



**THE LAW SOCIETY
of SCOTLAND**
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Written Evidence

**Supplementary response to Justice
Committee**

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

We are grateful for the Justice Committee's consideration of the regulations affecting summary criminal appeals before the new Sheriff Appeal Court (SAC). Since the Committee's meeting of 8 September, we offered to and have met with officials from Scottish Government and the Scottish Legal Aid Board. This supplementary response summarises our concerns around the regulations.

Status quo

All summary and solemn criminal appeals are currently heard by the High Court of Justiciary (HCJ) sitting as a court of appeal, customarily sitting in Edinburgh. There were 911 appeals in 2013-14 out of 76,555 summary complaints. For the appellant, a solicitor will instruct either a solicitor advocate or advocate, as there is automatic sanction for counsel. Many appellants will not reside in Edinburgh, where the court sits, nor are their solicitors based in Edinburgh. Therefore, their solicitor can engage a local Edinburgh solicitor, who will instruct the appeal. Both the local solicitor and the Edinburgh agent share the fees accrued from this role.

Sheriff Appeal Court

The SAC is due to commence on 22 September. The Courts Reform (Scotland) Act 2014 (s118) transfers all of the powers and jurisdiction of the HCJ for summary criminal appeals to this new judicial tier. This new court is part of the package of measures introduced by the 2014 Act to ensure that cases are heard at the most appropriate judicial tier and dealt with by the most appropriate people. For the appellant, a solicitor will appear. In more complex or novel cases, an application can be made to SLAB for sanction for counsel to appear. Unlike HCJ appeals, prior legal aid regulations prevent solicitor advocates from appearing as counsel: they may appear as a solicitor, though the difference in fees between solicitors and counsel is significant.

Legal aid fees – proposed rates

The regulations currently before the Committee establish the fee structures for solicitors and for counsel at the SAC. These are set by reference to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. These fees 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, fixed fees of £6 for witness citation and execution, £2.40 for lodging documents at court, 5p per sheet of photocopying case bundles 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 expense rate for firms of £141.

Legal aid fees – from High Court to Sheriff Appeal Court

The fees available for solicitors to conduct SAC work are significantly less than those available for solicitor advocates or advocates for HCJ appeal work. For instance, for a one hour hearing for an appeal against conviction, under existing arrangements the fee would be £292.20; under the new arrangements, £54.80. For a half-hour hearing for an appeal against sentence, under existing arrangements the fee would be £171.10; under the new arrangements, £27.40. For the preparation of a 4-page written submission for an appeal against sentence, under existing arrangements the fee would be £100; under the new arrangements, £24. For the drafting of a three page Adjustment to a Stated Case for an appeal against conviction, under existing arrangements the fee would be £82; under the new arrangements, £18. As mentioned above, we believe that the demands of appeal work will remain broadly the same in the new SAC as in the HCJ currently and do not think that a radically different scale of fees is acceptable.

Legal aid fees – 'time and line'

The fees paid under these regulations are 'time and line', providing fees per hour and requiring detailed account submission. The fee increases in proportion to the time spent on the appeal. SLAB published on Thursday 10 September a number of specimen accounts. These highlight a number of challenges for access to justice. For instance, in the example cited of a solicitor attending from Inverness, for the day of the appeal, the total fees accrued are £244.83 for nine hours and forty-five

minutes of work: an hourly rate of £25.91 gross to the firm, from which salaries, national insurance, office rent, utilities, support staff, ICT and other costs must be met (and in due course, auto-enrolled pension contributions and living wage). Overall, for this example, 16 hours and 22 minutes of work are recorded and 33 separate items of work are accounted for a total fee of £696.53. In broad terms, this would equate to an hourly rate of around £42.65. However, only 15 of the 33 accounted items of work actually record the time involved; significantly more than 16 hours would have been expended on such an appeal, and consequently, the hourly rate for the total work involved, in our view, would be significantly less than £42.65. Not only do the fees proposed not reflect the complexity of appellate work, we do not believe that they offer an economically viable rate: revenue does not necessarily equate to profit.

Solicitor advocates

Solicitor advocates and advocates are both considered as counsel for HCJ appeals currently. Under the regulations currently before the Committee, where sanction for counsel is granted for SAC appeals in more complex and novel cases, only advocates will be able to appear. This is the effect of Regulation 2(1) of the Criminal Legal Aid (Scotland) Regulations 1996, which the Scottish Government has the power to amend through the regulations currently before the Justice Committee. Solicitor advocates can appear as solicitors in the SAC, but in more complex and novel cases, they cannot be sanctioned as counsel and cannot employ the advocacy, expertise and skill which they currently provide at the HCJ. We believe that the 1996 regulations, as currently drafted, create an arbitrary barrier to open competition and undermine the client's ability to choose their own representative.

Transition period and flexible approach

SLAB published *Sheriff Appeal Court information* on 4 September, announcing its transitional and flexible approach to SAC work. The first element is sanction for counsel: "most applications for sanction for an appeal against conviction during the transitional period will be granted, where the solicitor has no experience of conducting criminal appeals." The aim of the 2014 Act was to create a new judicial tier, ensuring that cases are dealt with at the most appropriate level and by the most appropriate people. It is unclear how this 'experience' test would apply and this liberal approach to sanction simply masks the fact that the rates available for solicitors, who would otherwise have to conduct this work, are wholly inadequate.

The second step is flexibility around preparation fees: "During the transitional period, allowance would also be made for solicitors who haven't previously done the preparation work for summary appeals against conviction to ensure any reasonable additional preparation time required was allowed in the fees submitted." However flexible around preparation fees, and we have now seen SLAB's specimen accounts, these fees are not viable to run a business in 2015.

Access to justice

The appeals process is complex and has a number of strict timescales, including seven days following conviction or sentence within which to make an appeal. It will be difficult for appellants to find a solicitor to undertake this work within such a period. Appeal work is demanding for professional representatives, and would be far more onerous for unrepresented appellants. In our opinion, it will also be challenging for appellants in rural areas: because the court is based in Edinburgh; because there are few solicitors who will undertake this work at these rates, and few solicitors in more rural areas in any event; because legal aid rates for travel are uneconomic for rural firms; and because the opportunity to fee share between a rural practitioner and an Edinburgh agent is unlikely with the low rates available.

In short, these regulations will make appeal work unviable for solicitors to conduct. For such complex work with such significant consequences for appellants' liberty and livelihood, we cannot support these regulations and have asked the government to reconsider. If it would assist the committee, we would be willing and available to provide oral evidence.

For further information and alternative formats, please contact:

Andrew Alexander

Access to Justice

DD: 0131 226 8886

E: AndrewAlexander@lawscot.org.uk

The Law Society of Scotland
Atria One, 144 Morrison Street
Edinburgh EH3 8EX
www.lawscot.org.uk