

**EXECUTIVE NOTE TO
THE CRIMINAL LEGAL ASSISTANCE (FEES AND INFORMATION ETC.)
(SCOTLAND) REGULATIONS 2008
S.S.I. 2008/240**

1. This instrument is being made in exercise of the powers conferred by sections 12(3), 33, 36(1), (2)(a), (e) and (g) and 41A of the Legal Aid (Scotland) Act 1986 and is subject to negative resolution procedure.

Background

2. Summary criminal legal assistance consists of legal advice, assistance and representation in criminal (non jury) matters for people who are financially eligible. This instrument completes the amendments required to secondary legislation to effect the reform of summary criminal legal assistance initiated by the consultation paper *Reform of summary criminal legal assistance*, which was published in October 2007.

3. The Criminal Proceedings etc. (Reform) (Scotland) Act 2007 has brought extensive reform to the criminal justice system, with a view to improving the efficiency and quality of summary criminal procedure. To support and underpin these reforms, changes to summary criminal legal assistance are necessary.

Amendments

4. The regulations being amended in this instrument are:

- The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (S.I. 1999 no. 491 (s. 33))
- The Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996 No. 2447 (S.192))
- Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (SI 1989 No. 1491 (S.120))

5. The Advice and Assistance (Limits, Conditions and Representation) (Scotland) Regulations 2008 was laid before Parliament on 8 May 2008, and considered by the Subordinate Legislation Committee on 13 May and the Justice Committee on 27 May 2008. This amends three separate sets of legal aid regulations. It is intended that both instruments will come into force on 30 June 2008.

Policy Objectives

6. Reforms to the criminal justice system include increased use of direct measures (such as fixed penalty, compensation or work offers) and undertakings to appear in court. These changes are expected to impact on summary criminal procedure by promoting effective disposal of cases while reducing the burden on the courts. The policy intention underpinning this instrument is to support such reforms of the criminal justice system with corresponding changes to summary criminal legal assistance.

7. In addition to supporting the wider summary justice reform, the proposed changes to summary criminal legal assistance are intended to provide an incentive towards the early disposal of cases where this is appropriate and to fairly and properly remunerate solicitors who provide summary criminal legal assistance.

Overview

8. This instrument deals with a range of matters including:

- fees to be paid to solicitors providing summary criminal legal assistance in cases which are subject to early disposal in the sheriff and JP courts;
- fees to be paid for relevant ABWOR (Assistance By Way of Representation);
- the recording of information in criminal matters similar to that already provided for civil advice and assistance;
- notification requirements when the client seeking advice and assistance changes solicitor;
- requirements on the solicitor to establish the capital and income of the person being represented;
- a 10% uplift in the ABWOR fees paid on a time and line basis;
- amendments to the duty scheme to provide increased rates and caps for guilty and not guilty pleas;
- information required from applicants and assisted persons in criminal cases;
- provision for the Board to withhold payment in certain summary criminal matters;
- provision for the treatment of the single payment in summary criminal cases.

Application

9. Regulation 1 deals with the application of the changes in the instrument. The provisions come into force on 30 June 2008. However, the changes made in regulations 2, 3, 6, 7 and 8(1) will only apply to cases where criminal legal assistance is granted on or after 2-30 June 2008. The changes in regulation 4 will apply where criminal legal assistance is made available on or after 30 June 2008.

10. Regulation 5 will apply to all cases with effect from 30 June 2008, whether or not criminal legal assistance was made available before or after that date.

Regulation 2: Amendments to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 S.I. 1999 no. 491 (s. 33)

11. Regulation 2 introduces a new system of fees which remunerate solicitors providing assistance in summary cases.

The case disposal fee (sheriff and stipendiary magistrates courts)

12. The fee in the sheriff and stipendiary magistrates courts is known as the case disposal fee. The new case disposal fee of **£515** for summary criminal legal aid and ABWOR will cover all work done up to the sentencing stage in a case in the sheriff and stipendiary magistrates courts that does not proceed to trial (or go beyond the first 30 minutes of a trial). It will include any criminal advice and assistance which has been given to a client in the initial interview, and incorporate pre-trial work in guilty pleas, so that as well as the legal aid fee including the first half hour of the trial it will include all continuations without plea, up to 2 deferred sentences and routine police station visits.

13. The case disposal fee removes the present differential in payment rates between ABWOR and criminal legal aid in the sheriff and stipendiary magistrates courts. However though the same fee amount (£515) applies to both, the case disposal fee for each is set out separately. The criminal legal aid case disposal fee is provided for in new Schedule 1A of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 while the relevant ABWOR case disposal fee is prescribed in paragraph 1 of new Schedule 1B.

14. The case disposal fee for both types of summary criminal legal assistance is intended to cover undertakings and cited cases generated by the wider summary justice reforms. It will also apply in sheriff court cases, where a grant is made on the day of the hearing (e.g. in cited and undertaking cases disposed of on the day).

15. Aspects of the provision of summary criminal legal aid unaffected by this instrument apply to the case disposal fee irrespective of whether the fee is payable under a grant of ABWOR or summary criminal legal aid (eg split fees on transfer, half fee where there is a breach of bail, percentage reductions for multiple co-accused represented by the same solicitor, the roll up of cases under one grant arising from the one incident etc).

Fixed payments (JP courts)

16. The present differential in the fixed payment rates for summary criminal legal and for ABWOR is maintained in the JP courts but the new rates, like the case disposal fee, will also subsume pre-trial work in guilty pleas. The fixed payment for summary criminal legal aid in the JP courts will be **£315**, while the ABWOR fee relevant to summary cases will be **£150**. These payments will cover all work done up to the sentencing stage in a case in the JP courts that does not proceed to trial (or go beyond the first 30 minutes). It will include any criminal advice and assistance which has been given to a client in the initial interview, and incorporate pre-trial work in guilty pleas, so that as well as the legal aid fee including the first half hour of the trial it will include all continuations without plea, up to 2 deferred sentences and routine police station visits.

Detailed amendments made by regulation 2

16.1 Regulation 2(3) extends the application of the 1999 Regulations to ABWOR.

16.2 Regulation 2(4)(a) amends regulation 4 of the 1999 Regulations to insert reference to Schedule 1A which prescribes the case disposal fee for summary criminal legal aid.

16.3 Regulation 2(4)(b) inserts a new paragraph (1A) into the 1999 Regulation to provide that the case disposal fee and the core fixed payment for summary criminal legal aid and ABWOR are fees which are alternatives to each other.

16.4 Regulation 2(4)(d) modifies regulation 4(7) of the 1999 Regulations to deal with cases in which there is a change of solicitor and additional payments to continue to be applicable, where relevant, for fixed payments under Schedule 1.

16.5 Regulation 2(4)(e) inserts new paragraphs (7A) and (7B) into regulation 4 of the 1999 Regulations. Regulation 4(7A) ensures that for criminal legal aid fee only one fee can be shared even where there has been a transfer of case between solicitors. Regulation 4(7B) makes provision for the fees due to each solicitor for providing relevant ABWOR, so that whether £515 under paragraph 1 or £150 under paragraph 2 of Schedule 1B, there should be an equal split of the total amount, unless additional fees are payable.

16.6 Regulation 2(4)(f) and (g) makes it clear that where relevant ABWOR is provided in the drug court it is only the £150 fixed fee which applies.

16.7 Regulation 2(5) modifies existing provisions for the submission of accounts in the Advice and Assistance (Scotland) Regulations 1996.

16.8 Regulation 2(6) amends Schedule 1 of the 1999 regulations to reflect the £315 fixed fee for summary criminal legal aid in the JP courts, to increase the existing £500 fixed fee for cases proceeding to trial to £515, and to increase the current £550 for the rural courts as prescribed under Schedule 2 to £565. All 3 rates are reduced by £25 where paragraphs 11 and 12 of Schedule 1 of the 1999 regulations apply.

16.9 Regulation 2(7) provides for half rate fees for work in connection with 27(1)(b) of the 1995 Act.

16.10 Regulations 2(8) changes Part 1 of Schedule 1 to insert a provision for a new one-off additional fee of £25 to be claimed for representation at a first or second diet of deferred sentence at which social enquiry report is dealt with and the diet is conclusive of the case.

16.11 Regulation 2(9) omits existing paragraph 10A which refers to the fee presently applicable for representation before a summary justice pilot court. Similar provision for relevant ABWOR is made in paragraph 9 of Schedule 1B.

Regulation 3: The Advice and Assistance (Scotland) Regulations 1996

17. The 1996 regulations are amended to provide for the recording of information in criminal matters similar to that already provided for civil advice and assistance; notification for when the client seeking advice and assistance changes solicitor; requirements for the solicitor to establish as far as is reasonably possible an assessment of capital and income of the person being represented; and for the uplift by 10% of all ABWOR fees paid on a time and line basis.

17.1 Regulation 3(2) inserts new Regulation 8C to provide that the solicitor giving advice and assistance in relation to a criminal matter must record information on the nature and content of the advice in order that this can be linked to any subsequent grant of ABWOR or summary criminal legal aid (thereby avoiding duplication of payments).

17.2 Regulation 3(3) restricts regulation 13(3) of the 1996 Regulations to civil legal aid.

17.3 Regulation 3(4) inserts a new regulation 14A into the 1996 Regulations to make provision for the steps that must be taken when there is a change of solicitor.

18. Regulation 3(5) restricts regulation 15A(1) of the 1996 Regulations to civil legal aid.

18.1 Regulation 3(6) makes provision in relation to travelling time in the context of ABWOR.

18.2 Regulation 3(7) restricts paragraph 2 of Schedule 2 of the 1996 Regulations to civil matters and inserts a new provision as paragraph 2A relating to the steps that must be taken by solicitors to verify the financial status of the client.

18.3 Regulation 3(8) amends Schedule 3 Part 1 to provide for the removal of paragraph 1(a) and the references ABWOR Fixed fees of £70 and £44.40 while substituting them with Schedule 1B to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999.

18.4 Regulation 3(9) amends Schedule 3 Part 2 to provide for an increase by 10% of all criminal advice and assistance fee rates currently paid by time and line as provided for in the 1996 Regulations while correcting the rate for copies of documents above 20 sheets to 9 pence. Regulation 3(9)(c) removes the minimum restricted time and line fee of £25 currently provided for in the 1996 Regulations.

Criminal Legal Aid (Scotland) (Fees) Regulations 1989 SI 1989

The Duty Scheme

19. The duty scheme is amended to provide increased rates and caps for guilty and not guilty pleas. Currently appearances on undertaking and custody are routinely dealt with by the duty solicitor at a prescribed fee for each person represented of £47.95 for the first case and £6.48 for each additional case up to a maximum fee of £103.95 a session. Following the coming into force of the changes that are made in this instrument, the fee payable will depend on the plea made.

19.1 Regulation 4(2) amends the duty solicitor fees as set out in regulation 6(1) the Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

19.2 Regulation 4(2)(a) increases the *per capita* appearance and cap fees for duty solicitors appearing in either the sheriff or stipendiary magistrates or JP courts for work done for each accused appearing from custody or on an undertaking for which a plea of not guilty is tendered. The rates for these will be increased to £63 for the first case and £9 for each additional case with a cap of £140.

19.3 Regulation 4(2)(b), provides that duty solicitors appearing in either the sheriff or stipendiary magistrates or JP courts will be paid £70 for work done for each accused appearing from custody or on an undertaking for which a plea of guilty is tendered. This replaces the existing system of standard and subsequent *per capita* appearance fees.

19.4 Where further work has to be done then, as at present, it will be paid for up to the limit of the “follow-up” cap which is increased by regulation 4(2)(c) to £93 or £70 for attending a further session when a guilt plea is made. The Board will have discretion to lift that cap in appropriate cases.

20. Duty solicitors will be paid for work done for accused appearing from custody or on an undertaking where a plea of not guilty is tendered under the current system of an initial appearance fee followed by *per capita* subsequent appearance fees capped at £150.

21. In addition, the Board will have the ability to authorise further work beyond the capped fees for follow up work and named hearings which are chargeable on a detailed basis, and also to pay higher fees in exceptional cases. However regulation 4(5) makes it clear that the duty solicitors fees will not attract additional fees for related travelling expenses unless to provide cover at a remote court.

Supply of information by assisted persons

22. Regulation 5 provides the Board with statutory powers to require information or document from applicants and assisted persons who have been, or are, in receipt of criminal legal assistance.

23. The Board may recover any payments for advice and assistance made to their solicitor or counsel out of the Legal Aid Fund where the person has wilfully failed to comply with a request for information, or has made a false statement or representation.

Withholding payment in certain summary criminal matters

24. Under Regulation 6, the Board will be able to withhold payment, or recover payment made, from the Legal Aid Fund for advice and assistance or ABWOR provided in criminal cases where it has been provided contrary to statutory requirements, or where the provision is otherwise unjustified when the circumstances of the case have been taken into account.

Single payment in summary criminal cases

25. Regulations 7(1) to (4) provide for a ranking for determining the appropriate fee payable where more than one type of summary criminal legal assistance has been made to an assisted person. Three types of assistance are involved. These are, in order, advice and assistance where a complaint has been served or it concerns a direct measure, ABWOR in summary criminal proceedings, and summary criminal legal aid.

26. Of these three, where advice and assistance and ABWOR, but not summary criminal legal aid, have been provided, the fees and outlays payable will be those appropriate to ABWOR.

27. Where summary criminal legal aid and either advice and assistance or ABWOR has been given, the appropriate fee is that attributable to summary criminal legal aid.

28. This ranking does not however restrict the solicitor's ability to be paid an additional fee in two circumstances; namely, where the advice and assistance or ABWOR given involves a police station visit lasting more than 2 hours. Associated reasonable and proportionate travel costs may also apply; or for an ABWOR appeal in the High Courts under section 174(1) of the Criminal Procedure (Scotland) Act 1995.

Consultation

29. Public response on proposals for reform of summary criminal legal assistance was invited in *Reform of summary criminal legal assistance*, which was published in October 2007. In response to the concerns of the local faculties of solicitors and the Law Society for Scotland the formal closure deadline of 24 December 2007 was extended to mid February 2008. The draft Regulations have been sent to the Scottish Legal Aid Board and the Law Society of Scotland for their comments, and changes have been made following receipt of their comments.

Financial Effects

30. These regulations are not imposing a new burden on the solicitors who provide summary criminal legal assistance. The level of the case disposal fee, being introduced for criminal legal aid and relevant ABWOR by these regulations, has been adjusted to take into account an anticipated reduction in income for solicitors from predicted reductions in the volumes of summary criminal business consequent on wider summary justice reforms already implemented. The case disposal fee £515 level was achieved in the main through reducing the originally proposed 21% uplift increase to time and line payments for criminal legal aid down to 10%, as agreed in negotiations with the Law Society and representatives of the legal profession. Therefore these regulations are not expected to have a direct impact on expenditure.

Scottish Government
Constitution, Law and Courts Directorate
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