POLICY NOTE

THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2015

SSI 2015/xxx

The above instrument is to be made in exercise of the powers conferred by sections 9, 33(2), (3) and (3A) and 36(2)(c) of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

Policy Objectives

Provisions in the Courts Reform (Scotland) Act 2014 are being implemented in September 2015, relating to: criminal proceedings in the Sheriff Appeal Court, all-Scotland sheriff courts for specified civil proceedings, and judicial review. The policy objective of this instrument is to adapt the framework and arrangements in existing regulations to accommodate these changes by:

- making available criminal legal aid and assistance by way of representation (ABWOR) in criminal appeals to the Sheriff Appeal Court, and for appeals and references from that court to the High Court of Justiciary;
- setting fees for representation at bail appeals;
- ensuring fees for counsel are available for new judicial review processes and in respect of appeal or referral from the Sheriff Appeal Court to the High Court; and
- applying detailed fees to work done by solicitors in all-Scotland sheriff courts.

Criminal appeals to the Sheriff Appeal Court

Regulation 4(2) makes appeals to the Sheriff Appeal Court against conviction, sentence, other disposal or acquittal distinct proceedings for the purposes of criminal legal aid. This means that these appeals will require a separate grant of legal assistance.

Solicitors will be paid detailed fees as set out in Part 1 of Schedule 1 to the Criminal Legal Aid (Scotland) Fees Regulations 1989 for criminal appeals to the Sheriff Appeal Court. Regulation 3(3) allows these fees to be paid.

ABWOR is currently available for an appeal to the High Court under section 174(1) of the Criminal Procedure (Scotland) Act 1995 arising from appeal to the competency, relevancy or plea in bar of trial. This is part of the same grant of ABWOR made for the initial proceedings. Regulation 6 ensures that ABWOR continues to be available for the appeal regardless of whether it takes place in the Sheriff Appeal Court or the High Court. These appeals to the High Court are excluded from the fee structure set out in the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. This means detailed fees are paid to the solicitor for the appeal in addition to the fixed payments for the initial proceedings. Regulation 5(2) ensures this continues to be the case regardless of whether the appeal takes place in the High Court or the Sheriff Appeal Court.

Regulation 4(3) only allows the employment of counsel in the Sheriff Appeal Court with prior approval of the Scottish Legal Aid Board. Where counsel do represent a client in the

Sheriff Appeal Court, regulation 3(4)(a)(i) allows them to be paid at the same rates as if the proceedings were taking place in the High Court.

Regulation 3(2) ensures that, where there is a dispute between the Scottish Legal Aid Board and a solicitor or counsel as to the amount of fees or outlays allowable for criminal proceedings in the Sheriff Appeal Court, the matter will be referred for taxation to the Auditor of the Court of Session.

Bail appeals

Bail appeals are not distinct proceedings for the purposes of criminal legal aid and therefore do not require a separate grant of legal assistance. Under the provisions of the Courts Reform (Scotland) Act 2014, they may take place in either the High Court or the Sheriff Appeal Court depending on the circumstances. This means that solicitors may represent clients in bail appeal proceedings before the Sheriff Appeal Court.

Regulation 5(3) makes a fee for representation at each diet or continued diet of a bail appeal available to a solicitor where counsel is not employed, in addition to the existing fee for non-advocacy work in relation to a bail appeal. Regulation 3(4)(b) and (d) aligns fees for junior and senior counsel with this structure by making the fee they are currently paid for representation at a bail appeal diet available at any continued diet.

Appeals and referrals to the High Court from the Sheriff Appeal Court

The Sheriff Appeal Court may refer points of law to the High Court for consideration during the course of proceedings. These will not require a separate grant of legal assistance. Further, decisions of the Sheriff Appeal Court can be appealed to the High Court. Regulation 4(2) means that such appeals will require a separate grant of legal assistance.

Regulation 3(4)(c) and (e) make fees within a range available for junior counsel and senior counsel in both appeals and referrals to the High Court from the Sheriff Appeal Court. As with existing fees in a range for hearings, regulation 3(4)(a)(ii) ensures that counsel seeking a higher fee within the range must justify this by establishing that either an unusually high level of preparation was required or that novelty of the issues of law, unusually complex issues of fact, or issues of considerable legal significance had a significant effect on the conduct of the case.

Fees for counsel (civil)

New procedures for judicial review are being introduced by section 89 of the Courts Reform (Scotland) Act 2014. Regulation 2(2)(a) makes the junior counsel fee for a motion for first orders under the current system available for an oral hearing at permission stage or procedural hearing under the new procedure. It also makes the junior counsel fee for a first or second hearing under the current system available for a substantive hearing under the new procedure.

Regulation 2(2)(b) and (3) sets “catch-all” fees for representation at hearings by counsel in ordinary actions and in proceedings in the sheriff court respectively. These are intended to make sure a fee is payable to counsel for any new procedural hearings they are involved in as procedures continue to develop.

All-Scotland courts

Section 41 of the Courts Reform (Scotland) Act 2014 allows Scottish Ministers to allow a specified sheriff court to deal with specified types of civil proceedings for the whole of Scotland. This is being used to create a specialist personal injury court, which will use new procedures. The existing block fees will not be appropriate to the new procedure so regulation 2(4) makes detailed fees payable in those cases. As any new all-Scotland sheriff court could reasonably be expected to develop new procedures, regulation 2(4) also makes detailed fees payable for proceedings in any future all-Scotland sheriff court.

Consultation

Draft provisions were shared with the Scottish Legal Aid Board, the Law Society of Scotland, the Faculty of Advocates and the Auditor of the Court of Session. The Board is content with the regulations. The Faculty confirmed that it had no comment adverse or otherwise to make. No comments were received from the Auditor.

The Law Society raised three main points on the draft regulations:

- in respect of how it might affect solicitor advocates, that counsel fee levels for judicial review might not reflect the work involved in new procedures;
- that solicitor advocates would not be able to be paid counsel fees in the Sheriff Appeal Court, even where sanction for counsel is granted; and
- that solicitors representing clients in the Sheriff Appeal Court should be paid the same fee that junior counsel are currently paid for that work in the High Court.

Counsel predominantly provide representation in judicial review cases funded by legal aid. The Faculty of Advocates has expressed no concerns in relation to the fees being made available for this work.

Solicitor advocates may only charge counsel fees where they are using extended rights of audience, which they will not be doing in the Sheriff Appeal Court. The Scottish Government will consider this point in its discussion with both the Law Society and the Faculty on a range of issues affecting solicitor advocates and counsel.

The most flexible of the existing solicitor fee structures is being made available for Sheriff Appeal Court work, namely detailed fees. This flexibility accommodates any uncertainty in the types and amount of work that may arise from new procedures, by providing remuneration in line with the work actually and reasonably undertaken by the solicitor. Counsel fee rates will be paid for Sheriff Appeal Court work only to counsel, where sanction has been given to instruct them.

Impact Assessments

An equality impact assessment has been completed on the draft SSI and is attached. There are no equality impact issues.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that publicly-funded legal assistance will clearly be available for new courts and procedures, and fees will be available to solicitors and counsel doing that work. The shifting of work into the new courts means that there is a group of cases that currently require representation by counsel, which will no longer necessarily require counsel to be instructed. The Scottish Legal Aid Board estimates that this will reduce expenditure from the Legal Aid Fund by around £1.4 million per year.

Scottish Government
Justice Directorate

9th June 2015