

EXECUTIVE NOTE

THE CRIMINAL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2007 SSI/2007/180

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

Policy objectives: Reform of legal aid

Taxation and provision of a Table of Fees for counsel in criminal cases before the Judicial Committee of the Privy Council: This instrument provides for taxation in proceedings in Scottish criminal cases arising before the Judicial Committee of the Privy Council (JCPC) to be resolved by the Registrar of JCPC. No provision currently exists for taxations to resolve disputes or questions arising between the Scottish Legal Aid Board (SLAB) and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor or as to the amount of fees allowable to counsel from the Legal Aid Fund in relation to payments made in terms of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 ('the 1989 Regulations'). By this instrument, in cases where criminal legal aid is made available in respect of proceedings in Scottish cases before the JCPC, disputes or questions will now be referred to the Registrar to the JCPC for resolution.

This instrument also provides for a review mechanism so that any person who is dissatisfied with a taxation decision by the Registrar to the JCPC may lodge a petition with the JCPC which shall, in the first instance, be considered by a Board of the JCPC.

A new Schedule 3 is inserted in the 1989 Regulations to provide for a table of fees for counsel for proceedings in the JCPC.

Changes to first instance fees for counsel:

This instrument also makes a number of changes in respect payment of fees for counsel for proceedings in the High Court (other than appeals) and in the sheriff and district courts by amending Schedule 2 to 1989 Regulations. These changes are as follows:-

Preparation: Schedule 2 of the 1989 Regulations provides for a scheme in respect of payment of fees for separate preparation by providing for payment by means of a daily rate by reference to the total number of sheets of documentation. Regulation 6(c) amends the upper most range and lowers the total number of sheets required before the payment may in some cases be made.

Fees where cases conclude at hearings fixed for trial: Payment of fees are now included, at two-thirds of the fee for a trial day, where an accused pleads guilty at a hearing fixed for trial before the jury is empanelled or where the case is brought to an end by the Crown's acceptance of a plea of not guilty, or where, following the court deserting the trial, the indictment falls or, for any other reason is not brought to trial and where no order is made by the court to postpone or appoint a further trial diet.

Travel/ fees for consultations : The criteria by which a supplementary fee for travel is payable is amended so that the distance which must be travelled before the payment can be made is reduced from 90 miles single direction and 180 miles round trip to 60 and 120 miles respectively. Payment of a supplementary travel fee for travel furth of Scotland is also provided. The fees for consultations, accused and counsel meetings and locus visits are increased. The fee for accommodation and associated subsistence is increased from £75 to £100.

Written work: Fees are provided for certain types of written work which include petitions to the Nobile Officium, drafting of devolution minutes, section 275 applications under the Criminal Procedure (Scotland) Act 1995, specification of documents and interrogatories.

Preliminary hearings: In High Court proceedings (other than appeals), the fee for preliminary hearings which includes the managed meeting or equivalent communication with the Crown and any note on the line of evidence is increased by one half.

Changes in categorisation of cases: Trials are paid on a daily basis with the rate for payment depending upon the category of case and status of counsel. Category (a) charges are the most serious offences and attract the highest rate. Several changes have been made:

- Category (c) and (d) charges in High Court proceedings (other than appeals) are aggregated to become category (c).
- Category (b) and (c) charges in the Sheriff and District Courts are aggregated to become category (b).
- Category (a) is extended to include offences under the Explosive Substances Act 1883, money laundering and charges relating to lewd and libidinous behaviour against children under 12 years of age. Charges relating to firearms offences, incest, sodomy, embezzlement are uprated from category (b) to category (a). Category (b) is extended to include offences under the Immigration Act 1971 and offences under sections 52 and 52A of the Civic Government (Scotland) Act 1982.
- Provision is made for the payment of fees for proceedings in respect of the offence of attempting to pervert the course of justice.

Proceedings taking place outwith a jury: Payment of fees for evidential hearings in solemn proceedings taking place outwith the presence of a jury is provided.

Provision is made for the payment of first diets in Sheriff Court proceedings: A fee shall only be payable where a plea of guilty is tendered at that hearing or where the case is otherwise brought to an end by the Crown's acceptance of a plea of not guilty, withdrawal of the libel, desertion of the diet or by other means.

Commencement

Where this instrument makes provision as regards the payment of fees for counsel for proceedings in the High Court (other than appeals) and in the Sheriff and District Courts it applies to fees for work done and outlays incurred on or after 2 October 2006. This was the date on which agreement was reached with the Faculty of Advocates over a package of changes that would be made in respect of first instance fees following a lengthy period of consultation with them.

This instrument has intentionally been made to apply retrospectively in respect of the changes being made to first instance fees. Reference is made to the case of *Shelagh McCall v Scottish Ministers* 2005 CSOH 163 in which Lord Carloway held that it was ultra vires for regulations to be made which apply retrospectively where that application causes unfair detrimental retrospection to persons directly affected by them. So as to ensure that counsel will not suffer any unfair retrospective detriment as a result of the retrospective nature of these regulations, a savings provision is included. Regulation 9 of this instrument saves the operation of paragraph 15 of Schedule 2 to the 1989 Regulations in respect of proceedings commenced before 29 March 2007 where counsel would be entitled to a higher fee for work done in respect of those proceedings in relation to separate preparation than counsel would be entitled to had these regulations not been made.

Regulation 5 of this instrument makes similar provision in respect of references to taxation as in civil cases so that these regulations will apply in respect of proceedings concluded before 29 March 2007 which are referred for taxation after that date and proceedings concluded on or after 29 March 2007.

Regulations 4 and 8 of this instrument provides for the table of fees for counsel in proceedings before the JCPC to apply in respect of proceedings commenced on or after 29 March 2007.

The policy intention is to make provision for taxation arrangements to come into force for cases as soon as possible. This provides that from 29 March 2007 all Scottish criminal cases before the JCPC in which a question or dispute arises as to fees can be taxed by the Registrar of the JCPC and any questions or disputes in cases in which there may be outstanding questions or disputes can be resolved by this means. The table of fees for counsel will apply for proceedings commenced on or after 29 March 2007.

Consultation

In making this instrument, consultation has taken place among Executive officials, SLAB and the Registrar to the JCPC with her staff where she has confirmed that she is prepared to undertake taxations in Scottish cases. The Registrar of the JCPC and the Law Lords have provided comments that have been attended to in this instrument. In particular, the instrument provides for a review mechanism of the Registrar's decision.

There has been consultation too with both the Law Society of Scotland and the Faculty of Advocates. In respect of the taxation provisions, this advised them that provision was being made to provide for taxation in cases where disputes or questions arise in relation to payment of fees or outlays allowable to the solicitor or as to the amount of fees allowable to counsel from the Legal Aid Fund in relation to payments made in terms of the 1989 Regulations.

In respect of first instances fees, the 1989 regulations were amended in March 2005 when substantial changes were made introducing a system of block fees for work done by counsel that allowed for certainty as well as ensuring faster payment of fees in solemn cases to counsel. This system of block fees included reforms to allow for earlier pleas by way of section 76 of the Criminal Procedure (Scotland) Act 1995 as a result of the introduction of preliminary hearings and early disclosure of evidence by the Crown through the High court (Bonomy reforms). When these changes were introduced, these were to be monitored to ensure that they provided fair reward to counsel for work actually carried out as

well as ensuring that early preparation took place to ensure that pleas of guilty might be tendered at the earliest opportunity making savings in court time as well as avoiding witnesses attending court. The changes to first instance fees made now reflect the result of that further monitoring following discussion with the Faculty of Advocates where the preliminary hearing fee increase is designed to support early preparation of such cases.

Purpose

There are three purposes of this instrument:-

1. It provides for taxation in proceedings in criminal cases in Scotland where cases of dispute or questions arise in relation to payment of fees or outlays allowable to the solicitor or as to the amount of fees allowable to counsel from the Legal Aid Fund in relation to payments made in terms of the 1989 Regulations. Similar provisions are being made by way of separate instrument to provide for taxation in civil cases.
2. It provides for a table of fees by way of Schedule 3.
3. It also provides for changes to the first instance fees that have been identified by counsel.

Financial Implications

No financial implications arise in respect of this instrument in relation to the provision for the taxation of fees or outlays allowable to a solicitor or amount of fees allowable to counsel in criminal cases which provides a route for resolution of such disputes or questions by the Registrar to the JCPC who has the expertise in such cases in respect of English or Welsh cases.

The cost of bringing the changes to the first instance fees for counsel are estimated by SLAB to amount to approximately £622k per annum of which the increased fee for the preliminary hearing and changes in preparation banding represent most of the costs estimated at £303k. These measures are being made directly in response to monitoring of the High Court (Bonomy) reforms. The rest of the changes are relatively minor but are designed to secure access to justice in a number of respects, especially in more remote locations where sanction may be required for counsel because of the complexity of the proceedings. These costs will be offset by the savings that are being made as a result of the High Court reforms that have resulted in earlier pleas of guilty, reduction of the churn of cases in the court and savings in time and expense of witnesses attending court unnecessarily.

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