

EXECUTIVE NOTE

THE CRIMINAL LEGAL AID (FIXED PAYMENTS) (SCOTLAND) AMENDMENT REGULATIONS 2011

SSI 2011/162

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011 (“the Regulations”) amend the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (“the principal Regulations”).

Policy Objective

In 2009-10, there were over 290,000 grants of legal assistance and legal assistance expenditure was £150.5 million. In 2010-11, total net expenditure on legal assistance is expected to rise due to the VAT increase, increases in fees and an increase in demand for civil legal assistance. The Scottish Government’s budget will be cut by £1.3 billion in 2011-12 compared to this year. The legal aid and advice budget for financial year 2011-12 has been set at £142.3m compared to £155m in 2010-11, which is an overall reduction of 8.2%. The Scottish Legal Aid Board (“the Board”) is being asked to make savings of £1.1m (8.5%) in 2011-12 on its administration costs. This is a bigger proportion of savings than will be delivered on the Fund.

The financial circumstances of the public sector in Scotland mean that we need to ensure that taxpayers’ money is used effectively and efficiently to target the limited resources available on those who need them most and to help safeguard the long term sustainability of the legal aid system. The Regulations are therefore designed to deliver efficiencies and savings to ensure that legal aid and advice and assistance can be targeted at those most in need, whilst providing reasonable and affordable remuneration for solicitors undertaking summary criminal legal aid work.

The first policy objective is to pay solicitors only once for conducting a deferred sentence hearing, regardless of how many complaints are dealt with at the hearing. If a hearing relates to a single complaint then the payment remains as prescribed in the principal Regulations. If the hearing deals with more than one complaint the payment will be 150% of the currently prescribed amount, regardless of how many complaints were dealt with in that one hearing. Regulations 7 and 9 amend Schedules 1, 1A and 1B of the principal Regulations to give effect to this policy objective. It is estimated that this amendment will deliver circa £20,000 of savings to the Legal Aid Fund in 2011-12, £48,000 in 2012-13 and circa £50,000 for a full year.

The second policy objective is to widen the scope of what falls to be treated as a single matter attracting only a single fixed payment. Earlier savings provisions in 2004 provided for complaints arising from a breach of bail to be treated as a single matter with the original offence attracting only a single fixed payment. The provision made in 2004

only dealt with breach of bail. Breach of bail represents some 66% of the complaints that arise from a failure to appear. A further 21% of those complaints arise under section 150(8) of the Criminal Procedure (Scotland) Act 1995 (failure of accused to appear) and 6% arise under section 22(2) of that Act (breach of a police undertaking). Regulation 4 of the Regulations gives effect to the policy objective of bringing these further categories of case into the single payment regime. It is estimated that this amendment will deliver circa £108,000 of savings to the Legal Aid Fund in 2011-12, circa £259,250 in 2012-13 and circa £270,000 for a full year.

The third policy objective is to reduce the fixed payment allowable to solicitors where the solicitor represents an accused in the same court on the same day in respect of more than one complaint. This provision only relates to cases where an assisted person is receiving Assistance by Way of Representation (“ABWOR”) and pleads guilty to all charges. Presently, a solicitor can be paid the full core summary fee for tendering guilty pleas in respect of multiple unconnected complaints at a single hearing. Regulation 5 gives effect to this policy objective. It is estimated that this amendment will deliver circa £129,000 of savings to the Legal Aid Fund in 2011-12, circa £240,750 in 2012-13 and circa £250,000 for a full year.

The fourth policy objective is to reduce the payment for cases before the Stipendiary Magistrate’s Court. One of the key aspects of the summary justice reforms was the development of better appointed and trained lay magistrates in the JP courts who would be able to deal with more serious cases. As a result, the past few years have seen more serious cases now being routinely prosecuted at JP court level all over the country. This means that cases in the Stipendiary Magistrate’s Court are now generally closer to the cases in JP courts elsewhere as opposed to Sheriff Court cases. Further, in Glasgow, cases can often be programmed into either the Stipendiary Magistrate’s Court or the JP Court for convenience (for example the courts which have more available court slots), and not due to the seriousness of the case.

The Table below, based on figures supplied by the Board, provides an analysis of the share of business in each court and under a variety of case categories for summary criminal legal aid. This does not show how serious a case is, but the figures demonstrate that in terms of legal aid payments, the Stipendiary Magistrate Court is closer in profile to the JP court elsewhere in terms of case categories.

	Glasgow			Elsewhere	
	Stip	SH	JP	SH	JP
Road Traffic Act	23.4%	2.9%	31.1%	9.4%	30.8%
Assault	15.8%	32.1%	11.0%	31.7%	15.3%
Theft	15.4%	3.5%	13.7%	8.5%	18.1%
Breach of the Peace	13.3%	15.7%	17.4%	12.9%	15.0%
Drugs	8.7%	9.8%	7.1%	7.4%	4.0%
Police(S) Act	8.1%	6.3%	2.5%	5.1%	1.2%
Other	5.9%	17.8%	9.4%	14.4%	7.5%
Civic Gov. (S) Act	2.7%	0.6%	3.1%	1.0%	1.7%
Offensive weapons	1.8%	7.0%	0.3%	3.6%	0.0%
Attempt to pervert	1.4%	0.5%	1.0%	0.8%	0.6%
Vandalism	1.3%	0.5%	2.4%	1.0%	4.8%
Housebreaking	1.3%	1.6%	0.1%	2.7%	0.0%
Fraud	0.8%	1.6%	1.1%	1.5%	1.0%

Categories in which stip is closer in share to JP	64.1%
Categories in which stip is closer in share to SH	11.2%
Categories with no clear pattern	24.7%

For example, the percentage of business dealt with in the JP courts outside Glasgow under the case categories of assault, theft and breach of the peace are very similar to the percentages of work done under these case categories in the Stipendiary Magistrate's Court in Glasgow. The JP courts outside Glasgow deal with a much higher percentage of work under the case category of Road Traffic Act offences than does the Stipendiary Magistrate's Court in Glasgow. Work under the case categories of offences under the Police (Scotland) Act 1967, Offensive Weapons and Housebreaking are the three case categories where cases go to the Stipendiary Magistrate's Court in Glasgow that generally would not be in the JP court elsewhere. But that represents only 11% of the cases in the Stipendiary Magistrate's Court in Glasgow. Even if all of the work in the Stipendiary Magistrate's Court in Glasgow under the case category of offences under the Road Traffic Act was assumed to be sections 2, 3 and 5 (the most serious), then that would still only take the percentage of work in the Stipendiary Magistrate's Court in Glasgow that would likely go to the Sheriff Court elsewhere to 35%. That is the rationale for setting the summary fee at the middle of the level of the fees paid in the JP Courts and the Sheriff Courts.

Regulations 7 to 9 of the Regulations reduce the Stipendiary Magistrate's Court core payment to £390. Even with this reduction, solicitors in Glasgow will still be able to claim £390 for a guilty plea in the Stipendiary Magistrate's Court whereas elsewhere in the country a plea of guilty in the JP court attracts a payment of £150. It is estimated that this amendment will deliver circa £398,909.33 of savings to the Legal Aid Fund in 2011-12 and circa £652,500 for a full year.

The fifth policy objective is to reduce the core payment currently prescribed in the principal Regulations. The current prescribed rates are to be found in Schedule 1 of the principal Regulations. The payment of £315 is reduced by £20 and the payments of £515 and £565 are reduced by £30. In Schedule 1 there are also current payment levels for cases where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12. These payments are reduced and the new amounts are £270, £460 and £510 respectively. Schedule 1A currently provides for a payment of £515 (in both columns). Those payments are reduced by £30 to £485. Schedule 1B also provides for payments of £490 (both columns) for cases where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12. Again, these payments are reduced and the new amounts are £460 in both columns. Schedule 1B provides for a payment of £515. This too is reduced by £30. The new figure is £485. The payment of £150 is to remain unchanged. Regulations 7 to 9 give effect to this policy objective. It is estimated that this amendment will deliver circa £1,438,018.59 of savings to the Legal Aid Fund in 2011-12 and circa £2,388,776 for a full year.

The sixth policy objective is to reduce by half the new prescribed fees in Schedule 1 and 1A of the principal Regulations in the following circumstance: where the accused person appears from custody, is represented by the duty solicitor (whether or not the case is subsequently taken forward by the duty solicitor), a plea of not guilty is tendered and that plea is then changed to guilty before the start of the trial. Where a trial goes ahead, the full fees will be payable. The aim is to deliver the required savings by reducing the very significant discrepancy between the level of fees paid for a guilty and not guilty plea for solicitors operating under the duty scheme and to ensure that the appropriate plea is made at the earliest possible stage in the proceedings on the basis of the best possible advice from the solicitor. This also recognises that the duty scheme can, in some cases, provide new business to solicitors. It is of course always within the gift of the solicitor who will be acting for an accused person to attend the court personally. This amendment does not affect the fees set out in Schedule 1B which relate to ABWOR, where a plea of guilty has been tendered. Regulation 5 gives effect to this policy objective. It is estimated that this amendment will deliver circa £894,736.36 of savings to the Legal Aid Fund in 2011-12 and circa £1,601,057 for a full year.

Consultation

We have consulted with the Board and the Law Society of Scotland (“the Society”) on the Regulations. We have had a series of meetings with the Board and the Society on the detail of the Regulations.

In response to the Scottish Government’s original proposals to deliver savings on the legal aid fund, which included a significant expansion of the Public Defence Solicitors’ Office (“PDSO”), the Society wrote to the Cabinet Secretary for Justice on 7 January 2011 asking that consideration be given to a lesser expansion of the PDSO together with reductions in summary criminal fees. The Scottish Government’s original proposal was

based on previous discussions with the Society in which they made it clear that they wished to protect, as far as possible, the core summary criminal fees. The Cabinet Secretary wrote to the Society on 25 January 2011 confirming that he was happy to proceed on that basis. The proposals set out here are a specific package that has been agreed with the Society. The President of the Society wrote to the Justice Committee on 7 January 2011, making clear that the package of savings proposals presented here represent the best option for the profession and the public and commending the Government's general approach.

Business and Regulatory Impact Assessment

A Business and Regulatory Impact Assessment has been completed for the majority of the legal aid savings Regulations directly affecting legal aid providers, including these Regulations. This is due to be published very shortly.

Financial Implications

The Regulations are expected to make total savings of circa £2,988,664.28 in 2011-12 to the Legal Aid Fund and circa £5,212,333 full year savings from 2013-14.

Justice Directorate
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