

EXECUTIVE NOTE

THE CRIMINAL LEGAL ASSISTANCE (FEES) (SCOTLAND) REGULATIONS 2011

S.S.I. 2011/333

The Criminal Legal Assistance (Fees) (Scotland) Regulations 2011 (“the 2011 Regulations”) were made in exercise of the powers conferred by section 33(2), (3) and (3A) of the Legal Aid (Scotland) Act 1986 (“the Legal Aid Act”) and all other powers enabling the Scottish Ministers to do so. The Regulations are subject to the negative procedure.

Policy Objective

The policy objective is to encourage more private solicitors to sign up to the police station duty scheme, which was established on 4 July 2011 following the UK Supreme Court’s decision in the case of *Cadder v Her Majesty’s Advocate*. In that case, the Supreme Court held that suspects should ordinarily have the benefit of legal advice before and during police questioning. The police station duty scheme was established to ensure that high quality, timely legal advice is consistently available to suspects throughout Scotland.

Earlier this year the Scottish Government brought forward legislation (the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011) requiring the Scottish Legal Aid Board (“the Board”) to make arrangements for all suspects to have access to legal advice. The police station duty scheme came into operation on 4th July this year. The Cabinet Secretary for Justice subsequently had a constructive meeting with the Law Society of Scotland (“the Society”) on 3rd August to discuss the low level of involvement in the scheme from private solicitors since 4 July 2011. The Society raised certain issues about the way solicitors were paid and the Cabinet Secretary agreed to address those issues.

The 2011 Regulations give effect to that agreement, which has already achieved a large part of the policy objective. As of 9 September 2011, 352 solicitors were signed up to the police station duty scheme (including 23 Public Defence Solicitors and 10 Board employed solicitors). This compares with 159 solicitors who had signed up to the scheme as at 22 July 2011.

The 2011 Regulations—

- a.) create an exception to the single payment rule in relation to advice and assistance provided to a person who is facing questioning, or is being questioned by the police, who is suspected of a Revenue and Customs offence or who has been detained in connection with certain drug smuggling offences; and

- b.) abolish the rule (referred to by the Board and the Society as the “subsumption rule”) under which the payment made to one solicitor for providing advice and assistance to a person facing questioning, or being questioned, at a police station was, subject to certain exceptions, deducted from the fixed payment due to any other solicitor who went on to provide that person with criminal legal assistance in any related summary prosecution.

New exception to the single payment rule (regulation 4)

There are 3 separate schemes under the Legal Aid Act for funding legal assistance in relation to criminal matters. The advice and assistance scheme (“A&A”) pays for preliminary advice, but cannot be used to pay for representation in court. Representation in court may, depending on the circumstances, be paid for under either the assistance by way of representation scheme (“ABWOR”), or the criminal legal aid scheme.

The single payment rule was established by regulation 7 of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008. It means that if a client has been given A&A at a police station and goes on to receive ABWOR or criminal legal aid in respect of any related prosecution under summary procedure, no fee will be payable in respect of the A&A.

There have always been exceptions to the single payment rule. Solicitors are entitled to separate payment for providing A&A at a police station if the attendance and associated travel exceeds 2 hours. Furthermore, they have always been entitled to separate payment for A&A in relation to an appeal in the High Court under section 174(1) of the Criminal Procedure (Scotland) Act 1995. The 2011 Regulations leave those exceptions in place.

In 2010 two further exceptions to the single payment rule were created. The further exceptions were created to reflect the enhanced role of solicitors in providing legal advice to suspects under the interim guidelines the Lord Advocate put in place in June last year and latterly under the new statutory right to legal advice established by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010.

The Criminal Legal Assistance (Fees) (Scotland) Regulations 2010 (“the 2010 Regulations”) dealt with the scenario where one solicitor (“solicitor A”) provided A&A to a suspect at a police station but another solicitor (“solicitor B”) went on to provide that person with ABWOR or criminal legal aid in relation to the same matter. Under regulation 7(5), as originally enacted, solicitor A would not be paid for providing the A&A. The exception created by the 2010 Regulations allowed solicitor A to be paid.

A further exception to the single payment rule was created by the Criminal Legal Assistance (Fees) (Scotland) (No. 2) Regulations 2010. Those Regulations created an exception allowing solicitors to receive separate payment for A&A provided to a suspect at a police station between the hours of 10pm and 7am.

At the meeting between the Cabinet Secretary for Justice and the Society on 3rd August, the Cabinet Secretary agreed to go further and allow a separate payment to be made for providing A&A to a suspect regardless of whether a different solicitor subsequently provides ABWOR or criminal legal aid and regardless of the time of day that the A&A was provided. The 2011 Regulations give effect to that agreement.

Moreover, the 2011 Regulations extend the exception to the single payment rule beyond A&A provided to police suspects to suspects who are facing questioning, or are being questioned, by officers of Her Majesty's Revenue and Customs ("HMRC") and the UK Border Agency ("UKBA"). This is in line with the approach taken to HMRC and UKBA in the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011.

Abolition of the subsumption rule (regulation 3)

The "subsumption rule" was created by the 2010 Regulations. As discussed above, those Regulations created an exception to the single payment rule which allowed one solicitor ("solicitor A") to be paid for providing A&A to a client at a police station if a different solicitor ("solicitor B") went on to provide the client with ABWOR or criminal legal aid. The fixed payment payable to solicitor B was originally devised to incorporate an amount to cover the provision of advice to the client at a police station. Where that advice had in fact been provided by solicitor A, the 2010 Regulations provided for the fixed payment payable to solicitor B to be reduced by the amount of the separate payment payable to solicitor A.

The Society expressed its dissatisfaction with the subsumption rule to the Cabinet Secretary of Justice during the meeting on 3rd August. At that meeting the Cabinet Secretary agreed to abolish the rule. The 2011 Regulations abolish the subsumption rule so that in the circumstance described above the fixed payment due to solicitor B will no longer be reduced by the amount payable to solicitor A.

Consultation

The Scottish Government has consulted the Board and the Society in relation to the Regulations. The Society's legal aid negotiating team generally consults with the Government on behalf of the profession. The team includes a range of practicing criminal practitioners. Given these consultations, no separate Business and Regulatory Impact Assessment (BRIA) has been carried out in respect of these Regulations.

Financial effects

It is estimated that the Regulations will cost circa £104,000 - £167,000 in financial year 2011/12, depending on the number of people who take up the offer of legal advice and the split between those who are provided with advice by the solicitors employed on the Board's 24/7 contact line and those who access advice through private solicitors. It is further estimated that in the full financial year 2012/13 the Regulations will cost £250,000 - £400,000. As confirmed with the Society during

consultations and at the meeting with the Cabinet Secretary for Justice on 3 August, this increase in expenditure will be met from within the legal aid budget.