any direct financial effect on businesses, the voluntary sector or the public sector. However, there will be indirect financial implications arising from the planned uplift in civil court fees which will, in part, go towards financing the forthcoming package of civil court reform. As part of the wider Making Justice Work programme, those reforms will be designed to bring efficiencies and savings within the justice system wherever possible. A Business and Regulatory Impact Assessment will not therefore be carried out in relation to the Council at this stage. An impact assessment will be conducted by the Scottish Court Service prior to any change to court fees. In addition, a partial impact assessment will inform consultation on legislative proposals for civil courts reform, and a further assessment will be carried out before bringing any legislation to the Scottish Parliament.
This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill (SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012

SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL

POLICY MEMORANDUM


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