POLICY NOTE

THE CRIMINAL LEGAL ASSISTANCE (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2017

SSI 2017/xxx

The above instrument was made in exercise of the powers conferred by sections 8A(1), 9, 31(9), 33(2), (3) and 3A, 36(1), (2)(a), (d) and (e) and 41A, of the Legal Aid (Scotland) Act 1986 (the 1986 Act) and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Policy Objectives

The purpose of these Regulations is to ensure criminal legal assistance is available when Part 1 of the Criminal Justice (Scotland) Act 2016 (CJ(S)A) commences on 25 January 2018.

Part 1 of CJ(S)A includes provisions on the powers of the police to arrest, hold in custody and question a person who is suspected of committing an offence. This part also provides for the rights of such persons in custody. The key provisions of Part 1 of the CJ(S)A that are relevant to these draft regulations are as follows.

Section 32 of the CJ(S)A provides the right of a person reasonably suspected of committing an offence to have a solicitor present during police interview. It applies to a person who is in custody or voluntarily attending for the purpose of being interviewed.

Section 44 of the CJ(S)A provides that a person in custody has the right to consult with a solicitor at any time. CJ(S)A specifies that consultation may be any appropriate method. It is anticipated that telephone and video conferencing will be used, except where the person in custody is considered vulnerable under section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003 and a solicitor is requested to attend by the custody officer. New legal assistance provisions are desirable to ensure cost effective delivery of legal advice under section 44.

Section 16 of the CJ(S)A introduces the a new procedure, known as investigative liberation, which allows a person being held in custody to be released from custody on any condition which is necessary and proportionate for the purpose of ensuring the proper conduct of the investigation . Under section 19 of the CJ(S)A, a person subject to investigative liberation can apply to a sheriff for review of the conditions.

Section 26 provides a person in custody having been charged with an offence may be released on an undertaking only if the person signs the undertaking. The terms of the undertaking are the person undertakes to appear at a specified court as a specified time and comply with conditions imposed. Under section 30 of the CJ(S)A, a person may apply to a sheriff to have the condition imposed under section 26 reviewed.

Section 35 of the CJ(S)A introduces post-charge questioning where an application to the court can be made to question a person after they have been charged with an offence. This will mainly be used when new or significant evidence comes to light after the initial charge has been made. Under section 36(1)(a) of the CJ(S)A, where a warrant has been granted to

arrest the person in respect of an offence or the person has appeared before a court in respect of the offence, the application to the sheriff for authorisation may be made by the prosecutor.

In consequence of the CJ(SA), amendments are being made by the UK Parliament to reserved legislation in the Criminal Justice (Scotland) Act 2016 (Consequential Provisions) Order 2017 to apply aspects of Part 1 of the CJ(S)A to other bodies that have the power of arrest in Scotland such as the Ministry of Defence Police. The Order is due to commence on 25 January 2018. Criminal legal assistance will also be available on the same basis where the application of Part 1 is extended by that UK Order.

Background

Currently public funding of legal advice, in the context of advice in a police station is available in the form of Advice and Assistance (A&A) through the Police Station Duty Scheme.

A&A is suited to police station advice in that it was designed to allow relatively modest levels of legal advice to be provided quickly without the full scrutiny of applications that would be necessary for legal aid for court proceedings. However in some respects A&A is administratively cumbersome. When the Police Duty Scheme was introduced in 2011, it was on an interim basis with a commitment to review the fee arrangements when the various reviews on the criminal justice system had been completed. The implementation of the CJ(S)A marks the end of that process.

The current Police Station Duty Scheme arrangements are managed by the Scottish Legal Aid Board (SLAB) under section 31(8) of the 1986 Act. A&A may only be provided in relation to those exercising their rights under section 15A of the Criminal Procedure (Scotland) Act 1995 by a solicitor arranged by SLAB. SLAB maintain a list of solicitors in a duty rota scheme whereby those solicitors are allocated a duty period additionally SLAB operate the Solicitor Contact Line (SCL). The SCL acts as the handling interface for requests from Police Scotland, and arranges the duty cover through duty solicitors or SCL solicitors. Although only duty solicitors may provide police stations advice and advice most solicitors are on the duty lists and in the majority of cases clients will get advice from their solicitor of choice via the SCL.

Fees for A&A are detailed in Part 2 of Schedule 3 of the Advice and Assistance (Scotland) Regulations 1996 (the 1996 Regulations).

Over time, SG has removed any means testing and contributions for police station advice to the effect that currently the provision is for free legal advice for everyone who exercises the statutory right to police station advice. The full potential cost of this to the legal aid fund has never fully materialised. It is thought that at least 60% of telephone advice given by solicitors in private practice is given without engaging with the advice and assistance formalities. Solicitors are dissuaded from claiming because the A&A process is cumbersome and requires a hard copy signature

After advice has been provided, the solicitor has to prepare a fee claim. Most solicitors submit their A&A accounts online. The online account still requires a breakdown of the individual elements of the fees claimed.

The current feeing arrangements have resource costs to both the solicitor and the Scottish Legal Aid Board (SLAB).

Changes

In its paper "Legal Assistance in Scotland Fit for the 21st Century" the Law Society of Scotland (LSS) recommended that SG introduce a system of block fees, in addition to harmonising and streamlining, as much as possible, all funding arrangements in relation to summary crime. CJ(S)A has allowed SG to move forward on some of these recommendations by introducing block fees for police station advice and streamlining the payment system to solicitors for that advice.

Regulation 5 amends into Schedule 3 of the 1996 Regulations new block fee tables. Part 3 sets out the fees for ABWOR for proceedings under section 19, 30 and 36(1)(a) of the CJ(S)A. Part 4 sets out fees for A&A where a person has exercised their right to have a solicitor present under section 32 or 44 of the CJ(S)A.

In addition a higher rate of A&A is payable to a solicitor where the work takes place at an unsocial time and the definition of unsocial time includes weekends and specified holidays.

Recognising the cumbersome nature of claiming for police station advice Regulation 5(2) removes the requirement for applications for A&A to be signed and solicitors can claim payment online simply by using the National Custody System number.

Most of the anticipated legal work will take place a time when proceedings have not commenced and therefore would be either A&A or ABWOR. However, it is possible that some of the work may arise after a solicitor has been granted criminal legal aid. The amendments to the Criminal Legal (Scotland) (Fees) Regulations 1989 and the Criminal Legal Aid (Fixed Payments)(Scotland) Regulations 1999 by regulation 4(1) and 6(2) of these Regulations provide that the fee for the work will be same regardless of whether it is A&A, ABOWR or criminal legal aid.

With the introduction of the CJ(S)A SG has confirmed the right of a suspect to legal advice when being interviewed and added a right to consult with a solicitor at any time.

It is an issue, not a risk, that the cost of police station advice post implementation of the CJ(S)A will be higher than incurred now simply by virtue of the circumstances in which a suspect a police station may take legal advice.

These regulations also remove references in the legal regulations to the Criminal Procedure (Scotland) Act 1995 where they are no longer relevant and substitute reference to the to CJ(S)A as appropriate.

There is the opportunity to make changes and new provision by way of block fees that will have a positive benefit to the legal aid system in terms of reducing administrative costs to both SLAB and the profession.

There is also the opportunity to simplify the system of fees, as the previously cumbersome administrative process for A&A for police station advice will be automatic with only the National Police Custody number being required to enable the solicitor to claim payment.

Consultation

Meetings were held with the Law Society's Legal Aid Negotiating Team (LANT) to discuss fees for police station duty in light of the commencement of the CJ(S)A. Initial proposals were presented to the LANT on 8 March 2017. The fee levels in the original proposal were based on the legal aid costs in the financial memorandum of the Criminal Justice (Scotland) Bill and equated to an additional cost of £2.8m per annum to the legal aid fund.

The Minister for Community Safety and Legal Affairs met with the Law Society on 14 March 2017 and subsequently Ian Moir, LANT convener, wrote to the Minister with counter proposals. These proposals were costed by SG at around £4.3m per annum.

SG reconsidered their proposal and the counter proposal from LSS and agreed to a number of changes.

- Agreed to extend the times when an anti-social hour's premium will be applied
- Agreed to apply that anti-social premium to travel time
- Agreed to apply that anti-social premium to telephone calls
- Increased the block fees from the original proposal

The new offer from SG raises the spend on police station advice from £300k per annum to £3.1m per annum and is an additional pressure on the legal aid budget. This new offer was formally communicated to the profession on 11 May 2017.

At a meeting on 29 June 2017 between the Minister for Community Safety and Legal Affairs and the LSS it was agreed SG would consider the LSS suggestion that savings made by the increased use of diversions and alternatives to prosecution could fund an increase in the level of block fees considered.

Analysis of savings and forecast of spend continued to reflect an overspend, against budget allocation, on the legal aid fund.

The Minister wrote to the LSS on 30 July to confirm that SG could not offer any increase in the level of fees from the 11 May 2017 offer.

A consultation on the draft SSI closed on 15 September 2017. Responses were received from:

SG Victims and Witnesses Team
Police Scotland
Dunfermline District Society of Solicitors
Edinburgh Bar Association
Law Society of Scotland

The consultation exercise did not raise any fundamental concerns with the working of the new regulations but the level of block fees on offer was raised by each stakeholder from the legal profession.

Impact Assessments

An EQIA has been completed on Criminal Legal Assistance (Miscellaneous Amendments)(Scotland)Regulations 2017 and is attached. No groups with protected characteristics were identified as being adversely impacted by these regulations.

The CJ(S)A and the legal aid regulations around it will increase certainty for those detained at a police station around their right to advice, this will have a positive impact on justice.

A CRWIA was not considered necessary.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is an additional £3.1m spend on legal aid and advice.

Scottish Government
Justice Directorate

October 2017