

POLICY NOTE

CRIMINAL LEGAL AID (FIXED PAYMENTS) (SCOTLAND) AMENDMENT REGULATIONS 2013

SSI 2013/92

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

Policy Objectives

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 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 aid type available in summary criminal proceedings where the accused pleads guilty. Fixed payments were extended to summary ABWOR proceedings in 2008

Last year in *PF Edinburgh v Marshall* (ED11011303) the sheriff dismissed the case against the accused and upheld a devolution minute which argued that there was a breach of article 6 of the European Convention on Human Rights because the accused’s agents had incurred costs significantly above the fixed payment 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.

These Regulations therefore amend the 1999 Regulations to provide that in certain circumstances, and subject to certain conditions, the Board may determine that a solicitor is not to receive fixed payments for work done in connection with a grant of ABWOR but instead is to receive payment based on the amount of time spent and work done in providing the ABWOR.

The Regulations amend regulation 4A of the principal Regulations, which already makes provision for payment other than by fixed payments in respect of criminal legal aid, to extend that regulation to criminal ABWOR cases. Regulation 4A of the prescribes the factors to be taken into account by the Board in deciding whether to determine that a solicitor should not receive fixed payments; makes provision in relation to the form of application for a determination by the Board; requires solicitors to keep proper records of professional services and provide for a procedure for review of the Board’s decision.

These Regulations also amend regulation 4A of the principal Regulations to provide that, where there has been a change of solicitor, any solicitor who provided ABWOR to the assisted person at any time before that change is, in certain circumstances and subject to certain conditions, to receive payment based on the amount of time spent and work done.

Consultation

The Board, which administers the Legal Aid Fund, and the Law Society of Scotland, which is the regulator and representative body for the legal profession in Scotland, have been consulted on the proposals. Both bodies have indicated that they are content with the proposals.

Impact Assessments

An equality impact assessment has been completed on the draft SSI and is attached. No negative impacts were identified. The Board will continue to monitor the effect of the regulations as part of its ongoing programme of research and analysis on the supply of and access to legal aid and factors that might affect this.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that solicitors' firms carrying out publicly funded legal assistance could recover costs above the prescribed criminal ABWOR fixed payment where the case was granted exceptional status. The accused could continue to be represented by the same agent. The estimated cost to the Scottish Legal Aid Fund is £75,000 to £120,000 per year.

Scottish Government
Justice Directorate
7 March 2013