POLICY NOTE

THE CRIMINAL LEGAL AID (FIXED PAYMENTS AND ASSISTANCE BY WAY OF REPRESENTATION) (SCOTLAND) (MISCELLANEOUS AMENDMENTS) REGULATIONS 2014

SSI 2014/xxx

The above instrument was made in exercise of the powers conferred by sections 9, 33(3A), (3C), (3D), (3F) to (3H) and 36(1) and (2)(a), (c) and (e) of the Legal Aid (Scotland) Act 1986(a). In accordance with section 37 of the 1986 Act, this instrument is subject to affirmative procedure.

Policy Objective

Overview

The Scottish Government remains committed to maintaining a fair, high quality and equitable system which upholds public confidence at an affordable and sustainable level of expenditure. Reflecting the drop in Scotland's overall budget as a result of the UK Government's spending reviews, budgets will be increasingly challenging for the foreseeable future. It is imperative, therefore, that savings are made wherever possible.

In 2011 the Scottish Government set out its proposals in *A Sustainable Future for Legal Aid* to take forward a series of legal aid reforms.

This instrument is aimed mainly at amending the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 ("the 1999 Regulations") and the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 ("the 2003 Regulations") to make savings to the Fund by:

- simplifying the narrative relating to fees for deferred sentence hearings;
- simplifying the fees in relation to multiple pleas in assistance by way of representation (ABWOR) cases;
- widening the range of circumstances which can be treated as a single matter in failure to appear proceedings so an additional fee is not payable;
- simplifying the narrative relating to duty solicitor half fees; and
- returning the reduced fee for breach of bail conditions to half of the principal fee.

It also aims to make application of the regulations clearer and simpler in a number of subject areas by:

- paying solicitors for preparatory work for cases continued without plea, irrespective of whether the case is called;
- ensuring there is an exceptional case status provision for all fixed payments; and
- updating or removing redundant wording from the regulations.

Fees for diets of deferred sentence

The diet of "deferred sentence" occurs after conviction when the court has postponed its final decision about punishment. The diet at which that final decision is taken is the diet of deferred sentence of which there may be more than one. For legal aid purposes, the current definition only includes diets where the case has been adjourned for inquiries or reports under section 201 (power of the court to adjourn case before sentence) and 203 (Reports), respectively, of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

Regulation 4 amends regulation 2(1) of the 1999 Regulations to include adjournments under section 202 *(deferred sentences)* within its definition of deferred sentence. This ensures that such an adjournment is to be treated in the same way as adjournments under sections 201 and 203, for the purposes of fixed payments (detailed at Schedules 1, 1A and 1B to the 1999 Regulations) and that the fee may only be charged once in these circumstances.

Regulation 9(4) amends paragraph 10ZA of Part 1 of Schedule 1 to clarify that this fee cannot be paid for any deferred sentence diets already included in the case disposal fee at paragraph 1(iiia).

Reduced ABWOR fees in multiple cases

Regulation 6 substitutes an amended regulation 4(5A)(b) of the 1999 Regulations to provide that the sliding scale of payments can be applied where a mixture of pleas has allowed a case to be disposed of prior to trial, rather than only where a guilty plea to all charges on a complaint has been entered. The sliding scale provides that the fee may be reduced where the solicitor represents a person in the same court on the same day, on more than one complaint, and the person tendered a plea of guilty to the charge at the first pleading diet. The solicitor is entitled to 100% of the prescribed fee for the first complaint, 40% of that amount for the second complaint and 20% for any further complaints (sliding scale).

Half fees

Regulations 5, 9(3)(a), 10 (3)(a) and 11(5)(a) update various references to primary legislation found within the 1999 regulations to remove a reference to a section of the 1995 Act which has been repealed and take account of amendments relating to police liberation which were brought in by the Criminal Justice and Licencing (Scotland) Act 2010 ("the 2010 Act"). This will ensure that all of the sections of the 1995 Act dealing with police liberation are captured in the same way for the half fee for failure to appear proceedings, and incorporated into the grant of legal aid for the original proceedings.

Regulation 7 substitutes an amended regulation 4(5B) of the 1999 Regulations to allow this half-fee to be applied where there are multiple charges on any complaint for which a duty solicitor initially tenders a plea of not guilty on behalf of a client; and later that solicitor or a nominated solicitor changes the plea to guilty (to that charge or any other charge in the complaint) and any remaining charges are otherwise disposed of before a trial takes place.

Regulations 9(3)(b)-(d), 10(3)(b)-(c) and 11(5)(b) reduce the fees in the 1999 Regulations for a complaint under section 27(1)(b) (breach of bail conditions) of the 1995 Act. This restores the original intention of Regulation 2(7) of the Criminal Legal Assistance (Fees and Information, Etc., (Scotland) Regulations 2008, for work in connection with section 27(1)(b)

to be half the principal fee: i.e. the equivalent of half the fee paid for all work mentioned in paragraphs 1 of part 1 of Schedule 1, Schedule 1A and Schedule 1B to the 1999 Regulations.

Cases continued without plea

Regulation 11(4) (for the 1999 Regulations) and Regulation 12 (for the 2003 Regulations) revises the provision for fees where cases are continued without plea. This allows these fees to be paid where the diet itself is not called; removing any financial disincentive there may have been for solicitors to work with the Procurator Fiscal to reach agreement prior to the diet.

Exceptional case status

Regulation 8 permits the Scottish Legal Aid Board ("the Board") to apply exceptional case status to all Schedules of the 1999 Regulations, so that solicitors can now be paid detailed fees rather than a fixed payment in certain circumstances, allowing proper remuneration where the amount of work involved is well beyond the norm.

Updates and removals of redundant text

Regulation 9(2)(a) replaces all references to 'District Court' with 'Justice of the Peace (JP) Court' to reflect the introduction of Justice of the Peace Courts, by regulation, in 2008.

Regulation 9(2)(b) makes clear that fees to be paid are based on the level of Court a Procurator Fiscal intends that a case should be heard, depending upon the seriousness of the case.

Regulation 11(6) updates the 1999 Regulations by removing text relating to fees which no longer applies to Schedule 1B. In addition, regulation 11(3) adds a necessary reference, which was the result of a consequential amendment to an earlier revision of legal aid regulations.

Consultation

The Board, which administers the Fund, and the Law Society of Scotland ("the Society") which is the regulator and representative body for the legal profession in Scotland, have been consulted. Both the Board and the Society are content with the proposals.

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 1999 Regulations and the 2003 Regulations as part of its continuing programme of research and analysis on the supply of and access to legal aid and to the factors which might affect such access and supply.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that the fees that solicitors may charge for some areas of work will be reduced while, where certain criteria are met, solicitors will have the option of seeking exceptional case status to be paid in detailed fees rather than fixed payments. Any financial disincentive that might prevent solicitors from seeking to dispose of a case before it calls in court will be removed, encouraging more efficient use of court time.

The estimated impact on the Scottish Legal Aid Fund is an overall saving of £586,000 per annum.

Scottish Government
Justice Directorate
22 October 2014