



The Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/337)

Law Society of Scotland Comments

October 2015

Background

On 22 September, all of the powers and jurisdiction of the High Court of Justiciary “HCJ” for summary criminal appeals were transferred to the Sheriff Appeal Court “SAC”.

Following concerns raised by the Justice Committee and the withdrawal of the draft affirmative instrument (the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015), the Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 were laid in the Scottish Parliament on 17 September.

Comments

This instrument does not require a solicitor to seek prior approval from the Scottish Legal Aid Board (SLAB) before instructing an advocate or solicitor advocate. It also makes provision for solicitor advocates to be paid at the same level as advocates in the SAC. We acknowledge that the Government has made considerable movement to ensure equality of representation for the benefit of the public.

Whilst a solicitor will still be able to choose to conduct a case in the SAC without instructing counsel, the payments available to the solicitor have not been revised since the previous draft set of regulations. We refer to our comments in our previous responses and would add that there remains significant concern amongst the profession about this issue.

It will be difficult for solicitors to act on behalf of legal aid clients without instructing advocates or solicitor advocates because of the low payment. The fee rates set by the regulations were last revised in 1992 and on an inflation adjusted basis, have reduced by 47.8% since in real terms. The fee available for advocacy is £54.80 per hour. Most HCJ hearings are set for half hour periods, and we expect similarly so in the SAC. Other fees available include travel, at £21.12 per hour, £2.40 for lodging documents at court, and £42.20 per hour for other work. It is from such fees that the overheads of running a small to medium sized enterprise must be met. By comparison, our Cost of Time Survey, which provides a transparent and objective method of establishing benchmark hourly rates, suggests an hourly rate for firms of £141.

The legal aid system should provide a reasonable remuneration for work done. It is a matter of concern that rates of remuneration have not been kept under review by the Government and that, year after year, the rates have reduced in real terms and that the legal aid budget continues to be set at levels which are below forecast expenditure. The justice sector overall has kept track of

inflation and other cost drivers. Legal assistance has not done so. In some areas, rates have not been updated for many years. The regulations adopt the legal aid rates in Part 1 of Schedule 1 to the Criminal Legal Aid (Scotland) Fees Regulations 1989. In a little over a year, these rates will have been frozen for a quarter of a century. Solicitors have reported to us that they are struggling to continue to undertake work for which these rates apply. We strongly believe that these fees are not appropriate for appeals work.

In a letter to the Justice Committee dated 17 September the Government stated:

“Individual elements of the detailed fee arrangements which were provided for in the regulations are not directly comparable with the current block arrangements for the High Court, but instead build up a total fee from individual items of work and activity.”

In fact, the “individual items of work and activity” including travel, waiting, and preparation are already chargeable by solicitors where they have instructed counsel. It is therefore both possible and reasonable to compare the fees available to solicitors under the two arrangements, particularly to highlight that solicitors would be expected to conduct summary criminal appeals by themselves for little more than the fees they would receive for sitting behind an advocate or solicitor advocate. It is simply not appropriate to restrict solicitors to the detailed fees, set at 1992 levels, where they conduct the appeal themselves. The fees for work carried out by advocates or solicitor advocates should be transferred to the solicitor if he or she is expected to undertake the same work.

The model accounts recently published by SLAB demonstrate that a solicitor would have to submit accounts with multiple ancillary charges in order to make up for the low payment available for core items of work in an appeal. Many of these charges would be difficult to evidence and therefore carry a high risk of abatement. As outlined previously, summary criminal appeals differ from other types of summary criminal procedures where detailed charging might be more appropriate. The specimen accounts have been analysed by the Society of Solicitor Advocates and we refer to their comments.¹

We believe that block fees should be made available for solicitors for specific items of work. The needs of the client and the work-load will remain the same and therefore block fees should be set at the same level as those currently paid to counsel. For example, this would mean a block fee of £150 for a hearing on a sentence appeal and £250 for a hearing on a conviction appeal. The block fee

¹ Supplementary written submission from the Society of Solicitor Advocates to the Scottish Parliament’s Justice Committee, 17 September 2015

for preparing a written case and argument would be £100 and the fee for drafting a bill of suspension, bill of advocacy or an application for a stated case would be set at £100 (the lower end of the scale of fees currently available). The fees for travel and meetings would, of course, still be allowable under the detailed fee basis. This proposal would create a sustainable and appropriate fee structure in support of the SAC. The arrangements would generate savings to the legal aid fund.

The driver behind the creation of the SAC was better use of judicial time. It was not intended as a cost saving exercise. Whilst savings can be made by limiting payment to a single legal representative, solicitors must be entitled to the same level of payment as counsel if they are expected to carry out the same level of work.

Six Month Review

The Government has stated:

“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.”²

We support this approach and we want to move to a position whereby solicitors are able to undertake appeal work for clients directly - without the need to appoint an advocate or solicitor advocate. We acknowledge the Government’s comments about engaging with the Society during the transitional six month period. However, we are also aware that the police station duty scheme was established by SLAB as an “interim scheme” in 2011 and that a final police station duty scheme has yet to be proposed, far less implemented. Regarding the Sheriff Appeal Court, we want to work with the Government as soon as possible to assist and participate fully in any review process so that final arrangements can be made within the six month period.

We intend to write to the members of the Justice Committee to report on the progress of these discussions early in the new year.

For further information and alternative formats, please contact:

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² Policy Note to the Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015