POLICY NOTE

THE LEGAL AID (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2015

SSI 2015/337

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

Following concerns raised by the Justice Committee, this instrument does not require a solicitor to seek prior approval from the Scottish Legal Aid Board before instructing counsel. It also makes provision for solicitor advocates to be paid criminal legal aid counsel rates in the Sheriff Appeal Court. These measures allow legal professionals to do the same work as they do now for the same fees as in the High Court, while agreement is reached on an alternative bespoke structure for the Sheriff Appeal Court.

Criminal appeals to the Sheriff Appeal Court

Regulation 4 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 ("the Fees Regulations") for criminal appeals to the Sheriff Appeal Court. These are the same rates as are paid for criminal appeals to the High Court. Regulation 3(4) allows these fees to be paid.

Where counsel represent a client in the Sheriff Appeal Court, they will be paid at the same rates as if the proceedings were taking place in the High Court. Regulation 3(5)(a)(i) amends the notes on the operation of Schedule 2 to the Fees Regulations to make this clear. Regulation 3(2) amends the Fees Regulations' definition of "solicitor advocate" to allow solicitor advocates to be paid on the same basis as counsel in respect of proceedings in the Sheriff Appeal Court.

Regulation 3(3) 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 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 hearing or continued hearing 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(5)(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 hearing available at any continued hearing. Solicitor advocates can also access this fee by virtue of regulation 3(2).

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 means that such appeals will require a separate grant of legal assistance.

Regulation 3(5)(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. Solicitor advocates can also access this fee by virtue of regulation 3(2). As with existing fees in a range for hearings, regulation 3(5)(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.

Financial Effects

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. However, solicitors do not need to seek prior approval from the Scottish Legal Aid Board before instructing counsel in the Sheriff Appeal Court. The Scottish Legal Aid Board estimates that the transfer of cases to the new personal injury court will reduce expenditure from the Legal Aid Fund by around £1.2 million per year.

Scottish Government
Justice Directorate

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