

EXECUTIVE NOTE

LEGAL AID REGULATIONS

The Criminal Legal Aid (Scotland) (Fees) Amendment (No. 3) Regulations 2005 SSI/2005/656

1. The above instrument will be made in exercise of the powers conferred on Scottish Ministers by sections 33(2)(a) and (3) and 36(1) and (2)(a) of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative resolution procedure.

Policy Objective

2. **Legal Aid Efficiency Measures:** This instrument is part of the efficiency measures that were introduced in the context of ongoing modernisation of legal aid. The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 (“2005 regulations”) came into force on 25 March 2005.

2.1 The 2005 regulations introduced a new Table of Fees for payment of Counsel. The aims of this were to:-

- move away from the current payment regime and bringing in a block system of payments that would provide clarity, speed and certainty of payment for Counsel;
- introduce controls of expenditure for Counsel in the High Court with less requirement to use the Auditor of Court as specific blocks of work were to be paid at agreed set rates; and
- make payment for work in relation to the requirements of the Criminal Procedure (Scotland) Act 2004 that brought in the Bonomy reforms to the High Court including managed meetings.

2.2 The 2005 regulations only applied in respect of proceedings concluded on or after 4 April 2005.

3. The 2005 Regulations were amended by The Criminal Legal Aid (Scotland) (Fees) Amendment (No. 2) Regulations 2005 (“No. 2 regulations”) which came into force on 10 December 2005.

3.1 The No. 2 regulations were also retrospective in their effect in that they applied to proceedings concluded on or after 4 April 2005. This was, however, subject to a saving provision which provided that the instrument did not apply where its application would have resulted in a lesser sum being paid in respect of any item in the Table of Fees than the fees that would have been payable under the 2005 regulations.

3.2 They modified four aspects of the Table of Fees amending the rates of pay to Counsel to ensure that they received reasonable remuneration for work carried out by them. The four areas of work were:-

- Appeals: to amend payments for appeals that are set down for a half day, or longer, in court;

- Hearings under Section 76 of the Criminal Procedure (Scotland) Act 1995: to amend payments for post conviction work;
- Travel, accommodation and subsistence: to provide amended rates where travel to distant courts is required; and
- Confiscation Diets: to amend payments for confiscation hearings in proceeds of crime cases.

4. This instrument, subject to a savings provision, revokes both the 2005 regulations and the No. 2 regulations and retains the substance of the revoked regulations with an amended application provision.

4.1 It re-enacts the Table of Fees for payment to counsel which was introduced by the 2005 regulations but includes as a part of the Table of Fees (“the Table of Fees”) the changes that were made to the four specific aspects of work in the No 2 regulations to appeals, section 76 post conviction work, confiscation hearings and travel, accommodation and subsistence for work in distant courts. There are consequential changes to numbering included as part of the Instrument to incorporate the changes.

4.2 This instrument will apply only in respect of proceedings commenced on or after 4 April 2005. This has the effect of removing the retrospective application under the 2005 regulations that had meant work could have been carried out before the 2005 regulations came into effect but were to be paid at rates specified in the 2005 regulations. It has been accepted that this could result in a lower payment to counsel than they had been entitled to previously under the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 - the principal regulations, as amended by, amongst others the 2005 regulations and the No. 2 regulations.

4.3 A revocation and savings clause has been included. This provides that although both the 2005 regulations and the No 2 regulations will be revoked, they will continue to have effect in respect of proceedings which commenced before 4 April 2005 where counsel would be entitled to a higher fee for work carried out in respect of proceedings under the Table of Fees that existed under both these sets of regulations. This ensures that the position for counsel is preserved to ensure that they are not disadvantaged by this Instrument and can elect to obtain a higher fee if that had been possible under the Table of Fees that existed under the 2005 regulations and the No 2 regulations.

Consultation

5. There have been a number of meetings between the Scottish Executive and the Scottish Legal Aid Board recently to take forward the changes made by this Instrument. The intention to bring forward amending regulations was indicated in court at the recent hearing on 15 December 2005 in the petition brought by Shelagh McCall against Scottish Ministers. This was to address the aspect of retrospectivity that was the subject of the petition when Lord Carloway found against Scottish Ministers that this aspect of the 2005 regulations had been prejudicial to Shelagh McCall.

6. This instrument has been shown in draft to both the Faculty of Advocates and the counsel acting for Shelagh McCall who has indicated that they are content with its terms. The

Law Society of Scotland with their interest in solicitor advocates has been consulted on the terms of this Instrument as well. It is understood that the terms of the Instrument will be welcomed specifically with its effect being made retrospective.

Purpose

7. The purpose of this Instrument is to consolidate the changes made to the Table of Fees by the 2005 regulations and the No. 2 regulations and to amend their retrospective application following the judgement of Lord Carloway in the case of Shelagh McCall v the Scottish Ministers.

Financial Implications

8. The 2005 Regulations were estimated in March 2005 originally to save in the region of £1.2 million per year. It will however be some time before such figures will be finalised as the full impact of the High Court reforms are still ongoing and cannot still be fully determined.

9. In making the changes in this Instrument, there are difficulties in calculating what the potential reduction in the overall savings will be. With the enactment of the changes required by the No 2 regulations, the reduction in savings was estimated to be in the region of £150k per year. In making this further Instrument, it is not possible to estimate what the reduction in costs will be because the Scottish Legal Aid Board will only be able to see how many cases will be affected after fee notes are received from counsel. It will take some time before the full impact of all these changes can be fully calculated which is complicated by the success in the overall High Court reform programme which is still the subject of ongoing monitoring.

10. There will be a limited number of cases that will have work which has been carried out where the savings clause will be relevant. However, these costs will tend to be fairly insignificant in comparison with the overall savings in the High Court reform programme. It is essential that this Instrument is made for the purposes of the court judgment but the beneficial aspects of the 2005 regulations need to be maintained in respect of the provision of certainty, clarity and speed of payments that are to be made. This will allow Advocates to be paid for set blocks of work supporting the core principles of modernisation of legal aid of value for money to the tax payer and fair reward for work being undertaken.

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Access to Justice
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