

International Legal Aid Conference

Boston 2003

National report: Scotland

General

1. Legal advice and assistance is available on any matter of Scots Law. Legal aid is available for both civil and criminal proceedings. It covers the cost of assistance from, and representation in court by, solicitors and advocates where this is required, as well as any out of pocket expenses incurred by solicitors in providing these services.
2. The total gross cost of legal aid in 2001/02 at \$225m marked a 4% increase on the previous two years, but remained 6% lower than in 1997/98 (the year of our highest expenditure ever, at \$240m). The 2001/02 total showed a 24% increase over a ten year period. In 2001, Scotland had an estimated population of 5,064,200, meaning that the overall per capita gross cost of legal aid was approximately \$44. The net cost in 2001/02 was \$211m, giving a net per capita cost of \$42.
3. Responsibility for policy matters on legal aid rests with the Scottish Executive. This includes matters of eligibility, the proceedings for which legal aid is available and the rates payable to solicitors and advocates.
4. The responsibility for the administration of the legal aid system in Scotland rests entirely with the Scottish Legal Aid Board (the "Board") which is an independent statutory body. Ministers are expressly prohibited by statute from intervening in the Board's handling of individual cases.
5. The Board is a non-Departmental public body (NDPB) and acts independently within the powers afforded to it by statute. Its Management Statement and Financial Memorandum are determined by the Scottish Executive after consultation with the Board.
6. The Board currently consists of a chairman and 11 members. At least 2 members must be members of the Faculty of Advocates; at least 2 members must be members of the Law Society of Scotland and at least one other member must have experience of the procedure and practice of the courts. The Board currently employs around 320 staff.
7. The functions of the Board under the Act are :-
 - ensuring that legal aid and advice and assistance are available in accordance with the Act
 - administering the Legal Aid Fund.
8. To carry out these functions, the Board:-
 - considers applications for civil and criminal legal aid and makes decisions on whether to grant or refuse these (the courts are responsible for dealing with applications for criminal legal aid in solemn cases and in limited circumstances in summary cases).

- examines accounts sent in by solicitors and advocates for legal aid work, and pays them the appropriate amount for the work they have done
 - collects expenses and contributions
 - registers firms and solicitors under the Code of Practice in relation to criminal legal assistance and monitors their ongoing compliance
 - investigates and pursues abuse of legal aid
 - advises Scottish Ministers on legal aid matters.
 - manages the Legal Aid Fund.
9. Payments made out of the Legal Aid Fund are financed by a grant from the Scottish Executive, contributions from assisted persons, recovery of expenses, and any property recovered or preserved by the assisted person in the proceedings. The grant is not cash limited as it covers the shortfall between the payments made out of the Fund and the "income" received from contributions/expenses/damages. The cost of running the administration of the Board is paid by a grant-in-aid from the Scottish Executive, which is cash-limited.

Types of Legal Aid

Advice and Assistance

10. Advice and assistance enables persons of limited means to obtain advice from a solicitor, or where appropriate, from counsel, on any matter of Scots Law. Applicants can raise questions relating to marriage, debts, employment, injury, wills, criminal matters, and so on. A solicitor will often provide advice and assistance to ascertain if a client has a sufficiently strong case to apply for civil legal aid. Advice and assistance does not cover a solicitor representing his/her client in court or at a tribunal (although see ABWOR below).
11. An application for advice and assistance must be made to a solicitor. The applicant must provide his/her solicitor with information about his/her income/capital and that of his/her spouse. The solicitor undertakes a short calculation and can then tell the applicant there and then if he/she is eligible.
12. Applicants in receipt of various state benefits and with disposable capital of less than \$2201 will be eligible for advice and assistance without payment of a contribution.
13. An applicant whose disposable income (in respect of the seven days up to and including the date of application) does not exceed \$134 and with disposable capital of less than \$2201 will also be eligible for advice and assistance without payment of a contribution.
14. If disposable income is between \$134 and \$318, and disposable capital does not exceed \$2201, the applicant will be eligible for advice and assistance subject to the payment of a contribution, calculated on a sliding scale between \$12 and \$184. Any contribution due to be paid by the applicant is paid to the solicitor.
15. If disposable income exceeds \$318 and/or disposable capital exceeds \$2201, the applicant will be ineligible for advice and assistance.

16. The solicitor is required to intimate to the Board that he/she has made a grant of advice and assistance. A solicitor can make a grant of advice and assistance up to \$132. (In certain special cases set out in regulations, this initial limit can be \$248). Any further expenditure requires the prior authorisation of the Board.

Assistance by Way of Representation (ABWOR)

17. ABWOR is a form of advice and assistance under the Legal Aid (Scotland) Act 1986. ABWOR is provided by a solicitor or counsel in connection with any proceedings before a court, tribunal, or statutory inquiry as prescribed by regulation.

ABWOR - criminal matters

18. ABWOR allows a solicitor, in certain circumstances, to represent a client who is not in custody on the matter at issue and intends to plead guilty or, having made a not guilty plea, now intends to change that plea to guilty. A solicitor can make the grant if the applicant qualifies financially for advice and assistance and where he is satisfied that the sentence is likely to result in the applicant losing their liberty or livelihood, or if they cannot understand the proceedings or state their own case.

ABWOR - civil matters

19. ABWOR is also available for a number of civil proceedings, for example, petitions by a debtor for his own sequestration; proceedings arising from a failure by a person to pay a fine or other sum or obey an order of the court; proceedings before an Employment Tribunal (subject to additional tests relating to the ability of the applicant to understand the proceedings or the complexity of the case); and proceedings before the Immigration Appellate Authorities (which comprises adjudicators and the Immigration Appeal Tribunal).

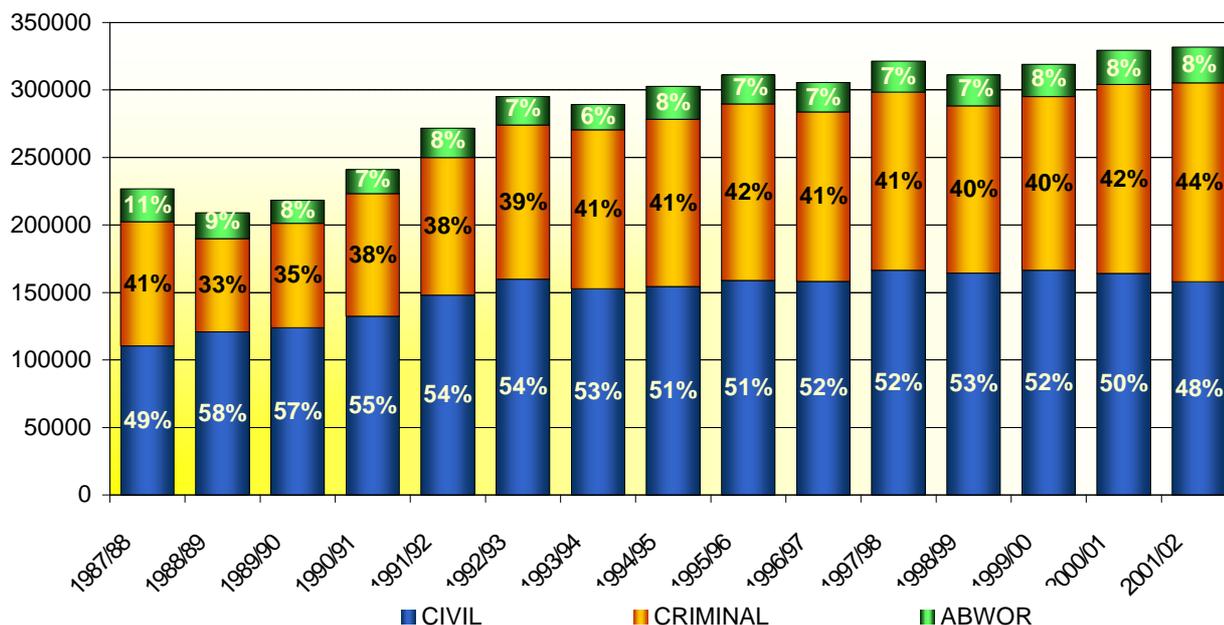
Advice and assistance – volumes and costs

20. The cost of advice and assistance in 2001/02 was \$50.1 million, the highest ever and 38% higher than ten years ago.

21. Chart 1 shows that numbers of advice and assistance intimations have fluctuated, but there has been a rise of 12% over a ten-year period. The rate of increase over this period has been considerably slower than that seen in the late 1980s/early 1990s. Nevertheless, the current total of 331,890 is the highest ever.

22. While the total costs of civil advice and assistance are more than double those of criminal, both have seen similar rates of growth. There has also been substantial growth in the use of ABWOR. In 2001/02, 26,521 intimations of grants of ABWOR by solicitors were made to the Board. Almost 85% of these related to criminal matters, although immigration matters are accounting for a hugely increased proportion over the last couple of years (1854 in 2001/02 compared to 774 the previous year. ABWOR for immigration proceedings was introduced only in 2000).

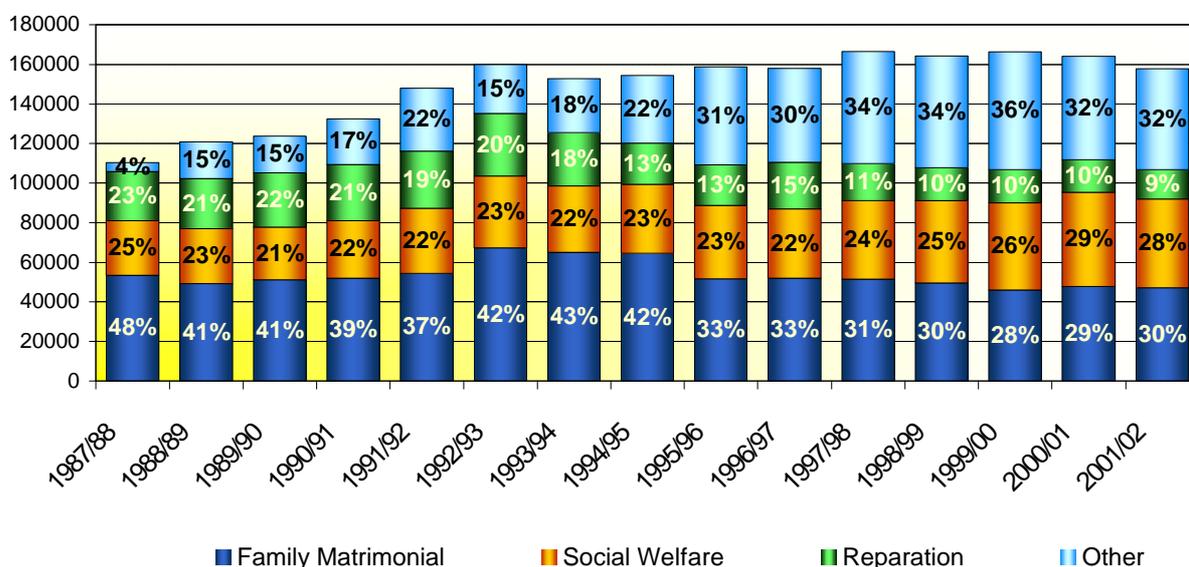
Chart 1: A&A intimations



23. For the first time in 2001/02, advice and assistance for civil matters accounted for less than half of all intimations (although it still accounted for 59% of costs, or 62% if one includes civil ABWOR). There has been a perception that the increasing volumes and costs of criminal advice and assistance are in danger of “squeezing out” civil advice and assistance. Although there is no real danger of this - the legal aid budget is not capped – the increasing share of expenditure criminal matters are attracting suggests that reform may be needed. The Board is currently exploring options with the Law Society of Scotland and will be taking these forward with the Scottish Executive in due course. One proposal is that the civil and criminal elements of advice and assistance be separated so that different arrangements can be applied to each.

24. There have also been significant shifts within civil advice and assistance, as shown in Chart 2 below.

Chart 2: uses of A&A



25. Family/matrimonial cases now account for 30%, down from over 40%, while reparation cases have dropped even more dramatically, from over 20% to 9% (a substantial drop in volume as well as share). This fall appears likely to be related to the increasing use of no-win no-fee arrangements, both by firms of solicitors and commercial claims companies. There have, however, been two particularly high profile collapses amongst such companies in recent months, so it will remain to be seen whether this trend continues.
26. The number of intimations relating to social welfare law, on the other hand (in this context meaning housing, employment, benefits, debt and mental health), has risen considerably. If one were to include immigration in this total, the pattern would be even more evident (immigration cases have been reported separately only in more recent years). It should also be noted that around 75% of civil ABWOR intimations and almost 90% of expenditure relates to social welfare areas (principally immigration, mental health and employment).

Civil Legal Aid

27. Civil legal aid is available in relation to various court, tribunal and other proceedings. It is not available for actions for defamation or verbal injury, election petitions, simplified actions of divorce, small claims and certain proceedings under the Debtors (Scotland) Act 1987 or for proceeding before any courts or tribunals not listed in the Act.
28. An application for civil legal aid must be made, through a solicitor, to the Board which requires to satisfy itself that the application meets the 3 statutory tests of financial eligibility, *probabilis causa* (that the applicant has a stable case), and reasonableness.
29. Civil legal aid is available without contribution where disposable income and capital are less than \$4719 and \$10,096 respectively. The lower capital limit was increased substantially in 2002 from the previous limit of \$4965, which had been in place for many years.
30. It is available subject to a contribution where disposable income is between \$4719 and \$14,958 and/or disposable capital between \$10,096 and \$16,833.
31. The level of contributions is, if payable from income, one third of the applicant's disposable income over the lower income limit and, if payable from capital, the entire amount of disposable capital over the lower capital limit. Contributions towards civil legal aid are collected by the Board and, where they are payable from income, are payable over 20 months. This marks an extension on previous arrangements, where contributions were payable over 10, 15 or 20 months depending on amount. This change makes it easier for applicants to accept offers of legal aid with a contribution. Where contributions are payable from capital, contributions are collected as a lump sum at the outset of the case.
32. We are currently considering ways in which the upper eligibility limits and contribution structure can be reformed to introduce greater 'tapering' of eligibility for those who currently exceed the limits.
33. Civil legal aid is not available to anyone with disposable income in excess of \$14,958. Where disposable capital exceeds \$16,833, the Board has discretion to grant legal aid where it appears to the Board that the applicant cannot afford to proceed without legal

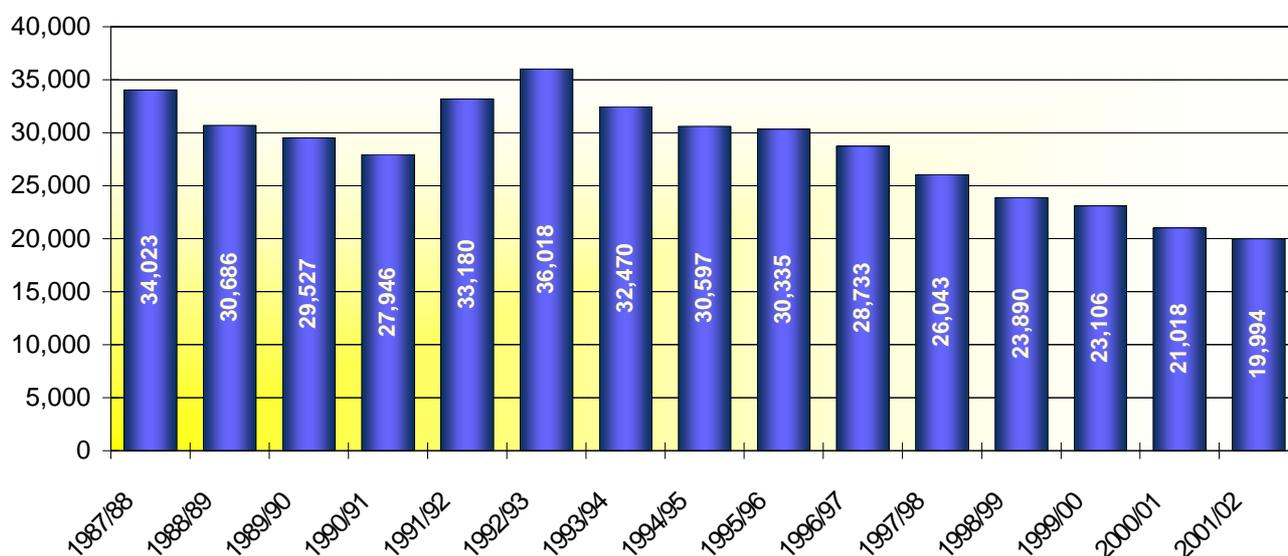
aid. We are currently reviewing our approach to the exercise of this discretion. We are not called upon to exercise it often. Indeed, we see fewer than 100 cases a year in which the applicant has a capital contribution at all.

34. Where an assisted person wins their case and is awarded expenses by the court, these are paid to the Board to cover the costs of the case. If, after recoupment of these expenses and any client contribution that may be payable, there is still a “net liability” of the legal aid fund, the Board will recover as much of this as possible from any property recovered or preserved as a result of the action taken under legal aid.

Civil legal aid: volumes and cost

35. Chart 3 shows that applications for civil legal aid peaked in 1992/93 at 36,018. Since then the numbers have dropped steadily to 19,994 in 2001/02, a reduction of 45%.

Chart 3: civil applications



36. There has been considerable concern in recent years over this reduction in the number of applications for civil legal aid. In 2001, the Board carried out a wide-ranging review of possible factors in this reduction. The report of this review is available at www.slab.org.uk/contents/resources/policy/.

37. The research findings suggest that:

- the fall in applications for civil legal aid is due primarily to external changes in the way dispute resolution is conducted, including a reduction in court business, particularly in family and matrimonial proceedings
- although overall financial eligibility has changed little, changes in 1993 moved a substantial number of people from being eligible with no contribution into contributory eligibility. The level of contributions also increased. These changes did have a significant effect on the number of applications in the following two years. Even so, over the period from 1992/93 to 2000/01 as a whole, the impact of changes

in eligibility is outweighed by that of external changes. In particular, the impact of changes in eligibility subsequent to those made in 1993 has been relatively minor.

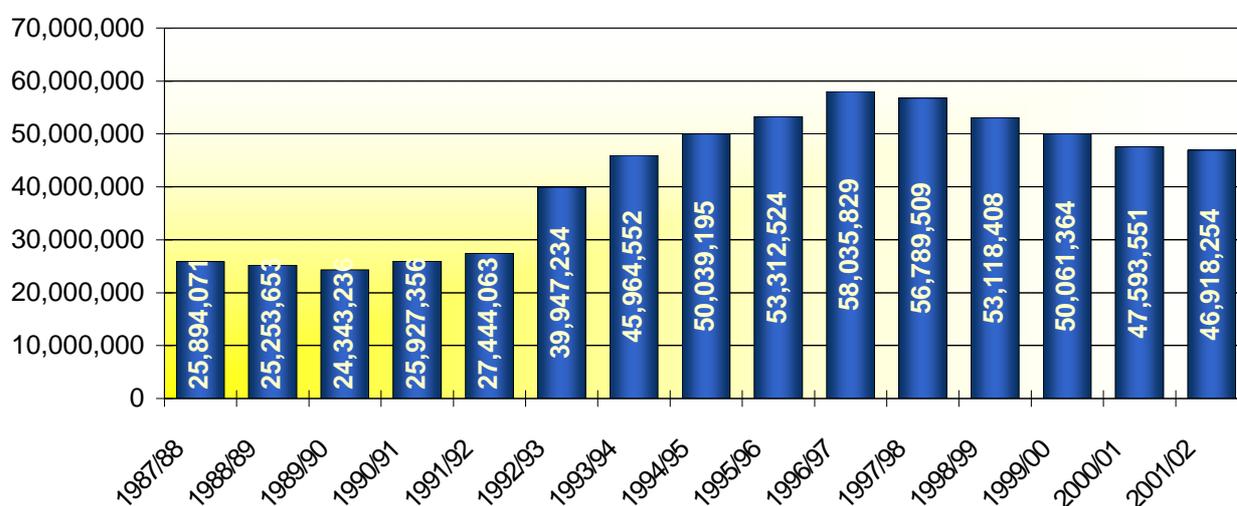
- overall numbers of solicitors' outlets - 1041 outlets in 2000/1 - are higher than in 1992, although there has been some reduction over the past three years. This, on the face of it, would not therefore explain a reduction in numbers of applications.

38. Following on from this research the Board published a study of the geographic distribution of solicitors' services. This report is available under the same link as provided above. It concludes that:

- In terms of outlets providing a service, the supply of civil advice and assistance and civil legal aid in Scotland as a whole has remained relatively stable. This is despite the increase in civil advice and assistance intimations and the significant fall in civil legal aid applications between 1991/2 and 2000/1.
- However, this apparent stability may conceal vulnerability to low provision or some gaps in provision. These might exist in particular geographic areas. Although a number of rural areas with few providers are identified as vulnerable, even those that seem well-supplied overall may contain 'pockets' of low provision. Another issue may be lack of depth or breadth of experience because of low case numbers (which may be due to lack of demand): specialist areas of law, such as immigration or mental health, might be expected to be particularly vulnerable in this regard.

39. Chart 4 shows that gross expenditure on civil legal aid rose from \$25.9 million in 1987/88 to a peak of \$58 million in 1996/97. It has fallen since then to \$46.9 million in 2001/02. These figures include solicitors' and advocates' fees, outlays (disbursements) and VAT.

Chart 4: cost of civil legal aid (US\$)

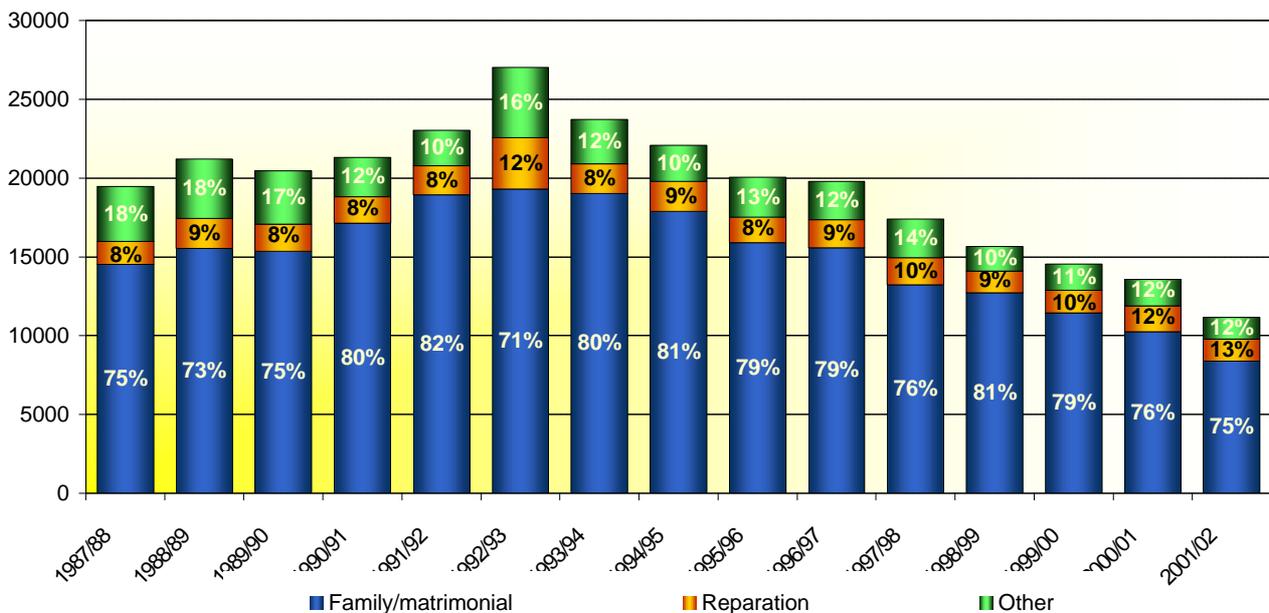


40. The Board recovers part of the cost of legal aid in a variety of ways. In 2001/02, we recovered contributions of \$1.9 million, expenses of \$10.4 million and amounts from property recovered and preserved of \$1.8 million. These recoveries represented 30% of

the gross cost of civil legal aid, meaning that civil legal aid cost just over \$32.8 million in the year. The level of recoveries varies from year to year. The cost of a particular case and recoveries against that cost may be spread over a number of years.

41. Over 25% of civil legal aid costs relate to outlays: costs incurred by the solicitor in the course of a case on such items as court dues, sheriff's officer's fees, travelling expenses, witness expenses and expert witness fees. Over the last ten years there has been a rise in the proportion of the total costs of civil legal aid accounted for by outlays.
42. Chart 5 shows that the mix of case types in civil legal aid has not changed a great deal over the years. Civil legal aid always has been and remains a family law and, to a lesser degree, reparation orientated service. Family law includes actions relating to separation or divorce and matters often considered alongside such actions, including those relating to financial arrangements and children, interdicts and exclusion orders. Reparation relates in the most part to actions for damages relating to personal injury.

Chart 5: types of case for which civil legal aid granted



43. There is a clear contrast between advice and assistance, the uses of which have diversified and shown a partial shift in focus towards social welfare law, and civil legal aid, which remains firmly focused on family law and reparation. This may partly be explained by the fact that work in many areas of social welfare law is not geared towards instigating or defending proceedings for which civil legal aid is available.

Criminal Legal Aid

General

44. Criminal legal aid essentially consists of legal representation in criminal proceedings in the High Court and in the sheriff and district courts. As well as representation, criminal legal aid also includes all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to criminal proceedings.
45. Criminal proceedings are classed as summary or solemn. Summary proceedings are the less serious e.g. most road traffic prosecutions, breach of the peace, minor theft, and assault etc which are dealt with in the District Court or by the sheriff sitting alone. The maximum period of imprisonment available on conviction for a summary offence is six months. Solemn proceedings are the most serious type of proceedings e.g. murder, culpable homicide, serious assault, rape, fraud etc - and are dealt with in the sheriff court or the High Court and may involve a jury trial.

Duty Solicitor Scheme

46. Criminal legal aid is available automatically through the duty solicitor for -
- attendance at identification parades
 - pre-bail work in solemn cases
 - the initial hearing in summary cases where the accused is appearing from custody (and thereafter if the accused pleads guilty)

Criminal legal aid in summary proceedings

47. In order to qualify for summary criminal legal aid, the Board must be satisfied that the accused or his family would suffer undue hardship if the accused had to pay for his/her own defence. Additionally, the Board must be satisfied that it is in the interests of justice that the accused should receive criminal legal aid. Criminal legal aid is non-contributory.

Criminal legal aid in solemn proceedings

48. If an accused person is charged and brought before the sheriff in a solemn case then s/he is automatically entitled to criminal legal aid until s/he is given bail or placed in custody. The accused person can choose his/her own solicitor or ask to see the duty solicitor.
49. Automatic legal aid only covers the first stage of the case, so it is necessary for the accused person to apply for solemn criminal legal aid straight away. The application has to be made to the court, which must be satisfied, after consideration of the applicant's financial circumstances, that the expenses of the case cannot be met without undue hardship to him or his dependants and that the applicant does not have available to him other rights and facilities making it unnecessary for him to obtain legal aid.
50. The court does not require to consider whether it is in the interests of justice for legal aid to be given, whether in solemn proceedings or in the limited summary proceedings in relation to which the court may make legal aid available. Consideration of the interests of justice applies only in the case of applications submitted to the Board.

Appeals

51. Application must be made for a fresh grant of criminal legal aid in connection with an appeal. Except where the applicant had criminal legal aid for the proceedings at first instance, full information must be provided about his financial circumstances and the availability of other rights and facilities. The statutory test is whether the financial circumstances of the applicant are such that the expenses of the appeal cannot be met without undue hardship to the applicant or his dependants.
52. Where the applicant wishes to be represented in an appeal at the instance of the prosecutor, only the financial eligibility criteria apply. The need to apply any other criteria will depend on the statutory or other basis under which the appeal is made. In some cases, the Board must be satisfied that in all the circumstances of the case it is in the interests of justice that the applicant should receive criminal legal aid.

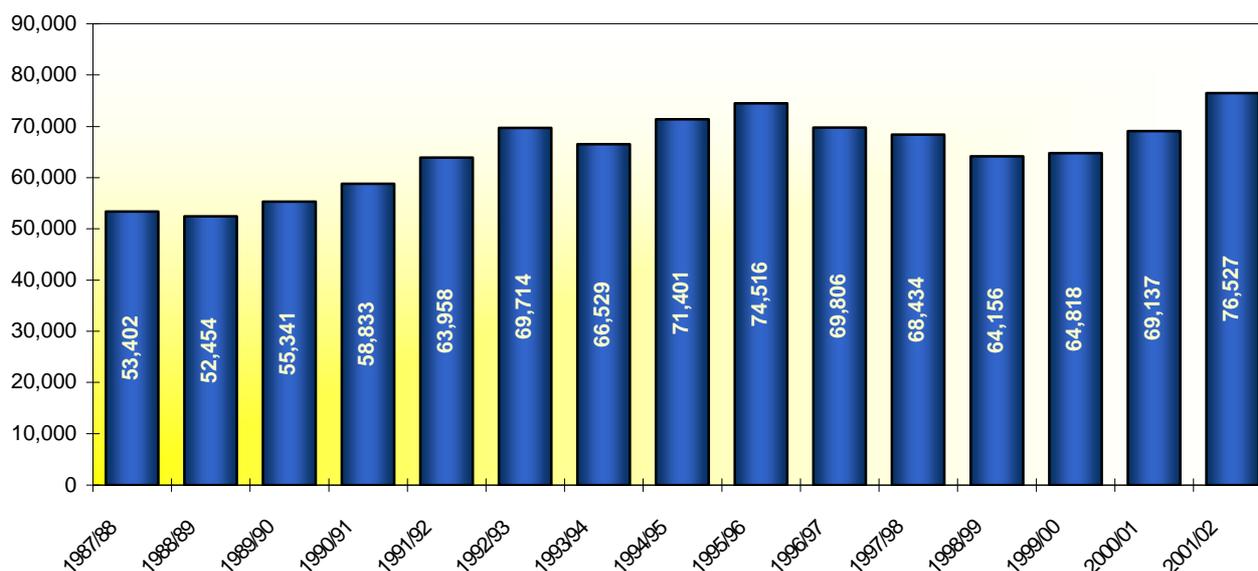
Registration and Code of Practice

53. From October 1998, all solicitors providing criminal legal assistance (criminal legal aid and advice and assistance on criminal matters) have to be registered by the Board. To be registered, solicitors and firms must comply with a Code of Practice drawn up by the Board in consultation with the legal profession and approved by Scottish Ministers. The Scottish Legal Aid Board audits compliance by the profession with the Code.

Criminal legal aid – volumes and costs

54. Chart 6 shows that applications for summary criminal legal aid have risen rapidly over the last couple of years and are now at their highest ever level. The latest figures suggest that there will be a further increase in the current year, but that the rate of increase has slowed.

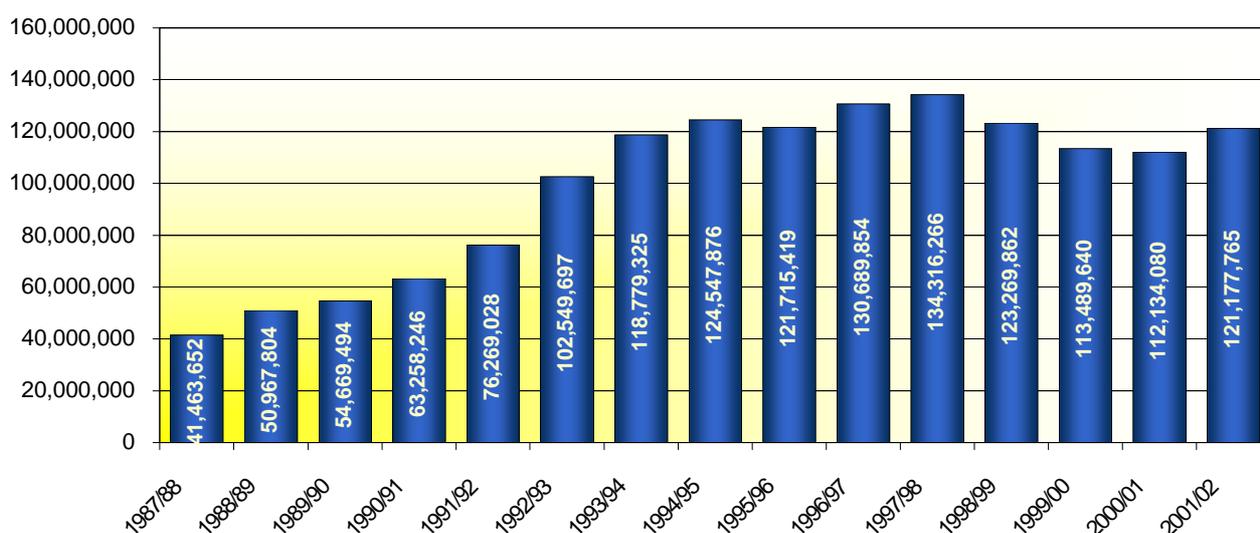
Chart 6: summary criminal applications



55. We are currently exploring with colleagues elsewhere in the criminal justice system whether the legal aid figures are simply reflecting wider trends. We are also reviewing our approach to the application of the interests of justice test.

56. Chart 7 shows that the total cost of criminal legal aid increased by 220% between 1987/8 and 1997/8, from \$41.5 million to over \$134 million. The cost fell sharply during the following two years, but has now started to pick up again. Although some of these trends are attributable to volume fluctuations, at least part of the reason for the reduction in the late 1990s was the introduction of fixed payments for summary cases (see below).

Chart 7: total cost of criminal legal aid (US\$)



Fees payable to solicitors and counsel

57. The Board pays solicitors according to the rates set out in Tables of Fees approved by Parliament. The level of fees for advice and assistance and criminal legal aid has not been increased since 1992, and that for civil legal aid has not been increased since 1995. However, a new fee structure was introduced in 1999 for summary criminal cases.

Civil legal aid

58. A solicitor can send the Board his/her bill in two forms, depending on which court the cases is raised in:

- s/he can claim fees for every letter, meeting, time in court, telephone calls etc, **or**
- s/he can claim a “block fee”, where a fee is paid for a stage or specified item of work.

59. The solicitor chooses the format of the bill, and is likely be driven by what s/he considers to be the more profitable option. S/he will also charge us for “outlays” incurred (e.g. medical reports). In some courts the bill can only be submitted on the detailed basis shown above.

60. A new feeing structure for most civil legal aid cases will be introduced in October 2003. This is based on a block system and requires the solicitor to report on progress to the Board at key stages of the case. The changes incorporate a significant increase in the fees payable to solicitors and do much to encourage efficiency. The new system also gives the Board more control over cases as they progress. At the same time as the new feeing system comes into force, a peer-review based quality assurance scheme will be introduced, marking a real departure in civil legal aid.

Criminal legal aid

61. In solemn legal aid cases, the solicitor must send the Board a detailed breakdown of time at meetings, number of phone calls, time at court, length of letters etc. S/he would be paid \$70 for an hour in a meeting or \$91 for an hour in court.

62. Since 1 April 1999, summary cases have been paid on a “fixed payment” basis. This has a core fee for all work up to a certain stage of the case and additional payments for further steps in the case. The core payments are –

- \$496 for a case in the district court
- \$828 for a case in the sheriff court (\$910 in certain remote courts).

63. There are additional payments for bail appeals (\$83), diets of deferred sentence (\$41 in the district court, \$83 in the sheriff court) and trials lasting longer than thirty minutes:

- The payment for the first day of a trial, after the first thirty minutes is \$83 in the district court and \$166 in the sheriff court
- For the second day of a trial, the payment is \$83 in the district court and \$331 in the sheriff court
- For the third and any subsequent day of trial, the payment is \$166 per day in the district court and \$662 per day in the sheriff court.

64. These fees are paid plus value added tax. Solicitors can also claim reimbursement of most outlays, although not those relating to the taking of precognitions. The cost of precognitions is included in the core payment.

65. Separate rates also apply to the duty solicitor who may have attended the accused person when he was first arrested.

Current policy developments

Pilot projects/community legal services

66. In early 2002, the Board established four pilot projects to allow the evaluation of different methods of improving access to justice through the direct employment of solicitors by the Board. The Board is also currently working closely with the Scottish Executive to implement a programme of research and development work to inform Executive policy on community legal services in Scotland. This involves a programme of research as well as the establishment of several pilot partnerships to explore options for local strategic planning of service delivery. This work and a description of the pilot projects are set out in detail in a separate paper for the ILAG conference.

Public Defence Solicitors' Office (PDSO)

67. Previous ILAG conferences have been updated on progress with the pilot Public Defence Solicitors' Office in Edinburgh. The PDSO opened in October 1998 as a five-year pilot scheme to compare the provision of criminal legal aid by private solicitors with salaried solicitors employed by the Board.
68. In the early days of the pilot, clients were directed to the PDSO to ensure that the public defence solicitors had a sufficient throughput of cases to make a fair and valuable comparison with solicitors in private practice. To ensure this was done randomly, clients whose birthdays fell in specific months were referred to the PDSO.
69. The power of direction was removed for cases with pleading diets after 1 July 2000. From July 2000, the public defence solicitors began to participate in the Edinburgh Sheriff Court Duty Solicitor Scheme and to undertake a small amount of associated solemn business where the client chooses to instruct them.
70. The pilot scheme has been independently evaluated. The public defence solicitors were compared against private practice solicitors in terms of cost effectiveness, quality of service, client satisfaction, and contribution to the efficiency of the wider criminal justice system. A report was made to the Scottish Parliament in October 2001 (3 years into the pilot). A summary is available at www.scotland.gov.uk/cru/resfinds/lsf37-00.asp
71. The research team found few differences between the PDSO and private solicitors.
 - The costs of the two modes of provision were broadly similar. However, the PDSO showed potential to be considerably cheaper if it were able to cut costs and/or increase workload (there being little scope for reduction in private costs due to the fixed payment regime).
 - Private clients tended to be more satisfied with the service they received. However, the report failed to recognise that far more private clients had prior experience of their solicitor and presumably returned because they were satisfied with the service they had previously received. The initial client satisfaction results also showed a very strong anti-direction reaction amongst clients: a second, post-direction sample showed results far closer to those for private solicitors.
 - PDSO cases were significantly more likely to resolve at an earlier stage in the proceedings. This resulted in savings to other parts of the criminal justice system, as well as witnesses who attend for cases that do not proceed to trial.
 - PDSO clients were slightly more likely to be convicted. The researchers argued this was because their cases concluded earlier, but the sample did not in our view withstand sufficient analysis to draw firm conclusions.
 - Despite their earlier resolutions, there was little evidence of sentence discounting for early pleas. PDSO clients received smaller fines on average than private clients, but there were too few custodial sentences to allow detailed analysis.
72. The Board's view was that the research was inconclusive. It would not justify a full roll-out of PDSOs, but nor did it raise concerns such that the idea should be abandoned. We therefore recommended to Ministers that further limited experimentation be provided for in new legislation.

73. The Criminal Justice (Scotland) Act 2003, passed in April, contains provisions removing the existing sunset clause and the previous restrictions on the number of solicitors the Board could employ as Public Defence Solicitors.
74. The intention now is for the Board to retain the present office in Edinburgh and establish two or three others, one in a rural area. This will allow further assessment of the costs and benefits of a mixed system; an additional research report will be required, but not until 2008.
75. We do not propose to use direction in the new offices. Without the previous pressure to become established with a full caseload early on, it should be possible for the offices to open with a smaller number of solicitors than in Edinburgh and to establish themselves in the marketplace much as any other solicitor. However, we have not ruled out exploring the use of duty solicitor rotas to help the new offices establish a client base. Our current target is to have new offices opened early in 2004.