



**THE LAW SOCIETY
of SCOTLAND**
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Brief

The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015

Law Society of Scotland Memorandum of Comments

August 2015

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

Background

The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 were laid in the Scottish Parliament on 9 June 2015. The Regulations make changes to legal aid payment structures in order to accommodate changes made by the Courts Reform Act 2014.

Comments

Regulation 3(3) provides that 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.

The Impact of the Regulations

We expect the following impacts:

1. People who are eligible for legal aid will have difficulty in finding a solicitor to take on a summary criminal appeal
2. Where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court he or she will be deprived of choice of representative: he or she will not be able to instruct a solicitor advocate as counsel in the Sheriff Appeal Court despite the significant experience of solicitor advocates in conducting summary appeals in the High Court
3. The changes will have a disproportionate impact on clients based out-with Edinburgh

We do not believe these outcomes will be positive for the justice system. We do not believe they were intended by the Scottish Civil Courts Review.

1. People will Have Difficulty in Finding a Solicitor

People who are eligible for legal aid will have difficulty in finding a solicitor to take on a summary criminal appeal. This is because it will be difficult for solicitors to act on behalf of these clients because of low payment.

Existing Arrangements

At present, summary criminal appeals are dealt with by both counsel and solicitor. Sanction for counsel is automatically granted for all summary appeals on the basis they are heard in the High Court. The work is chargeable:

By the solicitor, under Part 1 of Schedule 1 of the 1989 Regulations “Part 1”; and
By counsel, under Part 2 of Schedule 2[E] of the 1989 Regulations “Part 2”

Other than for the representation at the hearings, summary appeal work can be carried out by EITHER a solicitor OR an advocate or solicitor advocate.¹ There are certain items of work that are almost always carried out by the advocate or solicitor advocate because of their complexity and the block fees available under the Part 2 fees. For representation at the Appeal Court hearings, the advocate or solicitor advocate will charge for the advocacy under the Part 2 fees AND the solicitor will charge for supporting the advocacy under the Part 1 fees.

The Part 1 fee rates (fees payable to the solicitor) have not been adjusted since they were fixed in 1992. These detailed fees are not suitable for general summary criminal work and now only apply in limited circumstances, for example, where a block fee is not appropriate because of very significant numbers of witnesses and productions.²

¹ For example, if the solicitor carries out an item of work, he or she will charge under the Part 1 fees. If the advocate or solicitor advocate carries out the item of work, he or she will charge under the Part 2 fees.

² Under regulation 4A of the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 a solicitor may seek to have a case designated as an exceptional case and is paid, as a result, detailed fees rather than a fixed payment. See Chapter 11.20 of the SLAB Handbook for details of the test to be applied.

New Arrangements

All summary criminal appeals will lie to the Sheriff Appeal Court. There will be provision to appeal a decision of the Sheriff Appeal Court to the High Court.³ Such an onward appeal may only be made on a point of law, and only with the permission of the High Court. We would expect onward appeals to be extremely rare.⁴

Sanction for counsel will not be automatic in the Sheriff Appeal Court. The Regulations provide that employment of counsel in the Sheriff Appeal Court will need the prior approval of SLAB.⁵ We do not expect sanction for counsel to be granted regularly in the Sheriff Appeal Court.⁶ In cases where sanction for counsel is not granted, the solicitor will be required to carry out all of the work in a summary criminal appeal, including the advocacy itself. The funding will come from the Part 1 fees only. This limits the funding available for a summary criminal appeal to the extent that the work will not be economically sustainable.

EXAMPLES OF CHANGES IN FUNDING FOR SPECIFIC ITEMS OF WORK⁷

A one hour hearing for an appeal against conviction:

Under existing arrangements - **£292.20⁸**

Under the new arrangements - **£54.80⁹**

A half-hour hearing for an appeal against sentence:

Under existing arrangements - **£171.10¹⁰**

Under the new arrangements - **£27.40¹¹**

³ Section 119 of the Courts Reform (Scotland) Act 2014, amending the Criminal Procedure (Scotland) Act 1995

⁴ Paragraph 135, Financial Memorandum to the Courts Reform (Scotland) Act 2014 - [http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20\(Scotland\)%20Bill/b46s4-introd-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Courts%20Reform%20(Scotland)%20Bill/b46s4-introd-en.pdf)

⁵ Regulation 4(3)

⁶ Given existing numbers of counsel instructed in lower courts as well as sections 132 and 133 of the Financial Memorandum to the Courts Reform (Scotland) Act 2014.

⁷ Comparison of items of work in summary criminal appeal cases under existing arrangements in the High Court against same cases (where sanction for counsel has not been granted) in the Sheriff Appeal Court after regulations are implemented.

⁸ Block fee of £250 paid to the Advocate or Solicitor Advocate and £42.20 paid to the solicitor. Existing arrangements allow £250 block fee for the Advocate/Solicitor Advocate PLUS £10.55 per quarter hour for the supporting solicitor.

⁹ Fee to the solicitor will be £27.40 for the first half hour and £13.70 for each subsequent quarter hour.

¹⁰ Block fee of £150 paid to the Advocate or Solicitor Advocate and £21.10 paid to the solicitor. Existing arrangements allow £150 block fee for the Advocate/Solicitor Advocate PLUS £10.55 per quarter hour for the supporting solicitor.

Preparing a 4-page written submission for an appeal against sentence:

Under existing arrangements - **£100**¹²

Under the new arrangements - **£24**¹³

Drafting a 3-page Adjustment to a Stated Case for an appeal against conviction:

Under existing arrangements - **£82**¹⁴

Under the new arrangements - **£18**¹⁵

We believe the fee levels under the new arrangements are inadequate. The rates of remuneration will make summary appeals work unsustainable having regard to the work involved as well as the overheads solicitors incur in preparing and presenting appeals. This will create an access to justice issue for clients.

There is an equality of arms issue. In July, we were advised by the Crown Office and Procurator Fiscal Service that Advocate Deputes, rather than Procurators Fiscal, would be appearing for the Crown in the Sheriff Appeal Court, at least initially.¹⁶ This means that the state will be represented by a senior prosecutor, but legal aid appellants will be underfunded to the extent that they will be unlikely to be able to secure representation.

2. Where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court he or she will be deprived of choice of representative

Solicitor advocates are experienced solicitors who obtain an extension of their rights of audience by undergoing additional training.

The existing legal aid legislation restricts solicitor advocates from the definition of counsel unless they are acting in connection with their extended rights of audience in the High

¹¹ Fee to the solicitor will be £27.40 for the first half hour and £13.70 for each subsequent quarter hour.

¹² Block Fee of £100 paid to the Advocate or Solicitor Advocate.

¹³ Fee to the solicitor will be £6 per page.

¹⁴ Block Fee of £82-£200 paid to the Advocate or Solicitor Advocate for stated case adjustments.

¹⁵ Fee to the solicitor will be £6 per page.

¹⁶ Email from COPFS dated 7 July

Court.¹⁷ This means that, in lower court cases, it is not possible to instruct solicitor advocates when sanction for counsel has been granted in a legal aid case. This anomaly will be carried over to work undertaken in the Sheriff Appeal Court.

This means that where a legal aid client obtains sanction for counsel in the Sheriff Appeal Court, he or she will have to select an advocate and not a solicitor advocate, despite the fact that solicitor advocates have been conducting summary criminal appeals as counsel in the High Court for over 20 years and have built up significant experience and expertise in this area.

SLAB may consider a request to allow a second solicitor to assist in the conduct of a summary appeal but, even if the second solicitor is a solicitor advocate, he or she will be restricted to the Part 1 fees.¹⁸ Solicitor advocates are unlikely to be willing to continue to carry out this work for the significantly reduced levels of payment.

Where sanction for counsel is granted by SLAB, the legal aid payment available to the advocate will be the same as it is in the High Court. For example, the block fee payable to an advocate for presenting a summary appeal against conviction will be £250. A solicitor (whether or not a solicitor advocate) presenting the case in the Sheriff Appeal Court will receive only £27.40 for the first half hour and £13.70 for each subsequent quarter hour. For a half hour hearing, the solicitor or solicitor advocate will receive less than a ninth of the remuneration available to the advocate.

Where sanction for counsel is granted, the legal aid client will be restricted in his or her choice of representative. He or she will have no option but to choose an Advocate. The option to instruct a solicitor advocate as counsel will be available for private payers only. The arrangements deprive clients of choice of representative and restrict competition within the legal aid market place.

¹⁷ The Criminal Legal Aid (Scotland)(Fees) Regulations 1989 regulations define “solicitor-advocate” as “a solicitor who, in relation to the proceedings, has exercised a right of audience conferred by virtue of section 25A (rights of audience in specified courts) of the Solicitors (Scotland) Act 1980”. It is worth noting that there is equivalency between an Advocate and Solicitor Advocate in private cases. The Tables of Applicable Fees within the Acts of Sederunt are the same for both Advocates (Counsel) and Solicitor Advocates - Acts of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (as amended)

¹⁸ SLAB Draft Guidance, received by the Society on 25 August 2015

3. The changes will have a disproportionate impact on clients based out-with Edinburgh

Summary criminal appeals will continue to be administered centrally with work being focussed in Edinburgh.¹⁹

The regulations create practical problems. At present, much appeal work emanating from outside Edinburgh is referred to Edinburgh firms on an agency basis. The reduction in funding means that the Edinburgh-based referral network will cease to operate for summary appeals. For example, the Part 1 fee rates, by themselves, are too low to allow a solicitor or appellant to negotiate an agency fee with agents in Edinburgh.

It is not realistic to expect solicitors to travel to the Sheriff Appeal Court in Edinburgh for the low rates available. This will create difficulties for appellants based outwith Edinburgh. For example, where a person in Inverness is unfairly convicted, he or she is unlikely to be able to find an Inverness-based solicitor willing to travel to Edinburgh to conduct a 30 minute summary appeal hearing for remuneration of £27.40 and limited travel fees.

We recommend that steps are taken to ensure that appellants are able to engage with the centralised Sheriff Appeal Court through each of the local lower courts in Scotland, limiting the need for solicitors or unrepresented appellants to have to travel to Edinburgh, at least for pre-Hearing matters.

Alternative Suggestions

In our comments on the draft regulations we suggested that the Government introduce a block fee for summary appeals work. The Government responded that it lacked the time and data to introduce a block fee.²⁰ As an interim measure, we suggested that the High Court rate that is currently paid to junior counsel for conducting appeals could be adopted for this work. In other words, rather than limiting the solicitor to charging the Part 1 fees, the solicitor could be allowed to charge the Part 2 fees for certain items of work. This would allow time for costing work to be carried out for the introduction of a block fee whilst

¹⁹ SPICe Briefing, Courts Reform (Scotland) Bill, page 27

http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_14-23.pdf

²⁰ Email from Scottish Government, 18 May 2015

providing adequate remuneration in the interim. This would generate savings to the legal aid fund because SLAB would be paying for only one legal representative. The Government simply stated that these fees were reserved to counsel.²¹

Conclusion

The Part 1 Fees do not reflect the specialist type and amount of work that requires to be undertaken in a summary criminal appeal. It is disappointing there has been no attempt to review the complexity of the work to determine a reasonable remuneration for the solicitor. Preparing and presenting a summary criminal appeal is complex and requires skills not found elsewhere in summary criminal business. The work is time-consuming. Many hours of preparation are often necessary and complex documents are required to be drafted and submitted to the court before the full hearing. The work cannot be undertaken for the low levels of payment proposed.

In 2013-14 there were 714 legal aid applications granted for summary criminal appeals.²² Over the years, the number of appeals for summary criminal appeals has been on a gradual downward trend, reducing in line with summary criminal cases overall. However, the rate of summary cases being appealed has remained reasonably consistent at around 1.7%.²³ We expect a reduction in this rate and expect an increase in the number of unrepresented accused in summary appeals. We would encourage the Scottish Government to monitor the relevant statistics and we undertake to assist in this process.

Appeals from courts of summary criminal jurisdiction have made an important contribution to modern jurisprudence and have helped shape the law in Scotland.²⁴ A properly funded Sheriff Appeal Court would safeguard the integrity of Scots law and preserve access to justice by creating an accessible court structure. Unfortunately, the low payment rates means that legal aid clients will have serious difficulty in accessing the Sheriff Appeal Court.

In conclusion, the Society cannot support these regulations.

²¹ Policy Note to the Regulations

²² Data received from the Scottish Legal Aid Board, 27 July 2015

²³ Paragraph 136 of the Financial Memorandum to the Criminal Courts Reform (Scotland) Bill

²⁴ Some example of important summary appeal cases include: *Starrs v Ruxton*, 2000 J.C. 208, *Ambrose v Harris* 2011 SCCR 651, *Speirs v Ruddy* 2008 SLT 39

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