EXECUTIVE NOTE TO

DRAFT SSI: THE ADVICE AND ASSISTANCE (LIMITS, CONDITIONS AND REPRESENTATION) (SCOTLAND) REGULATIONS 2008 (S.S.I. 2008/)

1. This instrument is being made in exercise of the powers conferred by sections 9, 11(2) and 36(2)(b) of the Legal Aid (Scotland) Act 1986 and is subject to the draft affirmative resolution procedure.

Background

2. This instrument is the first of a suite of secondary legislation affecting summary criminal legal assistance, which consists of legal advice, assistance and representation in criminal (non jury) matters for people who are financially eligible. The regulations being amended in this instrument are:

- The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003
- The Advice and Assistance (Financial Conditions) (Scotland) Regulations 2008
- The Advice and Assistance (Financial Limit) (Scotland) Regulations 1993

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.

4. To support and underpin these reforms, changes to summary criminal legal assistance are necessary. These will take the form of amendments to eight sets of regulations, three of which are being amended by this instrument. It is hoped that the further changes will be made in a single amending instrument that will be subject to negative resolution procedure and will be laid no later than 6 June 2008 in order that the changes all come into force on 30th June 2008.

Policy Objectives

5. Reforms to the criminal justice system include increased use of direct measures (such as a fixed penalty, compensation or work offer) 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 is to support such reforms of the criminal justice system with corresponding changes to summary criminal legal assistance.

6 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.

Purpose

7 These Regulations amend existing regulations for summary criminal legal assistance which respectively concern financial limits, financial conditions and assistance by way of representation (ABWOR).

Financial Limits

8 Financial limits are introduced up to which solicitors may incur expenditure in providing summary criminal advice and assistance and ABWOR without applying to the Board for prior authorisation. The present £80 financial limit for providing standard advice and assistance on a criminal matter will be replaced by 2 limits of authorised expenditure depending on the client's circumstances. Where the solicitor provides advice and assistance on a criminal matter before the service of a complaint or following an undertaking to appear, or where the advice and assistance relates to a direct measure that the client accepts, a solicitor will be able to grant general advice and assistance up to £35 without applying to the Board for authorisation. The limit following service of a complaint or where a direct measure is challenged by the client or where ABWOR relates to any other criminal matter will be up to £90.

9 The financial limit for advice and assistance by way of representation on solemn criminal matters has also been raised to £90 so that the same level applies for summary or solemn cases as at present.

10 New initial limits of authorised expenditure for ABWOR are also introduced where the case proceeds to court for a guilty plea.

11 The new financial limit relating to the ABWOR case disposal fee in the summary sheriff and stipendiary magistrates courts will be £550. This adds to a fee of £515 the option for the solicitor to incur a further £25 for cases deferred for social enquiry report and £10 for sundries, without having to seek prior Board authorisation. The £150 limit in the JP court is similarly enhanced resulting in a limit of £185.

12 A £165 limit will replace the former £150 limit for ABWOR provided for second and subsequent diets ordered by the court or in proceedings in a Parole Board case.

Financial Conditions

13 The introduction of a £35 financial limit for advice and assistance in summary criminal matters (see para 8 above) requires a similar range of contributions to be prescribed as those already prescribed for what is known as the diagnostic interview in civil legal aid cases. The contributions specified in regulation 7(1) of the Advice and Assistance (Financial Conditions) (Scotland) Regulations 2008 will now also apply to the £35 summary criminal advice and assistance limit.

Assistance by way of representation (ABWOR)

14 The lack of adequate information before an appearance at court may make it difficult for the accused to make informed decisions on the appropriate plea to be tendered. ABWOR will be available where a continuation without plea is deemed necessary to establish the required information.

15 Specific provision for representation of an accused person following a finding of guilty but where criminal legal aid has not been granted in the summary justice pilot court exists in regulation 6(2)(c) of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003. This provision is being revoked and replaced by new arrangements that provide for all accused persons in these circumstances.

16 New regulation 6A of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 extends the availability of representation to an accused person appearing from custody beyond summary justice pilots. This regulation allows the client's solicitor, instead of the duty solicitor, to provide ABWOR to persons who are being prosecuted under summary procedure and who are either in custody or have been liberated by the police on an undertaking to appear in court.

17 A solicitor, other than the duty solicitor, may now provide the same range of services the duty solicitor provides to the accused on the first day he or she appears before a court to answer the complaint. The solicitor appointed by the accused person must be immediately available to act in person and have a pre-existing solicitor/client relationship with the accused person. However, where the appointed solicitor cannot appear for their client through no fault of their own, such as illness or any other reason falling within the criteria set out in these Regulations, the solicitor of choice may appoint another as a representative in their place. The fee in these circumstances will accrue to the client's original solicitor of choice. The duty solicitor is the sole alternative where these conditions cannot be met.

18 Differing criteria for granting ABWOR applications are currently set out in regulation 7(1) and 7(2) of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 according to the type of case. The draft Regulations replace the present tests with a single interests of justice test based on the factors listed in section 24(3)(a) to (c) of the Legal Aid (Scotland) Act 1986 Act.

Consultation

19 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 a number of changes have been made (in particular, those discussed at paragraph 17) following receipt of their comments.

Financial Effects

20 Because the regulations seek to change the financial limits within which solicitors can incur expenditure on advice and assistance and advice and assistance by way of

representation, rather than the fees they can claim, these regulations are not expected to have a direct impact on expenditure.

Scottish Government
Civil and International Justice Directorate
25 April 2008