

EXECUTIVE NOTE

THE ADVICE AND ASSISTANCE (ASSISTANCE BY WAY OF REPRESENTATION) (SCOTLAND) AMENDMENT REGULATIONS 2012

1. These Regulations amend the Advice and Assistance (Assistance By Way of Representation) (Scotland) Regulations 2003 (“the 2003 Regulations”).

Policy Objective

2. The policy objective is to make Assistance By Way Of Representation (“ABWOR”) available for application proceedings under sections 2(2), 3(3)(b), 4(3)(b), 11(3) and 12(3) of the Double Jeopardy (Scotland) Act 2011 (“the Act”). The Act reforms and restates the rule on double jeopardy, which prohibits a person being placed in jeopardy of criminal prosecution twice for the same offence. The Act also sets out certain exceptions to the rule and makes a number of related and consequential reforms.
3. Current provisions about the availability of criminal legal aid will operate in respect of any prosecutions arising under the Act. The Act does, however, establish a number of new proceedings which are not covered by existing legal aid legislation. Regulations are therefore required to ensure the provision of publicly funded legal assistance for these new proceedings.
4. First, before the Crown can bring a double jeopardy prosecution under sections 2, 3 or 4 of the Act, the High Court must first set aside the original acquittal and grant authority to bring a new prosecution. Section 5 of the Act envisages that the High Court will hear the parties before doing so.
5. Second, section 11 of the Act deals with the situation in which A assaults B and, some time after A is convicted (or acquitted) of the assault, B dies from his or her injuries. In that situation section 11 allows for A to be prosecuted for causing B's death. Section 11(3) requires that the High Court must be satisfied, after hearing the parties, that it is in the interests of justice to allow the second prosecution to proceed.
6. Third, section 12 covers situations where a person is to be prosecuted anew where previous proceedings on indictment or complaint are a nullity. Section 12(3) requires that on the application of the prosecutor, and after hearing parties, the High Court must be satisfied that the proceedings on the indictment or complaint were a nullity and that it is in the interests of justice to proceed with the new prosecution.
7. ABWOR, rather than criminal legal aid, has been chosen as the type of legal assistance to be provided for representation for the new proceedings created by the Act. An application hearing under section 5 of the Act and other procedures would not be covered by the criminal legal aid certificate granted in respect of the original proceedings and a hearing under the Act may be convened several years after the original trial, causing practical difficulties in identifying the original certificate and/or the nominated solicitor. Advice and assistance, as defined by section 6 of the 1986 Act, is advice and assistance to a client on a matter of Scots law. ABWOR is a form

of advice and assistance where a solicitor (or counsel) can provide representation in court. The proceedings for which ABWOR is available are set out in the 2003 Regulations, which are amended by these Regulations.

8. The main difference between ABWOR in criminal matters and criminal legal aid is that the solicitor assesses the client's eligibility for ABWOR subject to an initial limit of authorised expenditure. The solicitor then must obtain approval for an increase in the level of authorised expenditure from the Scottish Legal Aid Board ("the Board") by setting out an estimate of the likely costs to be incurred either by way of fees or outlays in the instruction of counsel (or an expert witness etc). To obtain criminal legal aid a solicitor must apply to the Board on behalf of his/her client, and the Board assesses the eligibility of the client to receive the aid.
9. Criminal legal aid is available under Part IV of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") in relation to summary proceedings, solemn proceedings and on appeal in the High Court, sheriff court and Justice of the Peace court. At the time when an application is made in the proceedings covered by these Regulations, a person is not being prosecuted under solemn or summary procedure nor is the person appealing his/her conviction. Criminal legal aid cannot therefore be made available for the application proceedings.

Consultation

10. The draft Regulations have been the subject of consultation with the Board, the Law Society of Scotland and the Faculty of Advocates. On this basis, no formal Business Regulatory impact assessment has been undertaken.

Financial implications

11. It is anticipated that proceedings under the Act will be rare, and that the financial implications are therefore likely to be minimal. The total legal aid cost for a double jeopardy case through all stages is estimated at £70,000. This is composed of the cost of 2 appeal hearings and one trial (£10,000+£10,000+£50,000). On the basis of one double jeopardy case progressing through all stages every 5 years, this gives an average annual cost to the Board of £14,000.

Scottish Government
December 2011