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SCOTTISH STATUTORY INSTRUMENTS

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**2011 No. 135**

**LEGAL AID AND ADVICE**

**The Criminal Legal Aid (Scotland)  
(Fees) Amendment Regulations 2011**

*Made* - - - - 21st February 2011  
*Laid before the Scottish  
Parliament* - - - - 23rd February 2011  
*Coming into force* - - 17th March 2011

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 33(2)(a), (3)(a) and (b) and 36(1) of the Legal Aid (Scotland) Act 1986<sup>(1)</sup> and all other powers enabling them to do so.

**Citation, commencement and interpretation**

1. These Regulations may be cited as the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2011 and come into force on 17th March 2011.

2. In these Regulations “the principal Regulations” means the Criminal Legal Aid (Scotland) (Fees) Regulations 1989<sup>(2)</sup>.

**Amendment of the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2010**

3.—(1) The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2010<sup>(3)</sup> are amended in accordance with paragraphs (2) to (4).

(2) For regulation 2(2) substitute—

“(2) If the counsel involved so requests the 1989 Regulations are, for the purpose mentioned in paragraph (3), to have effect as if amended by regulation 4.

(3) The purpose is determining the fees chargeable for all work done on or after 2nd October 2006 in relation to proceedings commenced on or after 4th April 2005 and before 23rd March 2010.”.

(3) Regulation 3—

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(1) 1986 c.47. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).  
(2) S.I. 1989/1491; as amended by S.I. 1990/474 and 1035, 1991/566, 1992/374, 1994/1019, 1997/719, 1999/491 and 1042 and S.S.I. 2002/246, 2004/264 and 316, 2005/656, 2006/515, 2007/180, 2008/240, 2009/312 and 2010/63 and 212.  
(3) S.S.I. 2010/63.

- (a) is renumbered as paragraph (1) of that regulation; and
  - (b) from the beginning to “2006” substitute “Subject to paragraph (2), for the purpose of determining the fees chargeable for any proceedings commenced on or after 4th April 2005 and before 23rd March 2010,”.
- (4) At the end of regulation 3 insert—
- “(2) Paragraph (1) does not apply to the extent that the 1989 Regulations have effect as if amended by regulation 4.”.

### **Amendment of the principal Regulations**

4.—(1) Subject to paragraph (2), regulation 5 applies only in relation to proceedings commenced on or after 17th March 2011.

(2) Paragraph (3)(c) of regulation 5 and, insofar as relevant to that paragraph, regulation 5(1) apply only—

- (a) in relation to proceedings commenced on or after 23rd March 2010; and
- (b) for the purpose of determining the fees chargeable for all work done on or after 2nd October 2006 in relation to proceedings commenced on or after 4th April 2005 and before 23rd March 2010, if the counsel involved has made a request in terms of regulation 2(2) of the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2010.

5.—(1) The principal Regulations are amended in accordance with paragraphs (2) to (4).

(2) In regulation 2 (interpretation)—

(a) for the definition of “junior counsel” substitute—

““junior counsel” or “junior” means counsel who is not senior counsel;”;

(b) omit the definition of “right of audience”;

(c) for the definition of “senior counsel” substitute—

““senior counsel” and “senior” are to be construed in accordance with paragraphs (1A) and (1B);”;

(d) for the definition of “solicitor-advocate” substitute—

““solicitor advocate” means a solicitor who, in relation to the proceedings, has exercised a right of audience conferred by virtue of section 25A (rights of audience in specified courts) of the Solicitors (Scotland) Act 1980(4);”;

(e) for paragraph (1A) substitute—

“(1A) Subject to paragraph (1B), for the purposes of these Regulations, counsel is senior counsel if—

(a) at the time of being employed in relation to the proceedings, the counsel had attained the rank and dignity of Queen’s Counsel; or

(b) in the case of a solicitor advocate—

(i) at the time of being employed in relation to the proceedings, the solicitor advocate was accredited by the Law Society to act as senior counsel for the purposes of these Regulations; and

(ii) the work undertaken by the solicitor advocate was consistent with the nature of the work ordinarily undertaken by a senior counsel.

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(4) 1980 c.46; section 25A was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), section 24.

- (1B) No counsel is to be treated as senior counsel for the purposes of these Regulations unless—
- (a) the proceedings relate to a prosecution or conviction for murder; or
  - (b) the Board has approved the employment of senior counsel under regulation 14 of the Criminal Legal Aid (Scotland) Regulations 1996(5).”.
- (3) In Schedule 2 (fees of counsel), in the notes on the operation of the Schedule—
- (a) in each place it occurs, for “Part II” substitute “Part 2”;
  - (b) in paragraph 3—
    - (i) in sub-paragraph (e) after “shown” insert “(and subject to sub-paragraph (ea))”; and
    - (ii) after sub-paragraph (e) insert—
      - “(ea) a fee is to be allowed to one counsel only in respect of a hearing of the type described in paragraph 6A of Chapters 1 and 2 of Part 2 of the Table of Fees that did not involve a debate, motion for re-trial or further procedure;”;
  - (c) in paragraph 4, after “1(c)” insert “or (d)”;
  - (d) after paragraph 4 insert—
    - “4A. Where a hearing on a bill of advocacy is set down for half a day or longer, counsel is to be paid (in addition to the fees payable under paragraph 2 of the applicable Chapter of Part 2 of the Tables of Fees) a fee for relative written work in the range specified in paragraph 3(b) of the applicable Chapter of Part 2 of the Table of Fees.”;
  - (e) in paragraph 6, for “3(d),” substitute “3(d) or (da) or”;
  - (f) in paragraph 8, for “or 6(d)” substitute “, 6(d) or 11”;
  - (g) in paragraph 11B for “6” substitute “8”; and
  - (h) after paragraph 11B, insert—
    - “11C.—(1) This paragraph applies in relation to a hearing on appeal against conviction or conviction and sentence if rule 15.15A (requirement for case and argument) of the Act of Adjournal (Criminal Procedure Rules) 1996(6) applies to all aspects of the appeal.
    - (2) For the purposes of sub-paragraph (1), rule 15.15A is to be deemed to apply to an appeal if the court has ordered under rule 19.18A (presentation of summary conviction appeals in writing) of the Act of Adjournal (Criminal Procedure Rules) 1996(7) that rules 15.15A and 15.15B of those Rules are to apply to the appeal as if it were an appeal to which those rules apply.
    - (3) In respect of a hearing in the course of an appeal against conviction or against conviction and sentence to which this paragraph applies, a fee is to be paid under paragraph 3(da) of Chapter 1, or as the case may be Chapter 2, of Part 2 of the Table of Fees.
    - (4) In respect of a hearing in the course of an appeal against conviction or against conviction and sentence to which this paragraph does not apply, a fee is to be paid under paragraph 3(d) of Chapter 1, or as the case may be Chapter 2, of Part 2 of the Table of Fees.

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(5) S.I. 1996/2555; amended by S.I. 1999/1042 and S.S.I. 2009/312.

(6) S.I. 1996/513; rule 15.15A was inserted by S.S.I. 2010/309.

(7) S.I. 1996/513; rule 19.18A was inserted by S.S.I. 2010/309.

**11D.** In Chapters 1 and 2 of Part 2 of the Table of Fees, the fees prescribed in paragraphs 1 to 6 do not apply to a hearing of the type described in paragraph 6A in each of those Chapters.

**11E.** This paragraph applies to a hearing of the type described in paragraph 6A of Chapters 1 and 2 of Part 2 of the Table of Fees if the Board is satisfied that a fee in accordance with paragraph 6A(a) of the relevant Chapter is justified on the grounds that the hearing involved a debate, motion for re-trial or further procedure.

**11F.** A fee is to be allowed to counsel for an opinion concluding that there is no stateable appeal case only if—

- (a) the counsel who prepared the opinion did not represent the assisted person at the trial; and
- (b) the Board, or as the case may be the auditor, is satisfied that it would not have been possible, or would not have been reasonable, in the circumstances for the counsel who represented the assisted person at the trial to have prepared the opinion.”.

(4) In the Table of Fees in Part 2 of Schedule 2(8) (fees of counsel in appeal proceedings)—

- (a) in Chapters 1 and 2, in paragraph 3—
  - (i) omit sub-paragraph (c); and
  - (ii) at the end of sub-paragraph (d) insert “(to which paragraph 11C of the notes on the operation of Schedule 2 does not apply)”;
- (b) in Chapter 1, after paragraph 3(d) insert—

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“(da) Hearing on Appeal against conviction or conviction and sentence (to which paragraph 11C of the notes on the operation of Schedule 2 applies)—

- |       |   |               |             |             |
|-------|---|---------------|-------------|-------------|
| (i)   | where the hearing lasts fewer than 3 hours                        | £395          | £350        | £250        |
| (ii)  | where the hearing lasts more than 3 hours, but fewer than 6 hours | £467 - £726   | £334 - £550 | £267 - £417 |
| (iii) | where the hearing lasts 6 hours or more—                          |               |             |             |
| (aa)  | for each 6 hour period  | £700 - £1,089 | £500 - £825 | £400 - £625 |

(ab)	for any remaining period of fewer than 3 hours	£395	£350	£250
(ac)	for any remaining period of more than 3 hours	£467 - £726	£334 - £550	£267 - £417”;

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(c) in Chapter 1, after paragraph 6 insert—

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**“6A.** Advising hearing

Any hearing relative to proceedings of a type described in the preceding paragraphs held subsequent to the court making avizandum, if paragraph 11E of the notes on the operation of Schedule 2—

(a)	applies	£360	£315	£225
(b)	does not apply	£150	£150	£150”;

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(d) in Chapter 1, after paragraph 7(b) insert—

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“(c) opinion in connection with an application under section 94(2A) of the Criminal Procedure (Scotland) Act 1995<sup>(9)</sup> (transcripts of record and documentary productions) £50 £50 £50”;

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(e) in Chapter 1, after paragraph 10 insert—

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“**11.** Opinion where, in the circumstance mentioned in paragraph 11F of the notes on the operation of Schedule 2, counsel concludes that there is no stateable case £250 - £800 £200 - £700 £140 - £600”;

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(f) in Chapter 2, after paragraph 3(d) insert—

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“(da) Hearing on Appeal against conviction or conviction and sentence (to which paragraph 11C of the notes on the operation of Schedule 2 applies)—

(i)	where the hearing lasts fewer than 3 hours			£450
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(9) 1995 c.46; subsection (2A) was inserted by the Criminal Justice (Scotland) Act 2003 (asp 7), section 65.

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*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

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- |  |   |               |
|--|---|---------------|
| (ii)   | where the hearing lasts more than 3 hours, but fewer than 6 hours | £600 - £834   |
| (iii) where the hearing lasts 6 hours or more— |   |               |
| (aa)   | for each 6 hour period  | £900 - £1,250 |
| (ab)   | for any remaining period of fewer than 3 hours                    | £450          |
| (ac)   | for any remaining period of more than 3 hours                     | £600 - £834”; |

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(g) in Chapter 2, after paragraph 6 insert—

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**“6A.** Advising hearing

Any hearing relative to proceedings of a type described in the preceding paragraphs held subsequent to the court making avizandum, if paragraph 11E of the notes on the operation of Schedule 2—

- |     |                |        |
|-----|----------------|--------|
| (a) | applies        | £410   |
| (b) | does not apply | £150”; |

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(h) in Chapter 2, after paragraph 7(b) insert—

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“(c)	opinion in connection with an application under section 94(2A) of the Criminal Procedure (Scotland) Act 1995 (transcripts of record and documentary productions)	£50”;
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(i) in Chapter 2, after paragraph 10 insert—

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“ <b>11.</b>	Opinion where, in the circumstance mentioned in paragraph 11F of the notes on the operation of Schedule 2, counsel concludes that there is no stateable case	£350 - £1,400”.
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St Andrew's House,  
Edinburgh  
21st February 2011

*KENNY MACASKILL*  
A member of the Scottish Executive

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## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations extend the effect of amendments made to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (“the principal Regulations”) by the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2010 (“the 2010 Regulations”) and make further amendments to the principal Regulations in connection with the fees allowable to counsel.

Regulation 3 of these Regulations amends the 2010 Regulations to extend their application. By virtue of regulation 2 of the 2010 Regulations, as enacted, the amendments made by regulation 4 of those Regulations were applicable only in respect of proceedings commenced on or after 2nd October 2006. By virtue of regulation 3 of these Regulations, the amendments made to the principal Regulations by regulation 4 of the 2010 Regulations are applicable to work done on or after 2nd October 2006 in relation to proceedings commenced on or after 4th April 2005. In addition, regulation 3 of these Regulations extends the effect of the amendment made by regulation 3 of the 2010 Regulations to all proceedings commenced between 4th April 2005 and 23rd March 2010 where the counsel involved has not requested that the principal Regulations be given effect as if amended by regulation 4 of the 2010 Regulations.

The further amendments made to the principal Regulations, except for the amendment made by regulation 5(3)(c), apply only in relation to proceedings commenced on or after 17th March 2011. The effects of those amendments are to—

- (a) prevent solicitor advocates from being paid fees at senior counsel rates unless the Law Society of Scotland has accredited the solicitor advocate in question to charge senior counsel rates (regulation 5(2));
- (b) convert the format of references to Part 2 of the Table of Fees in Schedule 2 to the principal Regulations from Roman to Arabic numerals in the notes on the operation of that Schedule (consistent with the number format of that Part of the Table of Fees as inserted by the 2010 Regulations) (regulation 5(3)(a));
- (c) make provision as to the fees payable to counsel in respect of advising hearings (regulation 5(3)(b) and (h) and (4)(c) and (g));
- (d) provide for a fee to be paid to counsel for an opinion that there is no stateable appeal case, but only in cases where the counsel who considers the prospects of appeal is not, and for some reason could not be, the counsel who represented the legally aided person at the trial (regulation 5(3)(f) and (4)(e) and (i));
- (e) change the basis for calculating any additional preparation fee for counsel so that chargeable time is divided into units of 8 hours rather than 6 hours (regulation 5(3)(g));
- (f) make provision as to the fees payable to counsel in respect of hearings in appeals against conviction or against conviction and sentence that proceed in accordance with the rules for the presentation of appeals in writing (regulation 5(3)(e) and (f) and 5(4)(a)(ii), (b), and (h));
- (g) remove the fee payable to counsel for completing a Form 15 (regulation 5(4)(a)(i));
- (h) provide for a fee to be paid to counsel for an opinion in connection with an application for a transcript of evidence under section 94(2A) of the Criminal Procedure (Scotland) Act 1995 (regulation 5(4)(d) and (h)).



Regulation 5(3)(c) amends paragraph 4 of the notes on the operation of Schedule 2 to the principal Regulations to allow counsel to be paid a higher hearing fee in cases where the appellant has been sentenced to a period of imprisonment of 10 years or more, to life imprisonment or where an order for lifelong restriction has been made. Paragraph 4 of the notes on the operation of Schedule 2 to the principal Regulations was substituted by the 2010 Regulations. The substituted paragraph 4 applies in relation to proceedings commenced on or after 23rd March 2010 (by virtue of regulation 2(1) of the 2010 Regulations) and, if the counsel involved so requests, is to be treated as if it applied to work done on or after 2nd October 2006 in relation to proceedings commenced on or after 4th April 2005 (by virtue of regulation 2(2) of the 2010 Regulations, as amended by regulation 3 of these Regulations). In both circumstances, the substituted paragraph 4 has effect as amended by regulation 5(3)(c) of these Regulations.