

Final Business and Regulatory Impact Assessment

Title of Proposal

Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2013.

Purpose and intended effect

- **Background**

Since 1999 a solicitor providing “relevant” criminal legal aid in summary proceedings has been entitled to the fixed payments prescribed in Schedule 1 the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (“the principal Regulations”). “Relevant criminal legal aid” means criminal legal aid provided by a solicitor in relation to summary proceedings other than excluded proceedings. A solicitor can also apply to the Scottish Legal Aid Board (“the Board”) where he or she feels that the case may be exceptional. It is for the Board to determine whether the case can be granted exceptional case status as set out in regulation 4A of the principal Regulations.

However, unlike for criminal legal aid, there is no provision for payment to solicitors over and above this fixed amount where the circumstances of the case are exceptional in relation to Assistance By Way Of Representation (ABWOR). ABWOR is usually the available aid type in summary criminal proceedings where the accused pleads guilty. Fixed payments were extended to summary ABWOR proceedings in 2008.

- **Objective**

The policy objective is therefore to make a provision for ABWOR cases which mirrors the current provision in relation to summary criminal legal aid cases and allow the Board to determine whether the case is exceptional. Exceptional circumstances will, as a result of the amendments made by the regulations, be prescribed in the same way as applies to summary criminal legal aid cases. The decision on exceptional case status will rest with the Board, as it does for those cases. This means that the Board can decide that the solicitor shall not receive fixed payments for this case, but shall instead be entitled to lodge a detailed account at the end of proceedings.

- **Rationale for Government intervention**

Last year in *PF Edinburgh v Marshall* (ED11011303) the sheriff upheld a devolution minute which argued that there was a breach of article 6 of the European Convention on Human Rights (ECHR) because the accused’s agents had incurred costs significantly above the fixed fee provided for in the 1999 Regulations, and would be forced to withdraw from acting for the accused as a result.

The Appeal Court recently upheld the sheriff’s decision, describing the circumstances in the case as being exceptional. Scottish Ministers cannot predict when such exceptional circumstances might arise again in a case, nor when the Appeal Court might make a similar decision.

The proposal is consistent with the Government Economic Strategy strategic objective of Equity. In the Strategy document, the Cabinet Secretary for Justice notes that “[a]n effective justice system, founded on the principles of equity before the law and protection of social and property rights, is the fundamental underpinning of a flourishing economy.”

Consultation

- **Within Government**

The Board is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. The Board has been consulted in the development of these regulations.

- **Public Consultation**

The regulations directly affect solicitors providing legal aid services and may affect applicants for legal aid. Consultation with legal aid solicitors is covered in the ‘Business’ consultation section.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (“the Society”). The Society’s work on legal aid issues is led by the criminal and civil legal aid negotiating teams, each being panels of experts in the field and responsible to the Council of the Society. The criminal legal aid negotiating team has been consulted in the development of these regulations.

Options

Option 1: Do nothing

Where an accused person is eligible for criminal ABWOR, the representing solicitor may only receive a fixed payment, as prescribed in regulations 6 and 6A of the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 (SSI 2003/179). Should the solicitor withdraw from representing for any reason, it may be that another solicitor is willing to take on the case. This would be less likely where the original solicitor has withdrawn due to incurring significant costs. Representation may be available from the Public Defence Solicitors’ Office (PDSO) but requires the accused to be aware of this option.

Option 2: Amend regulations to allow for payment above the fixed payment in criminal ABWOR cases granted exceptional status

The Appeal Court’s decision to uphold a devolution minute argued that there was a breach of article 6 of ECHR because the accused’s agents had incurred costs significantly above the fixed payment available and would be forced to withdraw from acting for the accused as a result. A change to the principal Regulations to allow payment above the fixed payment for criminal ABWOR where the case is granted exceptional status would significantly reduce the likelihood of agents raising a challenge on the grounds that they would be forced to withdraw from acting due to unusually high costs.

- **Sectors and groups affected**

These measures will largely impact on the Board and those solicitors' firms carrying out publicly funded legal assistance. There will be some positive impact on a small number of criminal ABWOR applicants.

- **Benefits**

Option 1: Do nothing

This option would not impact on the Board, thereby potentially saving upwards of £75,000.

Option 2: Amend regulations to allow for payment above the fixed payment in criminal ABWOR cases granted exceptional status

A change to the principal Regulations to allow payment above the criminal ABWOR fixed payment where a case is granted exceptional status would mean that an accused whose case was granted such status could continue to be represented by the same agent. The agent could be remunerated for reasonable costs incurred in the exceptional circumstances of the case.

- **Costs**

Option 1: Do nothing

There would be no costs to the Board. Solicitors' firms carrying out publicly funded legal assistance might in some cases incur costs significantly above the criminal ABWOR fixed payment. There will be a possible reputational cost to the Scottish Government for not acting to correct an identified problem.

Option 2: Amend regulations to allow for payment above the fixed payment in criminal ABWOR cases granted exceptional status

As with anything relating to rare situations, it is difficult to estimate accurately the costs resulting from the regulations. The Scottish Legal Aid Board estimates that, based on an estimated 50 criminal ABWOR cases being granted exceptional status, the cost of the draft regulations to the Legal Aid Fund will be between £75,000 and £120,000 per year and more likely at the lower end of that range.

Solicitors' firms who carry out publicly funded legal assistance would not incur costs significantly above the criminal ABWOR fixed payment where they were granted exceptional status.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the Society, which negotiates with Government on behalf of the profession on the regulations proposed. The Society was content with the proposed change to regulations.

The profession includes solicitors employed in firms, partners and sole practitioners. If there is any impact as a result of these proposals, the majority of providers affected is likely to be small providers (both small and micro sized businesses) due to the

dominance of small legal services providers in the legal aid market. In the Board's 2010 solicitor survey¹, partners were asked how many solicitors their firm employed across Scotland. Almost half of the firms (48%) employed 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

An initial Equality Impact Assessment has been carried out on the proposals to introduce exceptional case status to criminal ABWOR. It did not identify any negative impact as a result of this.

- **Competition Assessment**

In our view, having applied the Office of Fair Trading competition filter, the proposal will not impact on competition within the legal aid market. The regulations do not directly or indirectly limit the number or range of suppliers. They do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

- **Test run of business forms**

The proposed regulations will not introduce any statutory business forms.

Legal Aid Impact Test

The Scottish Legal Aid Board estimates that, based on an estimated 50 criminal ABWOR cases being granted exceptional status, the cost of the regulations to the Legal Aid Fund will be between £75,000 and £120,000 per year and more likely at the lower end of that range.

Enforcement, sanctions and monitoring

The proposals will be enforced through secondary legislation. The proposals do not create any new enforcement or monitoring mechanisms. The Board will, however, operate an appeal mechanism for solicitors who have been turned down for exceptional case status, as it already does for other types of legal assistance where exceptional case status may be granted. The Board will monitor the implications of these measures and has responsibility for administering the Scottish Legal Aid Fund.

Implementation and delivery plan

The policy will be implemented by the Board. It is intended that the regulations will come into force on 26 April. The Board are fully aware of this timescale.

- **Post-implementation review**

The Scottish Government and the Board will review the impact of this legislation within 10 years through consideration of analysis of data which is collected routinely by the Board.

Summary and recommendation

It is recommended that amendments to criminal legal assistance regulations are implemented (option 2).

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p><u>Legal aid solicitors</u> None.</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> None.</p>	<p><u>Legal aid solicitors</u> May incur costs significantly above the criminal ABWOR fixed payment, even where the circumstances of the case were exceptional.</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> Possible reputational cost for not acting to correct an identified problem</p>
2	<p><u>Legal aid solicitors</u> Could recover costs above the criminal ABWOR fixed payment where the case was granted exceptional status.</p> <p><u>Legal aid applicants</u> Could continue to be represented by the same agent.</p> <p><u>Scottish Government</u> Likelihood reduced of a breach of article 6 of ECHR because the accused's agents have incurred costs significantly above the fixed payment available and been forced to withdraw.</p>	<p><u>Legal aid solicitors</u> None.</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> Estimated cost of £75,000 to £120,000 per year on the Scottish Legal Aid Fund.</p>

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

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