

Final Business and Regulatory Impact Assessment

Title of Proposal

The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013.

Purpose and intended effect

- **Background**

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (“the 1989 Regulations”) set out the fees payable to solicitors (and counsel) in relation to summary and solemn criminal legal aid cases.

Fees payable to solicitors are set out in the Notes and Table of Fees in Schedule 1 to the Regulations, with general provisions being made in regulations 4 to 12. Part 1 of the Table of Fees sets out the detailed fees payable for separate items of work and Part 2 the inclusive fees which are payable for “blocks” of work by the solicitor.

The current solemn criminal legal aid fee structure was introduced by amendment of the 1989 Regulations in 2010. The introduction of inclusive fees for solemn cases in Part 2 of the Table of Fees was part of a movement away from detailed (or “time and line”) accounting. It was felt that detailed accounting created a wide variation in fees payable in cases, and that a block payment system remunerating the solicitor for advancing the case from stage to stage would encourage dealing with the case as efficiently as possible. The changes made in 2010, agreed to by the Law Society of Scotland at the time, created a “hybrid” fee structure where some work is paid by block fee but a significant percentage continues to be chargeable on a detailed basis.

Under the 1989 Regulations as currently in force there is no separate, inclusive fee in respect of “preparation” for a preliminary plea. A fee for preparation is only payable where the inclusive fee in paragraph 4 of Part 2 of the Table of Fees is payable for bringing a case to trial and either:

- (i) the indictment, containing a libel against the client, proceeds to trial; or
- (ii) on or after the day fixed for trial, the Crown withdraws any libel against the client.

However, the following steps, which allow a solicitor necessarily to prepare for a preliminary plea or any court hearing, are all payable by way of detailed fees under Part 1 of the Table of Fees:

- perusing, for the first time, the indictment, witness lists, statements, productions and libels received from the Crown and defence precognitions;
- work in connection with the taking of witness precognition and the perusal of all defence statements where it has not been taken by the solicitor;
- all communications and meeting with the Crown and Procurator Fiscal Service ;
- where the accused is at liberty, all communications and meetings with the accused, otherwise covered by the block fee where the accused is in custody, subject to provision to allow detailed fees;
- consultations between the defence agent and counsel (if relevant);

- travel, waiting and attendance at court.

These steps are not an exhaustive list of work that detailed fees can be charged under Part 1 of the Table of Fees. Paragraph 1(1) of the Notes on Schedule 1 allows the Board to consider payment under Part 1 of the Table of Fees, on cause shown, for any other steps which may arise in the course of proceedings where the work done is not already caught by an inclusive fee under Part 2.

Whether any fee is payable is also subject to the requirement under regulation 10 that the work was actually and reasonably done, with due regard being had to economy.

In cases where summary criminal legal aid or assistance by way of representation (ABWOR) is available payment is mostly made by means of fixed payments under the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 (“the 1999 Regulations”). Under regulation 4A of the 1999 Regulations a solicitor can apply for exceptional case status. This status allows the solicitor to “break out” of the fixed payment regime and be paid, instead, by means of detailed fees for each item of work done. There is no similar provision for exceptional case status in the 1989 Regulations for solemn proceedings.

- **Objective**

The Scottish Government’s intention is to allow sufficient flexibility in the 1989 Regulations for a preparation fee where there is not ultimately a hearing without excessive cost to the Fund, and to address the concerns of the Appeal Court and other recent decisions by amendment of the 1989 Regulations. The Scottish Government’s intention is also that any changes to the 1989 Regulations should be as cost-neutral as possible.

The Scottish Government’s intention is achieved by amending the 1989 Regulations to:

- give the Board, or auditor, the discretion to pay a fee for work reasonably undertaken where no other fee is prescribed by the 1989 Regulations;
- allow a solicitor to apply to the Board for a solemn case to be granted exceptional case status;
- clarify the existing availability of fees for research;
- extend the circumstances in which a fee for preparation may be available;
- make changes to the availability of a preparation fee for diets of deferred sentence; and
- reduce the amounts of the detailed fees to offset the costs of the new fees and provisions.

The amendments to the 1989 Regulations would apply to all relevant cases starting on or after the coming into force date. Solicitors would also be able to “opt in” to payment under the 1989 Regulations as amended for cases that commenced on or after 5 July 2010 (the date on which the relevant Schedule to the 1989 Regulations came into force) and have not yet concluded. This would allow solicitors much greater flexibility in respect of the fees they can charge for current, ongoing cases.

- **Rationale for Government intervention**

The Appeal Court commented in the recent Bill of Advocation *HMA v McCrossan*

([2013] HCJAC 95) that a number of aspects of the current solemn criminal legal aid fee structure for solicitors may not be wholly compliant with the European Convention on Human Rights (ECHR). The relevant legislation is the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (“the 1989 Regulations”). The issues identified by the Court were:

- the lack of provision in the 1989 Regulations for a preparation fee for trial being payable where proceedings are terminated without trial, as set out at paragraph 3(m) of the Notes on the operation of Schedule 1;
- a lack of flexibility in the 1989 Regulations compared to the 1999 Regulations which apply to summary proceedings for which criminal legal aid or ABWOR is available. Under regulation 4A of those regulations a solicitor may seek to have a case designated as an exceptional case and is paid, as a result, detailed fees rather than a fixed payment; and
- an absence in the 1989 Regulations of a prescribed fee for preparation for a plea in bar of trial, particularly where there has been a protracted procedural history to the case (for example, as an inclusive fee in Part 2 of the Table of Fees in Schedule 1).

Further, there have been three decisions by sheriffs (in relation to the cases of *HMA v Fraser Cormack* on 2 April 2012, *PF Dumbarton v Elizabeth McKeen* on 1 May 2013 and *HMA v Paul Owen* on 30 October 2013) about provisions of the 1989 Regulations relating to the circumstances in which a solicitor can be paid for preparation for a diet of deferred sentence. All these cases concerned a claim for preparation for a deferred sentence in circumstances where there had been an early plea and the case did not proceed to trial.

A diet of deferred sentence occurs after conviction when the court has postponed its final decision about any punishment, usually three to 12 months after conviction. The diet at which that final decision is to be taken is the diet of deferred sentence. This is not to be confused with an “adjourned diet”, which is where sentence is put off for a few weeks after conviction for further information, such as social enquiry reports.

The relevant provisions are paragraph 4 of Part 2 of the Table of Fees in Schedule 1 to the 1989 Regulations, and paragraph 3(j) to (m) of the Notes to that Schedule. The Scottish Legal Aid Board (“the Board”) has interpreted these provisions to allow a solicitor to be paid a general preparation fee under paragraph 4(a) (payable once only and not payable if the case does not proceed to trial), *and* a supplementary preparation fee under paragraph 4(b) (payable twice only, and only in circumstances where the fee under paragraph 4(a) is payable).

The recent decisions indicated that the reference to payment to preparation for a deferred sentence (payable twice only) can be paid in circumstances where fees under paragraphs 4(a) and 4(b) (for subsequent days of trial) are *not* payable – i.e. paragraph 4(b) may be read on its own rather than in conjunction with paragraph 4(a). The effect of this would be that a solicitor could be paid for preparation for a diet of deferred sentence whether or not the case proceeded to trial. This is not the result intended by paragraph 3(j) to (m) of the Notes to the Schedule, which is intended to restrict the circumstances in which preparation fees are chargeable.

This outcome causes a potentially significant increase in expenditure from the Scottish Legal Aid Fund (“the Fund”). Alternatively, if the Board does not follow these decisions, there is arguably a lack of flexibility under the 1989 Regulations

of the same sort as concerned the Appeal Court to allow a fee for preparation for a deferred sentence diet where one does not take place.

The Scottish Government's intention, therefore, in this instrument is to address the concerns of the Appeal Court and these recent decisions, by amendment of the 1989 Regulations.

The legal aid system contributes to the Safer and Stronger Strategic Objective. Particularly, it contributes to the National Outcome of "strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others" by ensuring that individuals can be held to account for their actions and can enforce their own legal rights through the effective functioning of our civil and criminal courts. As well as supporting this outcome, the proposal also contributes to "our public services are high quality, continually improving, efficient and responsive to local people's needs" in prioritising where and when fees should be paid to solicitors from the Legal Aid Fund in respect of solemn criminal proceedings.

Consultation

- **Within Government**

The Scottish Legal Aid Board ("the Board") is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. The Board has been consulted in the development of these Regulations.

- **Public Consultation**

The Regulations directly affect solicitors providing legal aid services and may affect applicants for legal aid. Consultation with legal aid solicitors is covered in the 'Business' consultation section.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland ("the Society"). The Society's work on legal aid issues is led by the criminal and civil legal aid negotiating teams, each being panels of experts in the field and responsible to the Council of the Society. The criminal legal aid negotiating team has been consulted in the development of these Regulations.

Options

Option 1: Do Nothing

The provisions for payment of solicitors for criminal legal aid work in solemn proceedings would remain the same.

Where an inclusive fee is payable for a piece of work, the solicitor would not be able to apply to be paid detailed fees instead, regardless of the circumstances of the case. Where a piece of work is identified that it would be reasonable for the solicitor to be paid for, and a fee is not prescribed in the 1989 Regulations, there would be no discretion to pay the solicitor a fee for that work. An inclusive fee for preparation would not be available for a hearing at which the client pleads not guilty, a hearing on a plea in bar of trial or a hearing raising a preliminary issue (where that issue would mean the client did not have to go to trial and there is no other fee for preparation).

Provisions on fees for diets of deferred sentence would remain comparatively inflexible, prohibiting a fee being charged for a second diet of deferred sentence and not including preparation and representation for a diet of deferred sentence in the inclusive post-conviction fee. The inclusive fee for post-conviction work would remain at its current level. The 1989 Regulations would continue to allow for fees for research, but the availability of those fees would not be clear from the face of the Regulations. All of the amounts of detailed fees for solemn proceedings would remain at their current levels.

Option 2: Amend 1989 Regulations

Where a case is granted exceptional status, a solicitor could 'break out' of any inclusive fee payment requirement, and instead be paid detailed fees.

An inclusive fee for preparation would be available for a hearing at which the client pleads not guilty, a hearing on a plea in bar of trial and a hearing raising a preliminary issue (where that issue would mean the client did not have to go to trial and there is no other fee for preparation).

The Board, or auditor, would have the discretion to pay a fee for a piece of work where a fee is not prescribed for that work in the 1989 Regulations. The availability of fees for research would be clear on the face of the 1989 Regulations.

All of the above measures would reduce the likelihood of a solicitor raising a challenge on the grounds that they would be forced to withdraw from acting due to unusually high costs.

Provisions on fees for diets of deferred sentence would become more flexible, allowing a fee being charged for a second diet of deferred sentence and including preparation and representation for a diet of deferred sentence in the inclusive post-conviction fee.

The inclusive fee for post-conviction work would increase by £25 to reflect the inclusion of representation in that fee.

The amounts of all the detailed fees for solemn proceedings would be reduced by 3.65%, rounded to the nearest 5p.

- **Sectors and groups affected**

These measures will largely impact on the Board and those solicitors' firms carrying out publicly funded criminal legal assistance. There may be some positive impact on a small number of criminal legal aid applicants; clients whose case was granted exceptional status would be able to continue to be represented by the same agent, rather than find the agent withdrawing from acting due to prospect of not receiving fees for some of the work undertaken in the case.

- **Benefits**

Option 1: Do nothing

Solicitors would not need to alter the way that they prepare their accounts for solemn criminal legal aid work. The Board would not have to make any changes to the way it administers those accounts. Solicitors would be able to charge detailed fees for solemn criminal legal aid at the current, higher rate.

Option 2: Amend the 1989 Regulations

Solicitors would be able to receive a greater level of fees where a case was granted exceptional status. Solicitors could charge an inclusive preparation fee for hearings at which the client pleads not guilty, on a plea in bar of trial or raising a preliminary issue where this is not currently available. Fees for diets of deferred sentence would be more flexible. Solicitors would receive an increased post-conviction fee for preparation and representation. The Board, or auditor, could allow a fee to be paid where there was an item of work for which a fee was not prescribed in the 1989 Regulations. The flexibility of charging detailed fees for preparation and research work would be clearer in the 1989 Regulations. The concerns of the Appeal Court as to the compatibility of the Regulations with ECHR would be addressed.

- **Costs**

Option 1: Do nothing

The concerns of the Appeal Court as to the compatibility of the 1989 Regulations with ECHR would not be addressed. Further challenges by way of compatibility minute to the terms of the 1989 Regulations would be raised, delaying those criminal proceedings.

Exceptional case status would not be available to allow solicitors to be paid detailed rather than inclusive fees. Solicitors could not charge an inclusive preparation fee for hearings at which the client pleads not guilty, on a plea in bar of trial or raising a preliminary issue that would cause the case not to proceed to trial. Fees for diets of deferred sentence would be less flexible. The inclusive fee for post-conviction work would not include representation and would not attract a higher fee. There would be no discretion for the Board, or auditor, to allow payment of a fee for an item of work where a fee is not prescribed in the 1989 Regulations. There would be no amendments to the 1989 Regulations to make clearer the availability of detailed fees for preparation and research work currently available.

Option 2: Amend 1989 Regulations

Solicitors and the Board would have to adapt their account preparation, account assessment and payment processes to the new ways in which fees could be paid for solemn criminal legal aid work. The amounts of the detailed fees for solicitors in these types of cases would reduce by 3.65%, rounded to the nearest 5p.

Scottish Firms Impact Test

As stated in the consultation section, consultation has taken place with the Society, which negotiates with Government on behalf of the profession on the Regulations proposed. The Society is content with the proposed changes to the 1989 Regulations with the exception of the reduction to the amounts of the detailed fees. It is the Society's opinion that it would be unfair and unreasonable for the cost of the new provisions and fees in the 1989 Regulations to be met by a reduction in the amount of fees payable to solicitors elsewhere in the Regulations.

While the fees payable for individual cases will change as a result of the reduction, the

overall amount of fees being paid to solicitors as a group for solemn criminal legal aid work will not.

The profession includes solicitors employed in firms, partners and sole practitioners. If there is any impact as a result of these proposals, the majority of providers affected are likely to be small providers (both small and micro sized businesses) due to the dominance of small legal services providers in the legal aid market. In the Board's 2010 solicitor survey¹, partners were asked how many solicitors their firm employed across Scotland. Almost half of the firms (48%) employed 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

An initial Equality Impact Assessment has been carried out on these proposals for solicitors' fees for criminal legal aid in solemn proceedings. It did not identify any negative impact as a result.

- **Competition Assessment**

In our view, having applied the Office of Fair Trading competition filter, the proposal will not impact on competition within the legal aid market. The regulations do not directly or indirectly limit the number or range of suppliers. They do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

- **Test run of business forms**

The proposed Regulations will not introduce any statutory business forms.

Legal Aid Impact Test

The Board estimates that the cost of the provisions, without the reduction in detailed fees for solemn criminal legal aid, would be between £260,000 and £380,000. It is estimated that the provision reducing detailed fees for solemn criminal legal aid by 3.65% rounded to the nearest 5p will generate a saving approximately equal to this cost. The regulations as a whole are therefore cost-neutral to the Fund.

Enforcement, sanctions and monitoring

The proposals will be enforced through secondary legislation and include a review mechanism for applications for exceptional case status which the Board has turned down. The proposals do not, otherwise, create any new enforcement or monitoring mechanisms. The Board will, however, monitor the implications of these measures. The Board has responsibility for administering the Fund.

Implementation and delivery plan

The policy will be implemented by the Board. It is intended that the Regulations will come into force on 8 January 2014. The Board is fully aware of this timescale.

- **Post-implementation review**

The Scottish Government and the Board will review the impact of this legislation

1

http://www.slab.org.uk/export/sites/default/common/documents/about_us/research/documents/FinalReporttoSLAB.pdf

within 10 years through consideration of analysis of data which is collected routinely by the Board.

Summary and recommendation

It is recommended that amendments to the 1989 Regulations are implemented (option 2) as a means of addressing the concerns of the Appeal Court, and that the amendments should be cost-neutral to the Fund.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p><u>Legal aid solicitors</u> Detailed fees remain at a higher rate (i.e. without a reduction of 3.65% rounded to the nearest 5p).</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> None.</p>	<p><u>Legal aid solicitors</u> May incur costs significantly above the block payment, even where the circumstances of the case were exceptional. Unable to charge an inclusive preparation fee for certain hearings. Representation not included in post-conviction inclusive fee and therefore at its lower rate (i.e. not increased by £25).</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> Possible reputational cost for not acting to correct an identified problem, and open to possible further challenge. No discretion for the Scottish Legal Aid Board to prescribe a fee where one is not otherwise prescribed by the regulations. Less clarity on the flexibility of the fee system as regards research and preparation.</p>
2	<p><u>Legal aid solicitors</u> Could recover costs above the block payment where the case was granted exceptional status. Could charge an inclusive preparation fee for proceedings not previously allowable. Representation included in the post-conviction inclusive fee with an increase to that fee of £25.</p> <p><u>Legal aid applicants</u> Could continue to be</p>	<p><u>Legal aid solicitors</u> Detailed fees reduced by 3.65% rounded to the nearest 5p.</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> None.</p>

represented by the same agent, where exceptional circumstances might otherwise have meant a solicitor having to withdraw due to the level of unremunerated work.

Scottish Government

Likelihood reduced of a breach of article 6 of ECHR because the accused's rights have incurred costs significantly above the fixed payable available and been forced to withdraw. Discretion for the Scottish Legal Aid Board to prescribe a fee where one is not otherwise prescribed by the regulations.

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Kenny MacAskill, Cabinet Secretary for Justice

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