

## **POLICY NOTE**

### **THE CRIMINAL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2012**

**SSI 2012/276**

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

#### **Policy Objectives**

2. In 2005 and 2007, as part of Ministers' recommendations to modernise the legal aid system, significant changes were made to the payment arrangements in respect of Counsel's fees in criminal first instance proceedings, set out in the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989/1491, ("the principal Regulations"). The core principles of modernisation were fair reward for work done; the introduction of quality assurance; and value for money in the use of taxpayer's money.

3. The new system was a much more detailed and sophisticated tables of fees, set out in the schedule to the principal Regulations. The revised payment arrangements introduced a number of graduated fees which varied depending on the status of Counsel, court in which the proceedings take place and the most serious offence specific to the client and prescribed clear rules for determining when and how various work activities could be paid. It was agreed that the fee system in the Principal Regulations would be reviewed at regular intervals.

4. Since the introduction of the new system the Scottish Legal Aid Board ("the Board") has been closely monitoring the new payment arrangements. In the main, the tables of fees in the principal Regulations operate very well. Counsels' fees are being paid quicker than ever before. However, the Board has identified a number of areas where refinements could be made to better control certain aspects and further improve the flexibility of the system.

5. A review of the first instance fees began with a number of productive meetings held by the Board with representatives from the Faculty of Advocates ("the Faculty") and with the solicitor advocate branch of the Law Society of Scotland ("the Society"). The Board also sought the views of the courts on areas where legal aid fees appear to influence court procedure/activity, changes to the fee structure which could assist in the early resolution of cases and details of any difficulties within the justice system which could be due to the way Counsel are paid. As a result of these meetings agreement was reached across a broad range of areas for further improvements to the system.

6. The outcome of the UK Government's Comprehensive Spending Review in 2010, and the subsequent drop in Scotland's overall budget, also formed a significant backdrop to the review. This settlement was extremely challenging for all areas of government expenditure. In the area of legal aid the overall budget, including the Board's administration costs, will reduce from £154.1m in 2011-12 to £142.8 in 2014-15. This follows the reductions in legal aid spending already made in 2010-11.

7. Proposed reforms of legal aid, including this review, were set out in the Scottish Government paper, published on 5 October 2011, “A Sustainable Future for Legal Aid”.<sup>1</sup>

8. The policy intention behind these Regulations is to:

- deliver full year legal aid savings of £500,000;
- update the tables of fees and notes on the operation as a result of wider justice system changes;
- provide fair reward for work done, responding to some requests from the Faculty and Society as part of the review process;
- take the opportunity to improve the operation of the system where that is possible within the current spending constraints.

9. The changes in the Regulations which are listed below give effect to this policy.

### **Definition of commercial and retail premises**

10. The case category of assault and robbery varies in the principal Regulations at present, depending on whether the premises are considered to be commercial or retail. There is no definition at present of the premises which are deemed to be commercial, which leads to confusion. Regulation 4 as a result includes a definition of commercial premises so that it is beyond doubt which fee is payable in each case. All premises, other than those listed, are “retail” premises.

### **Case Categories**

11. Counsel’s fees are currently paid on a graduated fee system and vary depending on a number of criteria including the category of offence. Where an offence is not categorised in the table of fees in the principal Regulations the Board (or the Auditor of the Court in the event of a dispute) must allow such fees as appear appropriate to provide reasonable remuneration for the work, having regard to all the circumstances of the case including the general levels of fees in the table of fees. This procedure for non-categorised offences causes uncertainty because the fee payable is not immediately apparent. Regulation 5, as a result, categorises a number of additional offences in order to make the lists of categorised offences in the tables of fees more comprehensive. Amendments to the principal Regulations also reflect wider legislative changes, for example the Sexual Offences (Scotland) Act 2009, in order to ensure that particular offences sit within the appropriate category.

### **Preliminary hearing fee**

12. The preliminary hearing fee is an inclusive fee which covers attendance by Counsel at the hearing and any managed meeting or equivalent communication with the Crown by whatever means, any note on the line of evidence and continued or adjourned hearings. A higher fee is currently payable for continued preliminary hearing diets which involve the arguing of substantive issues. To improve efficiency, regulation 6 clarifies that the preliminary hearing fee covers all managed meeting(s) and also includes any necessary discussions with the Procurator Fiscal rather than simply the Crown.

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<sup>1</sup> This paper can be found at: <http://www.scotland.gov.uk/Publications/2011/10/04161029/0>

## **Necessary notes**

13. Currently, a fee is prescribed in the tables of fees in the principal Regulations for a necessary note (covering, for example, notes to solicitors including on lines of evidence). Regulation 6 specifies that a fee payable for only one note in any case unless Counsel can demonstrate on cause shown that there are exceptional circumstances, and then no more than fees for two such notes.

## **Multiple preliminary hearings**

14. Cases which involve multiple indictments are dealt with under a single grant of legal aid. This will often result in a separate preliminary hearing being fixed by the court for further indictments. Regulation 6 ensures that, where a further preliminary hearing arises from a fresh indictment, a new range of fees are to apply. In cases where the fresh indictment arises from charges being split, a half fee should be payable. In circumstances where the indictment is deserted and subsequently re-raised, two thirds of the fee should be payable.

## **Defence statements**

15. Under section 70A of the 1995 a defence statement must be provided in certain circumstances in solemn proceedings and under section 125 of the Criminal Justice and Licensing (Scotland) Act 2010 a defence statement may be provided in certain circumstances in summary proceedings. There is at present no prescribed fees for the statements. Regulation 6 provides for a fee in each of the relevant tables of fees.

## **Revisal of documents**

16. Only a very limited number of written documents attract a separate fee under the tables of fees in the principal Regulations. Where a separate fee is prescribed, it is payable only once and includes any revisal between Counsel acting for the same accused (e.g. Senior and Junior). In order to increase the equity of the fees payable, regulation 6 provides that where a joint necessary note or a written document for which a fee is payable is subsequently revised, the fee for drafting should be split equally between the respective Counsel involved in the drafting and revisal of the document. This is a cost neutral measure but will improve the operation of the overall system of payment of Counsel at first instance.

## **Preparation**

17. Currently, a fee for preparation in a case is allowed where certain criteria are met. Preparation is paid on the basis of the "documentation" in the case, which includes Crown statements, precognitions, productions and labels. Regulation 7 makes some alterations to the current arrangements for payment in order both to deliver savings and to make improvements. Regulation 7 also clarifies what fees are payable for preparation in some circumstances where more than one Counsel are involved.

## **Abortive consultations**

18. Counsel may on occasion attend for a consultation with a client which does not proceed through no fault of Counsel (e.g. the client fails to attend or is not available as a result of a prison lockdown). The Board has had the practice of paying Counsel for travel to

the consultation in this case, but there is currently no prescribed fee is payable. Regulation 8 provides for a fee in the relevant tables of fees.

### **Multiple consultations in the same cases and on the same day, and the definition of a consultation**

19. It is a relatively common feature that Counsel will elect to charge for multiple consultations on the same day. Regulation 8 limits the number of fees payable to one per day where the consultations were with the same counsel and the accused, Crown Counsel or the Procurator Fiscal or an expert. In addition in regulation 4, the definition of “consultation” is clarified to include conference calls.

### **Exceptional consultations**

20. Currently, no work can be charged for where it is done for the same case on the same day in which payment for a court day is claimed. In longer running, novel or more complex cases which involve a higher than average number of expert witnesses it is sometimes necessary for Counsel to consult on the same day as a court day outwith what would normally be considered “working hours”. Regulation 8 details when a consultation fee is payable in those circumstances.

### **Criminal Procedure (Scotland) Act 1995: section 76 hearings where proceedings were initially deserted**

21. Where an accused makes an informed early plea at a hearing under section 76 of the Criminal Procedure (Scotland) Act an enhanced fee is payable to Counsel as an incentive. The enhanced fee is an all-encompassing fee which includes any previous pre-sentencing hearings in those proceedings. Where initial proceedings have been deserted and re-raised only one enhanced fee is currently chargeable under the principal Regulations.

22. In recognition that this fee is meant to incentivise and reward an early plea, regulation 9 provides that, where initial proceedings have been deserted, subsequently re-raised and ultimately disposed of by way of a section 76 hearing, additional fees may be payable for any hearings which took place during the initial proceedings.

### **Adjourned diets**

23. Currently under the principal Regulations, where a fee is claimed in respect of an adjourned preliminary hearing, information has to be provided by or on behalf of Counsel as to the reason for the adjournment. No fee is allowed by the Board or the Auditor where satisfied that an adjournment was caused because the defence was not prepared to proceed, or where the preliminary hearing could have been altered in advance. Regulation 10 extends this principle to cover all court hearings, including, where appropriate, trial diets. This puts beyond doubt that when hearings are adjourned because of a fault of the defence, no fee should be payable.

### **Trial where accused person’s plea of guilty is accepted**

24. In a case involving multiple accused it is not uncommon for a plea of guilty to be accepted at an earlier diet for one or more of the accused, with the case proceeding to trial for

the remaining accused. Counsel for the accused who have already pled will sometimes require to sit in on the remainder of the trial proceedings. Regulation 10 provides that these diets should not be treated as “trial” diets for the purposes of the principal Regulations as Counsel’s role is more akin to that of a “watching brief”. Instead, regulation 10 prescribes a trial fee is not payable for Counsel but a fee equivalent to the miscellaneous hearing rate for each table may be payable on a cause shown.

### **Judicial examinations**

25. There is currently in the principal Regulations no prescribed fee for Counsel attending a judicial examination. The need for Counsel to attend such a diet is very unusual. In practice, however, where Counsel has attended such a diet they have sought to charge the diet as if it were akin to a trial diet. The Board in response has restricted the fee paid to the miscellaneous hearing rate. In order to provide clarification, regulation 10 prescribes a fee for counsel attending a judicial examination which is equivalent to the miscellaneous hearing rate for each table.

### **Commission to take evidence**

26. The tables of fees in the principal Regulations prescribe fees for a number of court diets where evidence is led to be payable at the equivalent of the relevant trial rate. This reflects the practice of the Board and the Auditor of Court who treat evidential hearings as akin to trial diets. Regulation 10 puts this practice beyond doubt by prescribing fees for a commission on evidence at the rate equivalent to the relevant trial rate.

### **Reduced trial rate where trial exceeds a specific number of days**

27. Currently, in criminal cases counsel are paid a fixed daily trial rate regardless of the duration of the trial. Regulation 10 makes provision which broadly reflects arrangements which have been introduced for Counsel in civil cases. Where the trial (or any other hearing for which a fee is payable at the trial rate) exceeds 30 days in total, the daily fee payable is discounted by 10% for every day in excess of 30 days.

### **Multiple court days being claimed by counsel**

28. Counsel is currently paid daily trial rate for an attendance at court regardless of the duration of the trial (or equivalent hearing) or the number of hearings that Counsel attends on the same day. Regulation 10 provides that where Counsel attends more than one trial (or any equivalent hearing) on the same day, the fees payable are 100% (of the relevant trial fee) for the first trial and 50% (of the relevant trial fee) for any other trials or equivalent hearings attended.

### **Prescribe lower fee for drug treatment and testing order review**

29. Fees for drug treatment and test order diets are currently payable at the miscellaneous hearing rate under the tables of fees in the principal Regulations. Regulation 10 provides that fees for these diets, which can be short and routine, are to be payable at rates lower than the relevant miscellaneous hearings rate.

## **Cases which are not subsequently indicted in the High Court**

30. From time to time the Crown will drop proceedings which would have been marked and indicted as High Court proceedings at the petition stage. When these cases concluded they will have been dealt with exclusively in the sheriff court. At present under the principal Regulations Counsel can only be paid for these cases at the rates prescribed for sheriff court proceedings.

31. In line with changes already made for solicitors in solemn criminal cases, regulation 12 provides that in cases concerning a number of specified offences fees for Counsel may be payable as if the relevant table of fees for High Court cases applied. This is not a savings measure but the Scottish Government is content to proceed with this, at the request of the Faculty, as part of the overall package.

### **Fees for one Counsel only**

32. Currently, in cases where sanction has been authorised for the employment of Senior and Junior Counsel fees may be sought for the attendance of both counsel even at diets which do not appear to merit attendance by both counsel. Regulation 13 prescribes a list of court hearings where fees for attendance of only one counsel are payable.

### **Travel**

33. Regulation 14 restricts the fees paid to Counsel for travel, against a background of restrictions having already been imposed in 2011 on fees paid to solicitors for travel.<sup>2</sup> The amendments to the principal Regulations by regulation 14 ensure that the supplementary fee for travel is chargeable only where the travel involves a round trip exceeding 60 miles in each direction.

34. In addition, the fee will not be chargeable for travel to a number of specified courts in Scotland's 'central belt' for the purposes of a trial or any other hearing. Counsel are generally expected to be available within this area which is, in effect, their place of daily business. If counsel happens to live in Aberdeen or Stranraer, for example, and wishes to do this work, then no supplementary fee will be payable for doing so. That counsel will still be able to claim such fees for travel to courts not listed in the regulation.

35. Regulation 14 also makes clear that the supplementary fee is not to be payable when counsel travels to any of the listed courts for the purposes of a trial or any other hearing and also attends to business relating to any case on the same day – unless the Board is satisfied that the trip relating to business is separate and additional to the trip relating to the court.

36. Regulation 14 applies not to just first instance cases but to work undertaken in relation to appeals also. It is felt appropriate to make the changes in respect of appeals also at this time and the Board and Faculty have agreed to this change being advanced in these Regulations.

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<sup>2</sup> The Legal Aid and Advice and Assistance (Solicitors' Travel Fees) (Scotland) Regulations 2011 were introduced on 28 February 2011.

## **Consultation**

37. The current review of the fees began with a number of productive meetings held by the Board with representatives from the Faculty and with the solicitor advocate branch of the Society. Tripartite meetings then took place between the Scottish Government, the Board and the Faculty and the Society. A face to face tripartite meeting with the Faculty took place on 18 January 2012 and with the Society on 21 February 2012. Thirty proposed changes were initially discussed. Following detailed negotiations and exchanges many of the original proposals have been modified and 7 were dropped entirely. Many of the proposals were made at the request of the profession and as a result these regulations introduce for the first time new fees for abortive consultations, mandatory defence statements and exceptional consultations. In response to comments from the profession, a number of changes were made to the proposals including on travel. The Faculty and Society have both been consulted on the final policy proposals which are given effect to in these Regulations.

## **Financial Effects**

38. A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached.

39. The overall impact of this policy on business will be to produce a reduction in the fees paid to counsel and to solicitor advocates for criminal work. However, several of the changes made in the Regulations will deliver improvements and clarifications for the profession and in some cases provide for new fees in certain circumstances. It is estimated that these Regulations overall will deliver full year savings of £500,000. The full effect of the savings will be realised by 2015-16. In 2013-14 savings are likely to be £400,000 and in 2014-15 the savings are likely to be £450,000.

40. Given the continued pressure on legal aid expenditure, the Government will work with the Board to closely monitor the delivery of the savings expected to arise as a result of these Regulations. It may be necessary to reopen the current review of these fees either if the expected savings are not delivered or if further savings are required above and beyond those already outlined to the profession.

Scottish Government  
Justice Directorate  
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