



Law Society
of Scotland

Written Evidence

Justice Committee - The Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017

5 December 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

This paper is in response to the Justice's Committee call for written evidence which is considering The Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017 (Regulations). We thank the Justice Committee for providing the Society with the opportunity to comment and provide input.

General Comments

Part 1 of the Criminal Justice (Scotland) Act 2016 (2016 Act) is being implemented on 25 January 2018. It introduces significant changes to the current arrangements in relation to suspects' being interviewed rights to legal advice. These new procedures relate to the right of consultation with a solicitor at any time while in police custody, self-contained court procedures which can arise in relation to review of conditions of investigative liberations or bail undertakings and post-charge questioning.

All these changes will provide significantly more effective protection for suspects' human rights in Scotland. More people will now have access to advice from a solicitor with the inclusion of safeguards for some of the most vulnerable in society who are now guaranteed access to a solicitor through the operation of section 33 (2) of the 2016 Act. It provides that a person may not consent to being interviewed without having a solicitor present if they are:

- under 16 years
- 16 or 17 years and under a supervision order or
- over 16 years and owing to a mental disorder unable to understand sufficiently what is happening or communicate effectively with the police

These provisions will also add to measures introduced earlier to safeguard the rights of suspects with the issue of the Letter of Rights for suspects (provided in a number of languages) which ensure that any suspect is made aware of their rights which includes their right of access to a solicitor (para 3).¹

These changes being brought in by the 2016 Act will result in an increase in the number of persons being entitled to legal advice. The Financial Memorandum to the Criminal Justice (Scotland) Bill estimated that an additional 163,360 people would be eligible to access legal advice. It recognised that not all of them will exercise their rights to solicitor access as they can of course decline access to advice. But the right of advice to a solicitor must be offered. The anticipated take-up rates for actual advice were estimated at 35% though to a large extent, that is unknown until such time as the 2016 Act is in force and the implications of the changes in practice can be assessed. Additionally, under the 2016 Act, there are a number of other factors that may affect solicitors, in that:

- when attending to provide advice to more vulnerable adults, this may well increase the time taken by solicitors at police stations;
- six hour review periods may require increased advice
- refusal of police bail could also extend the requirements for legal advice and
- questioning after charge and police bail could also result in an additional requirement to provide further legal advice.

Solicitors recognise that they will need to adapt their practices to meet the challenges of the changes being brought in by the 2016 Act. Since the number of clients requiring advice is expected to increase, this will have significant effects for our members' working practices in providing advice and potentially, representation at police stations 24/7 365 days a year.

Our members are committed to making the changes in the 2016 Act work effectively. Solicitors do need to be remunerated adequately for providing information, advice and representation (criminal legal assistance) as required.

The Regulations seek to amend various regulations made under the Legal Aid (Scotland) Act 1986. Sections 3, 4, 5 and 6 respectively of the Regulations make the necessary changes to secure the structure and fees payable in respect of criminal legal assistance. Section 4A (5) of the Regulations introduces Part 111 consisting of two tables of fees setting out the fee rate for solicitors for criminal legal assistance (consisting of Assistance by way of representation, and advice and assistance).

We would comment on the practical impact and fee levels proposed in these Regulations.

¹ <http://www.gov.scot/Resource/0042/00426560.pdf>

Practical Impact

Publicly funded expenditure on police station advice is a small proportion of the overall expenditure on criminal legal aid. The total cost of legal aid in Scotland fell in 2016-2017 to £135.7 million of which criminal legal aid formed approximately £85 million. Police station advice is only a small proportion of the overall costs. The Scottish Legal Aid Board (SLAB) has indicated that the additional cost to the Legal Aid Fund in respect of these Regulations will be £3.1 million². These estimated costs will include not only criminal legal aid paid in respect of solicitors in private practice but also includes the legal and running costs of solicitors employed by SLAB in the Solicitor Contact Line³ and the Public Defence Solicitors Office)

Criminal legal assistance can be required at any time of day or night. This is highly disruptive for those solicitors involved.

We had previously expressed considerable concerns about the equality and business and regulatory impact of these Regulations. A Business and Regulatory Impact Assessment (BRIA) but no Equality Impact Assessment) has subsequently been submitted in respect of these Regulations on 8 November 2017. It recognises under the Scottish Firms Impact Test that *'if there is any impact as a result of these proposals [to bring in the Regulations] the majority of the providers affected are likely to be small providers (both small and micro sized businesses)'*. Small businesses have less than 50 employees. Micro businesses have less than 10 employees.

The BRIA recognises that these Regulations will have an impact on all criminal legal firms since none have more than 50 employees. This recognises earlier submissions made by the Law Society about the impact of these Regulations on the profession.

These Regulations have therefore significant potential implications for solicitors in a number of ways:

- Those solicitors who have childcare or carer responsibilities may have problems in being able to attend a police station out of hours; and
- The approach that the Regulations take with regard to the 'specified holiday' under para 2 of Part IV of the Regulations. The Regulations do not recognise court holidays or other religious festivals which may well impact on the availability and anti-social effect on solicitors.

We understand that the Regulations make reference to public sector holidays, probably due to the way that SLAB's structure operates. We would consider that it would be better to make reference to the actual relevant local court holidays where the solicitor/firm is based.

² The Business and Regulatory Impact Assessment in respect of the Regulations dated 8 November 2017

³ The Solicitor Contact Line were £823 000 (SLAB Annual Accounts 2016-2017). These costs are only attributable to provision of the Police Station Duty Scheme.

- When and where a person requires criminal legal assistance varies according to a number of factors such as commission and detection of the crime followed by the identification of the potential suspect. We show the progression of a case to promote an understanding as to what is involved for solicitors by way of the practical effects of providing advice:

How is advice required?: Once a suspect is detained, arrested or attending voluntarily at a police station, the suspect has a statutory right to a private consultation with a solicitor before and at any other time during police questioning. The suspect may choose to waive his right to advice. If such a waiver is not exercised appropriately, any subsequent replies made by the suspect may well be evidentially inadmissible for court purposes. It is therefore vital for the criminal justice system that the procedures regarding right of advice secure fairness for the suspect.

How is a solicitor contacted?: SLAB operates a 24 hour daily telephone contact system for notification of a suspect's detention by the police. If a suspect asks for a named solicitor, SLAB staff will contact the named solicitor or firm so that they can arrange to assist the suspect if they choose to do so. This contact does and can arise at any hour of day or night, inclusive of any public holidays or personal arrangements and circumstances affecting the solicitor, as indicated above.

What professional responsibilities does the solicitor have?: Where the named solicitor intends to assist the suspect, they will contact the police station to advise them of this within 30 minutes of receiving the call from SLAB. Advice can be given by phone. The provision of that advice can take any amount of time. Though the call has been received, as police stations are busy places, it may well not be possible to arrange to give advice to a suspect immediately even where the solicitor is immediately available. The suspect may be asleep. There may be no 'charged' mobile phone. There may be other operational considerations such as the investigating officer changing shift or dealing with other cases. Frequently too, phone calls can be interrupted due to factors beyond everyone's control. The result is an impact on the actual time spent where the time spent on the legal advice element may be relatively small.

Thereafter, if it is in the professional judgment of a solicitor a personal attendance is required or indeed if the suspect requests it, a solicitor will be required to attend at a police station. The solicitor will inform the police that they will attend.

Attendance times are estimated for travel at one hour (urban) / two hours (rural). This needs to consider availability of modes of transport and weather conditions as well as the time within the period of detention when the investigating officer considers that the interview may be likely to take place. This can be hard to judge in ongoing inquiries such as serious crimes effectively leaving the solicitor on stand-by unpaid awaiting the requirement for his attendance at the police station. There are also personal arrangements to consider, such as the solicitor awaiting the return of a partner to allow for childcare duties or work or court commitments for the following morning.

Interviews too seldom are straightforward. They may be delayed because of operational requirements of the police and health considerations for the suspect. There may be a need for substantial briefing from the police. Interviews can be and are interrupted due to requirements to obtain search warrants or consider medical examinations in sex offences. What that means for the solicitor is that what might be anticipated

as a short (relatively standard) interview can take much longer than unanticipated with consequential implications for family and professional requirements.

Where the solicitor cannot attend: There are arrangements for SLAB under the duty scheme to cover that advice if required.

This case scenario should show how onerous the police station duty can be for a legal profession who is committed to providing professional criminal assistance in the best interests of their client. There are clear benefits for the named solicitor to be in a position to provide criminal legal assistance where requested by a suspect. The most significant benefits are in early advice provision and support for their client at a time of need and in due course, continuity of representation with the inevitable economies of scale that this brings forward in avoiding unnecessary duplication or repetition of work. That may not always be possible but should be obtained wherever possible.

Fee levels

The arrangements provided in the fee levels have not been increased since 1992 dating before the creation of the Scottish Parliament. Since devolution, Scotland's laws and other parts of the legal system have gone through substantial reform, yet legal aid has not gone through a similar process. The police station duty scheme in place today was established in 2011 as a result of the *Cadder* case.

The arrangements put in to support the police station scheme were complex and recognised to be on an interim basis pending substantial changes to the criminal justice system which are now coming in with the implementation of the 2016 Act. The Scottish Government were committed to reviewing these fees following the publication of the recommendation of the Carloway Review. That Review was published in 2011. These Regulations are due to commence in January 2018, almost seven years later. The complexity and bureaucracy of the structure of the fee arrangements as outlined above meant that fees around 70% of all criminal legal assistance cases were not claimed by the profession. The current arrangements which do need regularised have operated on the goodwill of the profession.

Reflecting on the practical impact of the Regulations, we continue to propose that the viable rate of remuneration for solicitors in providing police station advice is the rate for the VIPER (Video Identity Parade Electronic Recording) parade. VIPER parades are usually carried out during office hours at a time when the solicitor would normally be working. The operation of the fee structure of VIPERs is complex but is set at £114 per hour. It does provide a basis for calculation what the fee level should be as it does take into account the disruptive and unplanned nature of the work.

Payment of travel at half the rate otherwise available is also impractical. We refer to the estimated time travel implication as discussed above. There are a number of factors which have not been fully considered such as the location of the suspect's detention. The solicitor/firm might be based at one location. That does not mean that their client will not travel and may well be detained at a police station a distance from the solicitor's business or indeed home (when considering the out of hour requirement) address. Police operational requirements and centralisation of custody units may well mean that a suspect is moved from Edinburgh to Greenock for example. There are implications too arising from the gender of the accused and

availability of holding cells at a police station that may affect the distance and time required by the solicitor to travel.

Overall we believe that the level of fee proposed for police station advice in the Regulations risks the effective operation of the changes being made in the 2016 Act. The profession do need to be able to plan and put suitable and appropriate arrangements in place to service their clients. That has implications for their staffing levels as at present, criminal legal assistance is provided by a legally qualified solicitor. Members may require to arrange for staff to cover additional shifts as no one can be certain how the full effect of the changes in 2016 Act will impact with the number of suspects requiring advice and/or attendance.

There is a need to ensure that there is effective and practical protection of suspects' rights that the 2016 Act intends. Remuneration for solicitors must take account of the requirements of the changing landscape and providing the effective professional service that the public expects and demands.



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