

POLICY NOTE

THE CRIMINAL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2013

SSI 2013/320

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

Policy Objectives

Overview

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 Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 (“the 1999 Regulations”) which apply to summary proceedings for which criminal legal aid or assistance by way of representation (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.

As regards preparation for diets of deferred sentence, the policy objective of this instrument is to allow sufficient flexibility for payment of a preparation fee for these diets where there is not ultimately a hearing but without incurring excessive cost to the Fund.

As regards the concerns of the Appeal Court the policy objective is that this instrument should amend 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 availability of fees for research, detailed fees more generally and existing fees for preparation;
- 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
- alter the amounts of the detailed fees payable for solemn proceedings to offset the costs of addressing the Appeal Court’s concerns.

These provisions will apply to all new relevant cases starting on or after the coming into force date. Solicitors will also be able to “opt in” to payment under the principal Regulations, as amended by this instrument, 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 on the date this instrument comes into force. This application provision allows solicitors much greater flexibility in respect of the fees they can charge for current, ongoing cases.

Background

The 1989 Regulations set out the fees payable to solicitors (and counsel) in relation to 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 ABWOR is available, payment is mostly made by means of fixed payments under 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.

Exceptional case status

Regulation 3 of the instrument inserts a new regulation 7A into the 1989 Regulations which will allow, in certain circumstances, a solicitor in solemn proceedings to seek exceptional case status for a case. This status means the solicitor will be paid detailed fees under Part 1 of the Table of Fees for each item of work done, and not be paid any inclusive fees under Part 2 of the Table.

This provision replicates, for the most part, regulation 4A of the 1999 Regulations. Differences between the two regulations are due to the different payment regimes between the 1989 and 1999 Regulations. For example, where under the 1999 Regulations a fixed payment of £485 for disposal of a sheriff court case is due, anything which adds considerably to the time taken by a solicitor in properly conducting the case is a factor under regulation 4A of those Regulations in relation to whether exceptional case status should be granted. Things which add to the time taken by a solicitor could arise where there are many witnesses, or many documents to be read.

Part 1 of the Table of Fees in the 1989 Regulations, on the other hand, sets out detailed fees. This means that where a solicitor has had to peruse many documents, the solicitor can already be paid for perusing each of them. As a result, the test in the new regulation 7A, unlike regulation 4A of the 1999 Regulations, does not specifically require the Board to consider the number etc of witnesses and productions. Instead, under regulation 7A the Board is required to consider whether the case involves legal or factual complexity, including procedural complexity.

The exceptional cases status provisions, as set out in regulation 7A(1) to (5), offer a solicitor the option to apply for exceptional case status where he/she can demonstrate that the case is one where there is a risk that the assisted person would not receive a fair trial because of the amount of fees otherwise payable under the 1989 Regulations, and where certain conditions are met. As noted above, the Board will include in its consideration of such an application whether the case involves legal or factual complexity, which may include procedural complexity. The Board will, as with exceptional case status under the 1999 Regulations, offer guidance to solicitors on how the provision will be applied.

Regulation 7A(6) to (8) makes provision for the solicitor to request a review of the decision where the Board has refused an application for exceptional case status.

Regulation 7A(9) and (10) makes provision about where a transfer of agency has occurred during a case, allowing the solicitor who represented the assisted person before exceptional case status was granted to be paid detailed fees where certain record-keeping conditions are met.

Discretion to prescribe a fee

Regulation 4(b) of the instrument inserts a new paragraph 1(3A) into the Notes on Schedule 1. This provides the Board, or auditor, with discretion to allow a fee for any work which has been done by the solicitor but which is not covered by any inclusive fees in Part 2 or any of the detailed fees in Part 1 of the Table of Fees. This new discretion is similar to the discretion already available to the Board or auditor for counsel's fees (see paragraph 2 of the Notes on the operation of Schedule 2 to the 1989 Regulations).

In allowing a fee the Board or auditor has to ensure the fee is reasonable remuneration for the work done with regard to all the circumstances. A fee will not be payable if paragraph 3 of the Notes on Schedule 1 already provides that no fee is payable for that item of work. As the Table of Fees in Schedule 1 already makes provision for all likely items of work undertaken by a solicitor, the occasions on which the Board or auditor would have to exercise this discretion are expected to be very limited. However, the new discretion is considered necessary to ensure as much flexibility as possible in the payment regime under the 1989 Regulations.

Preparation

Regulations 4(f) and 6(b) and (d) of the instrument make various new provisions about fees payable for preparation.

Regulation 4(f) of the instrument inserts a new paragraph 3A in the Notes on Schedule 1 to ensure that, where preparation fees would otherwise be chargeable under both paragraph 4A(c) and paragraph 6(a) or (ab) of Part 2 of the Table of Fees, only one of the inclusive fees is chargeable, that being the higher of the two.

Regulation 6(b) of the instrument creates a new inclusive fee in paragraph 4A of Part 2 of the Table of Fees. The effect of this new inclusive fee is that there is more opportunity for payment to solicitors for preparation early on in proceedings (i.e. not preparation for trial) namely for:

- a hearing at which the client pleads not guilty, as described in section 76 of the Criminal Procedure (Scotland) Act 1995;
- 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.

Regulation 6(d)(i) amends paragraph 6 of Part 2 of the Table of Fees to insert reference to a first diet. The result is that a fee for the various matters listed in paragraph 6 is not available where that work is dealt with as part of a preliminary hearing or first diet. This amendment brings provision about payment for work in relation to sheriff court procedure into line with payment for work in relation to High Court procedure. In the sheriff court the matters listed in paragraph 6 may be dealt with at a first diet; in the High Court they may be dealt with at a preliminary hearing.

Regulation 6(d)(ii) and (iii) corrects an erroneous reference to compatibility minutes under the Criminal Procedure (Scotland) Act 1995, by removing the erroneous reference from paragraph 6(a) in Part 2 of the Table of Fees and inserting the correct reference as paragraph 6(ab) in the same Part.

Preparation for diets of deferred sentences

Regulations 4(e) and 6 of the instrument make various amendments to Part 2 of the Table of Fees in Schedule 1 of the 1989 Regulations in relation to fees for preparation for diets of deferred sentence. As noted above, 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.

The amendment made by regulation 4(e) of the instrument removes a reference to a diet of deferred sentence from paragraph 3(m) of the Notes on Schedule 1 and the amendment made by paragraph 6(a) removes a similar reference from paragraph 4(b) of Part 2 of the Table of Fees. Paragraph 3(m) currently provides that no fee is payable for preparation for a subsequent day of trial or a diet of deferred sentence where more than two fees have already been charged under paragraph 4(b) of Part 2 of the Table of Fees (the inclusive fee for preparation for a subsequent day of trial or diet of deferred sentence). By removing reference in both provisions to diet of deferred sentence there is no inclusive fee payable in relation to preparation for a diet of deferred sentence.

However, the amendments made by regulation 6(c) makes new provision about preparation for diets of deferred sentence. It amends the existing inclusive fee at paragraph 5 of Part 2 of the Table of Fees which covers post-conviction work. At present that fee covers only advisory work – including advice on the prospects of success of any appeal. The wording is expanded by regulation 6(c) of the instrument to cover representation as well, which would encompass diets of deferred sentence. The amendment also increases the inclusive fee, to reflect the inclusion of work as regards such diets.

These amendments address the issue caused by the sheriffs' decisions by removing deferred sentence diets from the existing preparation fee where the fee is only intended to be paid if the case proceeds to trial. Instead a fee for preparation for such diets is made available in all cases as part of the inclusive fee for post-conviction work.

Clarification of availability of detailed fees generally, and for research and preparation

Some amendments are being made to the 1989 Regulations to clarify what fees are already available under Schedule 1.

Paragraph 1(1) of the Notes on Schedule 1 is intended, and is currently interpreted, to provide that solicitors may be paid any relevant inclusive fees under Part 2 of the Table of Fees and if any work is not covered by an inclusive fee but is covered by a detailed fee under Part 2, that detailed fee may be payable too.

In light of the Appeal Court's concerns, Scottish Government feels that the wording of this provision could be more clearly set out on the face of the 1989 Regulations. As a result, paragraph 4(a) of the instrument restates paragraph 1(1) of the Notes. The restatement does not intend to make substantive changes to the current operation of the provision, but seeks to make its operation clearer.

A similar issue arises with paragraph 1(5) of the Notes on Schedule 1. It lists items of work for which a detailed fee may be payable under Part 1 because they do not fall within any inclusive fee under Part 2. While the current provision has this effect, the fact that a fee may be payable under Part 1 could be more clearly stated. Regulation 4(c) of the instrument restates paragraph 1(5) of the Notes. Again, the restatement does not intend to make substantive changes to the current operation of the provision, but seeks to make its operation clearer.

The Board currently allows payment of fees for research into novel, developing or unusual points of law. The relevant fees are in paragraph 6 of Part 1 of the Table of Fees. Payment of fees for research in this situation is consistent with regulation 10A of the 1989 Regulations which stipulates that a solicitor is deemed to be “as up to date with the substantive and procedural law of the field in which they practise as a competent solicitor”. Payment of fees for research seeks to ensure that a solicitor is adequately remunerated where the work involved has been beyond that expected under regulation 10A.

Given the Appeal Court’s concerns about the 1989 Regulations, the Scottish Government feels it is appropriate that the current practice described above is expressly set out on the face of the 1989 Regulations. To that end, regulation 4(f) of the instrument inserts a new paragraph 3B into the Notes on Schedule 1 about fees for research.

Specifically, a fee may be payable for research on novel, developing or unusual points of law where the Board considers the circumstances of the case to be exceptional (whether or not the case has been granted exceptional status) where the research required goes beyond the expected understanding of the solicitor as set out in regulation 10A. This fee might be payable where something arises in the context of that case either in the form of an unusual set of circumstances on which there is currently no firm law, or circumstances where a solicitor thinks that the existing law can be distinguished or where a Sheriff made a decision which appears to be contrary to the accepted law. The fee might be payable in the context of a novel ECHR challenge or extradition proceedings. In such situations, a solicitor may reasonably need to undertake research in order to defend the client’s interests. A fee for research under this provision is not intended for every minor novel, developing or unusual point of law. Inserted paragraph 3B(a) therefore provides that the Board must consider the circumstances in some way exceptional in order to allow the fee. This ensures that any points for research are substantial, and have significance and importance to the case. An example of this kind of exceptionality might be where there is a whole new chapter of law that was previously unexplored that it would be considered reasonably required for the solicitor to research in order to properly conduct the case. Wider importance or significance beyond the case might be an indicator of the circumstances of the case in question being exceptional.

Finally, the amendment made by regulation 4(d) of the instrument represents a clarification of the existing provision in paragraph 3(j) of the Notes on Schedule 1 about fees for preparation in some circumstances. It seeks to clarify the intention of paragraph 3(j) – that a fee is not payable for a hearing other than where preparation forms part of a relevant inclusive fee in Part 2 of the Table of Fees.

Offsetting costs

The Fund is under great financial pressure. It is therefore vital that any changes to the 1989 Regulations as regards fees for solicitors for solemn proceedings do not result in additional

expenditure to the Fund. Regulation 5 of the instrument, therefore, reduces the amounts of the detailed fees in Part 1 of the Table of Fees in Schedule 1 in order to offset the costs of the other provisions in the instrument. The reduction in the amounts of the fees is the equivalent of approximately 3.65% of the current fee, rounded to the nearest five pence.

Consultation

The Board, which administers the Fund, and the Law Society of Scotland, which is the regulator and representative body for the legal profession in Scotland, have been consulted on the proposals. The Board is content with the proposals. The Law Society of Scotland, while content with the provisions so far as they address the Appeal Court's concerns, is of the view that the cost of these new provisions should not be met by a reduction in detailed solemn fees. The Society wishes additional money to be allocated by Scottish Ministers to the Fund's expenditure rather than to have the cost be borne by the legal profession.

Impact Assessments

An equality impact assessment has been completed on the instrument and is attached. No negative impacts were identified. The Board will continue to monitor the effect of the 1989 Regulations as part of its ongoing programme of research and analysis on the supply of and access to legal aid and factors that might affect this.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that there will be a greater degree of flexibility in the fees that solicitors can charge for solemn criminal proceedings. This includes the option of seeking exceptional case status to be paid in detailed fees rather than in the block fee system. The estimated cost to the Legal Aid Fund of this new flexibility is £260,000 to £380,000 but detailed fees will be reduced by 3.65% rounded to the nearest five pence to offset these costs, making the provisions as a whole cost-neutral to the Fund. 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.

Scottish Government
Justice Directorate

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