The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

35th Meeting, 2013 (Session 4)

Tuesday 3 December 2013

The Committee will meet at 10.00 am in Committee Room 2.

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.

2. **Subordinate legislation:** The Committee will take evidence on the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [draft] from—

   John Swinney, Cabinet Secretary for Finance, Employment and Sustainable Growth;

   Susan Gilroy, Senior Policy Manager, and Felicity Cullen, Legal Services, Scottish Government.

3. **Subordinate legislation:** John Swinney (Cabinet Secretary for Finance, Employment and Sustainable Growth) to move—

   S4M-08390—That the Justice Committee recommends that the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [draft] be approved.

4. **Criminal Justice (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Assistant Chief Constable Malcolm Graham, Police Scotland;

   Chief Superintendent David O'Connor, President, Association of Scottish Police Superintendents;

   David Ross, Vice Chairman, Scottish Police Federation;

   and then from—

Shelagh McCall, Commissioner, Scottish Human Rights Commission;

Tony Kelly, Chair, Justice Scotland;

Alan McCloskey, Acting Deputy Chief Executive, Victim Support Scotland;

Sandie Barton, Helpline Manager and National Co-ordinator, Rape Crisis Scotland;

Lily Greenan, Manager, Scottish Women's Aid.

5. **Subordinate legislation:** The Committee will consider the following negative instrument—

   Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320).

6. **Offender Rehabilitation Bill (UK Parliament legislation):** The Committee will consider its approach to the legislative consent memorandum lodged by Kenny MacAskill, Cabinet Secretary for Justice (LCM(S4)27.1).

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The papers for this meeting are as follows—

Agenda item 2

Paper by the clerk	J/S4/13/35/1
Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [draft]	

Agenda item 4

Private paper	J/S4/13/35/2 (P)
Copy of the Bill, accompanying documents and SPICe briefing	
Written submissions received on the Bill	

Agenda item 5

Paper by the clerk	J/S4/13/35/3
Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320)	

Agenda item 6

Private paper	J/S4/13/35/4 (P)

Justice Committee

35th Meeting, 2013 (Session 4), Tuesday 3 December 2013

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

- Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [draft]

Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013 [draft]

Purpose of instrument

2. This instrument was laid under the Charities and Trustee Investment (Scotland) Act 2005 and amend the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Regulations 2011. The instrument makes changes to the powers of the Office of the Scottish Charity Regulator in relation to Scottish Charitable Incorporated Organisations.

3. The Scottish Charitable Incorporated Organisation (SCIO) was created by the Charities and Trustee Investment (Scotland) Act 2005. It enables a charitable organisation to have the advantages of charitable status while also enjoying limited liability for debts for those involved in the organisation in the same way as those involved in a company have limited liability for its debts. A SCIO is one of a number of forms of charity, and SCIOs appear on the Office of the Scottish Charity Regulator's (OSCR) register of charities.

4. SCIOs are regulated by OSCR and must demonstrate to OSCR's satisfaction that their purposes are charitable. SCIOs are entirely the creation of the 2005 Act. It is important to note that, if the requirements of the 2005 Act are not met, a SCIO ceases to exist. The organisation has no ability to function or deal with its assets (also known as "legal personality") if it is not recognised as a SCIO.

5. The 2005 Act also regulates what names a charity can have. Section 10 outlines restrictions to the names a charity can use, including where a name is too similar to that used by another charity or where the name is likely to mislead the public (eg. in relation to the purpose of the charity or by giving the impression that it is connected to another organisation when it is not). Names which breach the restrictions are termed "objectionable" names. OSCR can issue a direction requiring a charity to change its name. Section 12(5) of the 2005 requires OSCR to remove a charity from the register of charities if it fails to change its name in line with such a direction.

6. However, the requirement as it currently stands creates problems if it is directed against a SCIO. Because a SCIO has no legal personality separate from its appearance on the charities register, its affairs cannot be wound up in an orderly fashion after it has been removed from the register. Usually, a SCIO can only be

removed from the charities register after its affairs have been wound up in line with the requirements of the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Regulations 2011 (the 2011 Regulations). This puts in place procedures to deal with a SCIO's assets and/or liabilities in a fair and transparent manner. The 2011 Regulations empower OSCR to make an application to the Court of Session where a SCIO fails to follow the required procedures.

7. The purpose of the draft Regulations is to ensure that a SCIO can only be removed from the register of charities where it has refused to change a name deemed "objectionable" after its affairs have been wound up in line with the requirements in the 2011 Regulations. Thus, regulation 2(2) of the draft Regulations disapplies section 12(5) in relation to SCIOs. Regulation 2(3) of the draft Regulations places a SCIO which fails to comply with a direction to change its name in to the winding up procedures set down by the 2011 Regulations.

8. Further details on the purpose of the instrument can be found in the policy note in the Annexe to this paper and an electronic copy of the instrument is available at:
http://www.legislation.gov.uk/sdsi/2013/9780111021842

Consultation

9. The policy note explains that as the instrument provides the necessary framework to achieve the original policy intention of the 2011 Regulations, a full public consultation has not been undertaken. However, the OSCR has been consulted and is fully supportive.

Delegated Powers and Law Reform Committee consideration

10. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 12 November and agreed that it did not need to draw the attention of the Parliament to it on any grounds within its remit.

Justice Committee consideration

11. The Justice Committee is required to report to the Parliament on this instrument by 10 December 2013.

12. The instrument is subject to affirmative procedure (Rule 10.6. of Standing Orders). The Cabinet Secretary for Finance has, by motion S4M-08390, proposed that the Committee recommends the approval of the instrument. The Cabinet Secretary will attend the Committee meeting on 3 December to answer any questions on the instrument, and then, under a separate agenda item, will be invited to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament accordingly by 10 December 2013.

13. The Parliament will then be invited to approve the instrument.

14. The Committee is asked to delegate to the Convener authority to approve the report for publication.

ANNEXE

Policy Note

The Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2013

The above instrument was made in exercise of the powers conferred by sections 64(d) and 103(2) of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"). The instrument is subject to affirmative resolution procedure.

Policy Objectives

Chapter 7 of the 2005 Act introduced a framework for the creation, operation and regulation of a new legal form of incorporation for Scottish charities, namely the Scottish Charitable Incorporated Organisation ("SCIO"). Being a SCIO allows Scottish charities to enjoy the benefits of incorporation, notably there being no liability on members and there being a legal personality for the charity, without requiring them to become companies or industrial and provident societies. SCIOs are registered with and regulated by the Office of the Scottish Charity Regulator ("OSCR").

Section 64 of the 2005 Act provides for the Scottish Ministers to make regulations on a range of matters related to the operation of SCIOs, and, specifically under section 64(d), the Scottish Ministers can make provision concerning the winding up, insolvency or dissolution of a SCIO. The Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Amendment Regulations 2011 ("the 2011 Dissolution Regulations") came into force on 1 April 2011 and set out the detailed requirements for the winding up and dissolution of solvent and insolvent SCIOs.

Section 10 of the 2005 Act sets out the circumstances when a body's (including a SCIO's) name may be considered to be objectionable. This provision ensures an applicant's, charity's or proposed SCIO's name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.

Section 12 of the 2005 Act allows OSCR to direct a charity to change its name where it considers that the name is objectionable. It should be noted that a name is objectionable whether or not another charity (or any other body/person) contacts OSCR regarding it.

Where OSCR directs a charity to change its name, the charity must do so within the time period set out in the direction. If the charity does not comply with the direction, section 12(5) provides that OSCR must remove it from the Scottish Charity Register ("the Register").

When charities that are not SCIOs are removed from the register they can continue to exist as a non-charitable legal entity. The position is different for SCIOs. The body corporate status of a SCIO is dependent on it being registered as a charity. It can have no separate legal existence if it is not a charity and would require to re-constitute itself as a different type of legal body if it wanted to continue to exist. Under section 55 of the 2005 Act when a SCIO is removed from the Register and is, no longer a charity, it therefore ceases to be a SCIO and ceases to exist.

Because of this, the policy intention behind the 2005 Act and subsequent 2011 Dissolution Regulations was that a bespoke dissolution framework in the 2011 Dissolution Regulations would ensure that the affairs of a SCIO would always be wound up prior to it being removed from the Register. No other exit route from the Register would be available. So essentially, a SCIO would always have to apply to OSCR to be dissolved before it could be removed from the Register.

Additionally, in order to ensure that the interest of beneficiaries, (potential) creditors and other third parties are protected, under the 2011 Dissolution Regulations the SCIO must satisfy certain conditions prior to seeking dissolution and removal from the Register, and must publicise this. The conditions include ensuring that all outstanding debts and liabilities are to be transferred and that any surplus assets are to be transferred to another body (or bodies) with charitable purposes the same as or as closely resembling those set out in the SCIO's constitution.

This policy intention is achieved in regulations 3 and 4 of the 2011 Dissolution Regulations for SCIOs which voluntarily seek dissolution and removal and for SCIOs which fail the charity test.

However, the 2011 Dissolution Regulations omitted to address the position of a SCIO which has failed to change its name in accordance with section 12 of the 2005 Act. Section 12 enables OSCR to remove the SCIO from the Register where it has failed to comply with a direction to change its name. The requirement to remove the SCIO in that section does not allow for the SCIO to be dissolved first. Therefore, there is no protection for interested third parties or surplus assets.

This instrument will amend the 2011 Dissolution Regulations to disapply the simple requirement on OSCR to remove a SCIO from the Register under section 12(5) of the 2005 Act and instead provide that, where a SCIO does not comply with a direction under section 12(2) or (3) to change its name, OSCR must direct the SCIO to make and application to OSCR to be dissolved and removed from the Register in accordance with regulation 3 or 4 of the 2011 Dissolution Regulations.

In the event that the SCIO does not apply for dissolution as directed, the amendments in this instrument have the effect that OSCR must apply to the Court of Session to deal with the SCIO appropriately. The amendments made by the instrument also allow OSCR to revoke or vary any directions given to a SCIO as regards change of its name and the powers of OSCR are to be subject to the review and appeal mechanisms set out in Chapter 10 of Part 1 of the 2005 Act.

The amendment to the 2011 Dissolution Regulations applies to any directions issued by OSCR on or after 6th January 2013, when this instrument comes into force. To date OSCR has issued only one direction under section 12 was not complied with. That case brought to light the omission in the 2011 Dissolution Regulations. In the absence of provision in the 2011 Dissolution Regulations about dissolution of the SCIO before removal, OSCR sought from the SCIO details of its current assets and liabilities, but the SCIO failed to respond. OSCR considers it unlikely that the SCIO has undertaken any activities or has any assets. As a result, in August 2013 OSCR removed the SCIO from the Register in accordance with its obligation to remove under section 12.

It is not expected that OSCR will issue any further directions under section 12 until after this instrument is in force.

Consultation

Given that the proposed changes will provide the necessary framework to achieve the original policy intention of the 2011 Dissolution Regulations, a full public consultation has not been undertaken. OSCR has been fully consulted and is supportive of this instrument.

Financial Effects

There will be costs to OSCR associated with processing applications and monitoring compliance but these were always included in the assumptions and estimates of its running costs, in accordance with the original policy intention of the 2011 Dissolution Regulations and were to be met within existing budgets.

Scottish Government Local Governance and Communities Directorate
November 2013

Justice Committee

35th Meeting, 2013 (Session 4), Tuesday, 3 December 2013

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:

- Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320)

2. Further details on the procedure for negative instruments are set out in Annexe B attached to this paper.

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320)

Introduction

3. The purpose of the instrument is to amend the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 as regards the fees payable to solicitors for carrying out legal aid work in relation to solemn criminal proceedings.

4. It has been argued in a recent criminal appeal case that the inflexibility of the 1989 Regulations results in defending solicitors being unable to claim payment from the legal aid fund for the work that they undertake where a case does not progress to trial. In which case, solicitors could be less prepared to take on cases or carry out work for which they possibly would not be paid. By extension, accused people whose cases raised such issues could find that they were unable to find solicitors to represent them, or that less work might be done by their solicitors to prepare for a case than by the prosecution, who would be fully remunerated for their work. Article 6 of the European Convention on Human Rights (brought into UK law through the Human Rights Act 1998) guarantees the right to a fair trial. "Inequality of arms", where one side to a court case is able to prepare their case better than the other side, can prejudice the right to a fair trial.

5. Separately, but connected to the fact that payment under the 1989 Regulations is restricted when a case does not go to trial, recent sheriff court decisions have introduced a new interpretation of the 1989 Regulations which allows for payment to be made for a "diet" (or hearing) of deferred sentence when no trial has taken place. The Scottish Government is concerned that this may have implications for increased spending from the legal aid fund.

6. The instrument seeks to address these issues and comes into force on 8 January 2014.

7. The Law Society of Scotland, while content with the provisions so far as they address the Appeal Court's concerns, is of the view that the cost of these new provisions should not be met by a reduction in detailed solemn fees. The Society wishes additional money to be allocated by Scottish Ministers to the Fund's expenditure rather than to have the cost be borne by the legal profession.

8. The Law Society of Scotland has since made a written submission to the Committee, which concludes that Society cannot support these regulations (correspondence attached at Annexe A).

9. Further details on the purpose of the instrument can be found in the policy note (see below). An electronic copy of the instrument is available at: http://www.legislation.gov.uk/ssi/2013/320/contents/made

Delegated Powers and Law Reform Committee consideration

10. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 26 November 2013 and determined that it did not need to draw the attention of the Parliament to the instrument on any grounds within its remit.

Justice Committee consideration

11. Members are invited to consider the instrument and make any comment or recommendation on it. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 6 January 2014.

Policy Note: Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320)

The above instrument was made in exercise of the powers conferred by section 33(2)(a) and (3) of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

Policy Objectives

Overview

The Appeal Court commented in the recent Bill of Advocation *HMA v McCrossan* ([2013] HCJAC 95) that a number of aspects of the current solemn criminal legal aid fee structure for solicitors may not be wholly compliant with the European Convention on Human Rights (ECHR). The relevant legislation is the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 ("the 1989 Regulations"). The issues identified by the Court were:

- the lack of provision in the 1989 Regulations for a preparation fee for trial being payable where proceedings are terminated without trial, as set out at paragraph 3(m) of the Notes on the operation of Schedule 1;
- a lack of flexibility in the 1989 Regulations compared to the Criminal Legal Aid (Fixed Payment) (Scotland) Regulations 1999 ("the 1999 Regulations")

which apply to summary proceedings for which criminal legal aid or assistance by way of representation (ABWOR) is available. Under regulation 4A of those regulations a solicitor may seek to have a case designated as an exceptional case and is paid, as a result, detailed fees rather than a fixed payment; and

- an absence in the 1989 Regulations of a prescribed fee for preparation for a plea in bar of trial, particularly where there has been a protracted procedural history to the case (for example, as an inclusive fee in Part 2 of the Table of Fees in Schedule 1).

Further, there have been three decisions by sheriffs (in relation to the cases of *HMA v Fraser Cormack* on 2 April 2012, *PF Dumbarton v Elizabeth McKeen* on 1 May 2013 and *HMA v Paul Owen* on 30 October 2013) about provisions of the 1989 Regulations relating to the circumstances in which a solicitor can be paid for preparation for a diet of deferred sentence. All these cases concerned a claim for preparation for a deferred sentence in circumstances where there had been an early plea and the case did not proceed to trial.

A diet of deferred sentence occurs after conviction when the court has postponed its final decision about any punishment, usually three to 12 months after conviction. The diet at which that final decision is to be taken is the diet of deferred sentence. This is not to be confused with an "adjourned diet", which is where sentence is put off for a few weeks after conviction for further information, such as social enquiry reports.

The relevant provisions are paragraph 4 of Part 2 of the Table of Fees in Schedule 1 to the 1989 Regulations, and paragraph 3(j) to (m) of the Notes to that Schedule. The Scottish Legal Aid Board ("the Board") has interpreted these provisions to allow a solicitor to be paid a general preparation fee under paragraph 4(a) (payable once only and not payable if the case does not proceed to trial), *and* a supplementary preparation fee under paragraph 4(b) (payable twice only, and only in circumstances where the fee under paragraph 4(a) is payable).

The recent decisions indicated that the reference to payment to preparation for a deferred sentence (payable twice only) can be paid in circumstances where fees under paragraphs 4(a) and (4)(b) (for subsequent days of trial) are *not* payable – i.e. paragraph 4(b) may be read on its own rather than in conjunction with paragraph 4(a). The effect of this would be that a solicitor could be paid for preparation for a diet of deferred sentence whether or not the case proceeded to trial. This is not the result intended by paragraph 3(j) to (m) of the Notes to the Schedule, which is intended to restrict the circumstances in which preparation fees are chargeable.

This outcome causes a potentially significant increase in expenditure from the Scottish Legal Aid Fund ("the Fund"). Alternatively, if the Board does not follow these decisions, there is arguably a lack of flexibility under the 1989 Regulations of the same sort as concerned the Appeal Court to allow a fee for preparation for a deferred sentence diet where one does not take place.

The Scottish Government's intention, therefore, in this instrument is to address the concerns of the Appeal Court and these recent decisions, by amendment of the 1989 Regulations.

As regards preparation for diets of deferred sentence, the policy objective of this instrument is to allow sufficient flexibility for payment of a preparation fee for these diets where there is not ultimately a hearing but without incurring excessive cost to the Fund.

As regards the concerns of the Appeal Court the policy objective is that this instrument should amend the 1989 Regulations to:

- give the Board, or auditor, the discretion to pay a fee for work reasonably undertaken where no other fee is prescribed by the 1989 Regulations;
- allow a solicitor to apply to the Board for a solemn case to be granted exceptional case status;
- clarify the availability of fees for research, detailed fees more generally and existing fees for preparation;
- extend the circumstances in which a fee for preparation may be available;
- make changes to the availability of a preparation fee for diets of deferred sentence; and
- alter the amounts of the detailed fees payable for solemn proceedings to offset the costs of addressing the Appeal Court's concerns.

These provisions will apply to all new relevant cases starting on or after the coming into force date. Solicitors will also be able to "opt in" to payment under the principal Regulations, as amended by this instrument, for cases that commenced on or after 5 July 2010 (the date on which the relevant Schedule to the 1989 Regulations came into force) and have not yet concluded on the date this instrument comes into force. This application provision allows solicitors much greater flexibility in respect of the fees they can charge for current, ongoing cases.

Background

The 1989 Regulations set out the fees payable to solicitors (and counsel) in relation to solemn criminal legal aid cases. Fees payable to solicitors are set out in the Notes and Table of Fees in Schedule 1 to the Regulations, with general provisions being made in regulations 4 to 12. Part 1 of the Table of Fees sets out the detailed fees payable for separate items of work and Part 2 the inclusive fees which are payable for "blocks" of work by the solicitor.

The current solemn criminal legal aid fee structure was introduced by amendment of the 1989 Regulations in 2010. The introduction of inclusive fees for solemn cases in Part 2 of the Table of Fees was part of a movement away from detailed (or "time and line") accounting. It was felt that detailed accounting created a wide variation in fees payable in cases, and that a block payment system remunerating the solicitor for advancing the case from stage to stage would encourage dealing with the case as efficiently as possible. The changes made in 2010, agreed to by the Law Society of Scotland at the time, created a "hybrid" fee structure where some work is paid by block fee but a significant percentage continues to be chargeable on a detailed basis.

Under the 1989 Regulations as currently in force there is no separate, inclusive fee in respect of "preparation" for a preliminary plea. A fee for preparation is only payable where the inclusive fee in paragraph 4 of Part 2 of the Table of Fees is payable for bringing a case to trial and either:

(i) the indictment, containing a libel against the client, proceeds to trial; or
(ii) on or after the day fixed for trial, the Crown withdraws any libel against the client.

However, the following steps, which allow a solicitor necessarily to prepare for a preliminary plea or any court hearing, are all payable by way of detailed fees under Part 1 of the Table of Fees:

- perusing, for the first time, the indictment, witness lists, statements, productions and libels received from the Crown and defence precognitions;
- work in connection with the taking of witness precognition and the perusal of all defence statements where it has not been taken by the solicitor;
- all communications and meeting with the Crown and Procurator Fiscal Service ;
- where the accused is at liberty, all communications and meetings with the accused, otherwise covered by the block fee where the accused is in custody, subject to provision to allow detailed fees;
- consultations between the defence agent and counsel (if relevant);
- travel, waiting and attendance at court.

These steps are not an exhaustive list of work that detailed fees can be charged under Part 1 of the Table of Fees. Paragraph 1(1) of the Notes on Schedule 1 allows the Board to consider payment under Part 1 of the Table of Fees, on cause shown, for any other steps which may arise in the course of proceedings where the work done is not already caught by an inclusive fee under Part 2.

Whether any fee is payable is also subject to the requirement under regulation 10 that the work was actually and reasonably done, with due regard being had to economy.

In cases where summary criminal legal aid or ABWOR is available, payment is mostly made by means of fixed payments under the 1999 Regulations. Under regulation 4A of the 1999 Regulations a solicitor can apply for exceptional case status. This status allows the solicitor to "break out" of the fixed payment regime and be paid, instead, by means of detailed fees for each item of work done. There is no similar provision for exceptional case status in the 1989 Regulations for solemn proceedings.

Exceptional case status

Regulation 3 of the instrument inserts a new regulation 7A into the 1989 Regulations which will allow, in certain circumstances, a solicitor in solemn proceedings to seek exceptional case status for a case. This status means the solicitor will be paid detailed fees under Part 1 of the Table of Fees for each item of work done, and not be paid any inclusive fees under Part 2 of the Table.

This provision replicates, for the most part, regulation 4A of the 1999 Regulations. Differences between the two regulations are due to the different payment regimes between the 1989 and 1999 Regulations. For example, where under the 1999 Regulations a fixed payment of £485 for disposal of a sheriff court case is due, anything which adds considerably to the time taken by a solicitor in properly conducting the case is a factor under regulation 4A of those Regulations in relation to whether exceptional case status should be granted. Things which add to the time taken by a solicitor could arise where there are many witnesses, or many documents to be read.

Part 1 of the Table of Fees in the 1989 Regulations, on the other hand, sets out detailed fees. This means that where a solicitor has had to peruse many documents, the solicitor can already be paid for perusing each of them. As a result, the test in the new regulation 7A, unlike regulation 4A of the 1999 Regulations, does not specifically require the Board to consider the number etc of witnesses and productions. Instead, under regulation 7A the Board is required to consider whether the case involves legal or factual complexity, including procedural complexity.

The exceptional cases status provisions, as set out in regulation 7A(1) to (5), offer a solicitor the option to apply for exceptional case status where he/she can demonstrate that the case is one where there is a risk that the assisted person would not receive a fair trial because of the amount of fees otherwise payable under the 1989 Regulations, and where certain conditions are met. As noted above, the Board will include in its consideration of such an application whether the case involves legal or factual complexity, which may include procedural complexity. The Board will, as with exceptional case status under the 1999 Regulations, offer guidance to solicitors on how the provision will be applied.

Regulation 7A(6) to (8) makes provision for the solicitor to request a review of the decision where the Board has refused an application for exceptional case status.

Regulation 7A(9) and (10) makes provision about where a transfer of agency has occurred during a case, allowing the solicitor who represented the assisted person before exceptional case status was granted to be paid detailed fees where certain record-keeping conditions are met.

Discretion to prescribe a fee

Regulation 4(b) of the instrument inserts a new paragraph 1(3A) into the Notes on Schedule 1. This provides the Board, or auditor, with discretion to allow a fee for any work which has been done by the solicitor but which is not covered by any inclusive fees in Part 2 or any of the detailed fees in Part 1 of the Table of Fees. This new discretion is similar to the discretion already available to the Board or auditor for counsel's fees (see paragraph 2 of the Notes on the operation of Schedule 2 to the 1989 Regulations).

In allowing a fee the Board or auditor has to ensure the fee is reasonable remuneration for the work done with regard to all the circumstances. A fee will not be payable if paragraph 3 of the Notes on Schedule 1 already provides that no fee

is payable for that item of work. As the Table of Fees in Schedule 1 already makes provision for all likely items of work undertaken by a solicitor, the occasions on which the Board or auditor would have to exercise this discretion are expected to be very limited. However, the new discretion is considered necessary to ensure as much flexibility as possible in the payment regime under the 1989 Regulations.

Preparation

Regulations 4(f) and 6(b) and (d) of the instrument make various new provisions about fees payable for preparation.

Regulation 4(f) of the instrument inserts a new paragraph 3A in the Notes on Schedule 1 to ensure that, where preparation fees would otherwise be chargeable under both paragraph 4A(c) and paragraph 6(a) or (ab) of Part 2 of the Table of Fees, only one of the inclusive fees is chargeable, that being the higher of the two.

Regulation 6(b) of the instrument creates a new inclusive fee in paragraph 4A of Part 2 of the Table of Fees. The effect of this new inclusive fee is that there is more opportunity for payment to solicitors for preparation early on in proceedings (i.e. not preparation for trial) namely for:

- a hearing at which the client pleads not guilty, as described in section 76 of the Criminal Procedure (Scotland) Act 1995;
- a hearing on a plea in bar of trial; and
- a hearing raising a preliminary issue, where that issue would mean the client did not have to go to trial and there is no other fee for preparation.

Regulation 6(d)(i) amends paragraph 6 of Part 2 of the Table of Fees to insert reference to a first diet. The result is that a fee for the various matters listed in paragraph 6 is not available where that work is dealt with as part of a preliminary hearing or first diet. This amendment brings provision about payment for work in relation to sheriff court procedure into line with payment for work in relation to High Court procedure. In the sheriff court the matters listed in paragraph 6 may be dealt with at a first diet; in the High Court they may be dealt with at a preliminary hearing.

Regulation 6(d)(ii) and (iii) corrects an erroneous reference to compatibility minutes under the Criminal Procedure (Scotland) Act 1995, by removing the erroneous reference from paragraph 6(a) in Part 2 of the Table of Fees and inserting the correct reference as paragraph 6(ab) in the same Part.

Preparation for diets of deferred sentences

Regulations 4(e) and 6 of the instrument make various amendments to Part 2 of the Table of Fees in Schedule 1 of the 1989 Regulations in relation to fees for preparation for diets of deferred sentence. As noted above, a diet of deferred sentence occurs after conviction when the court has postponed its final decision about any punishment, usually three to 12 months after conviction. The diet at which that final decision is to be taken is the diet of deferred sentence.

The amendment made by regulation 4(e) of the instrument removes a reference to a diet of deferred sentence from paragraph 3(m) of the Notes on Schedule 1 and the amendment made by paragraph 6(a) removes a similar reference from paragraph 4(b) of Part 2 of the Table of Fees. Paragraph 3(m) currently provides that no fee is payable for preparation for a subsequent day of trial or a diet of deferred sentence where more than two fees have already been charged under paragraph 4(b) of Part 2 of the Table of Fees (the inclusive fee for preparation for a subsequent day of trial or diet of deferred sentence). By removing reference in both provisions to diet of deferred sentence there is no inclusive fee payable in relation to preparation for a diet of deferred sentence.

However, the amendments made by regulation 6(c) makes new provision about preparation for diets of deferred sentence. It amends the existing inclusive fee at paragraph 5 of Part 2 of the Table of Fees which covers post-conviction work. At present that fee covers only advisory work – including advice on the prospects of success of any appeal. The wording is expanded by regulation 6(c) of the instrument to cover representation as well, which would encompass diets of deferred sentence. The amendment also increases the inclusive fee, to reflect the inclusion of work as regards such diets.

These amendments address the issue caused by the sheriffs' decisions by removing deferred sentence diets from the existing preparation fee where the fee is only intended to be paid if the case proceeds to trial. Instead a fee for preparation for such diets is made available in all cases as part of the inclusive fee for post-conviction work.

Clarification of availability of detailed fees generally, and for research and preparation

Some amendments are being made to the 1989 Regulations to clarify what fees are already available under Schedule 1.

Paragraph 1(1) of the Notes on Schedule 1 is intended, and is currently interpreted, to provide that solicitors may be paid any relevant inclusive fees under Part 2 of the Table of Fees and if any work is not covered by an inclusive fee but is covered by a detailed fee under Part 2, that detailed fee may be payable too.

In light of the Appeal Court's concerns, Scottish Government feels that the wording of this provision could be more clearly set out on the face of the 1989 Regulations. As a result, paragraph 4(a) of the instrument restates paragraph 1(1) of the Notes. The restatement does not intend to make substantive changes to the current operation of the provision, but seeks to make its operation clearer.

A similar issue arises with paragraph 1(5) of the Notes on Schedule 1. It lists items of work for which a detailed fee may be payable under Part 1 because they do not fall within any inclusive fee under Part 2. While the current provision has this effect, the fact that a fee may be payable under Part 1 could be more clearly stated. Regulation 4(c) of the instrument restates paragraph 1(5) of the Notes. Again, the restatement does not intend to make substantive changes to the current operation of the provision, but seeks to make its operation clearer.

The Board currently allows payment of fees for research into novel, developing or unusual points of law. The relevant fees are in paragraph 6 of Part 1 of the Table of Fees. Payment of fees for research in this situation is consistent with regulation 10A of the 1989 Regulations which stipulates that a solicitor is deemed to be "as up to date with the substantive and procedural law of the field in which they practise as a competent solicitor". Payment of fees for research seeks to ensure that a solicitor is adequately remunerated where the work involved has been beyond that expected under regulation 10A.

Given the Appeal Court's concerns about the 1989 Regulations, the Scottish Government feels it is appropriate that the current practice described above is expressly set out on the face of the 1989 Regulations. To that end, regulation 4(f) of the instrument inserts a new paragraph 3B into the Notes on Schedule 1 about fees for research.

Specifically, a fee may be payable for research on novel, developing or unusual points of law where the Board considers the circumstances of the case to be exceptional (whether or not the case has been granted exceptional status) where the research required goes beyond the expected understanding of the solicitor as set out in regulation 10A. This fee might be payable where something arises in the context of that case either in the form of an unusual set of circumstances on which there is currently no firm law, or circumstances where a solicitor thinks that the existing law can be distinguished or where a Sheriff made a decision which appears to be contrary to the accepted law. The fee might be payable in the context of a novel ECHR challenge or extradition proceedings. In such situations, a solicitor may reasonably need to undertake research in order to defend the client's interests. A fee for research under this provision is not intended for every minor novel, developing or unusual point of law. Inserted paragraph 3B(a) therefore provides that the Board must consider the circumstances in some way exceptional in order to allow the fee. This ensures that any points for research are substantial, and have significance and importance to the case. An example of this kind of exceptionality might be where there is a whole new chapter of law that was previously unexplored that it would be considered reasonably required for the solicitor to research in order to properly conduct the case. Wider importance or significance beyond the case might be an indicator of the circumstances of the case in question being exceptional.

Finally, the amendment made by regulation 4(d) of the instrument represents a clarification of the existing provision in paragraph 3(j) of the Notes on Schedule 1 about fees for preparation in some circumstances. It seeks to clarify the intention of paragraph 3(j) – that a fee is not payable for a hearing other than where preparation forms part of a relevant inclusive fee in Part 2 of the Table of Fees.

Offsetting costs

The Fund is under great financial pressure. It is therefore vital that any changes to the 1989 Regulations as regards fees for solicitors for solemn proceedings do not result in additional expenditure to the Fund. Regulation 5 of the instrument, therefore, reduces the amounts of the detailed fees in Part 1 of the Table of Fees

in Schedule 1 in order to offset the costs of the other provisions in the instrument. The reduction in the amounts of the fees is the equivalent of approximately 3.65% of the current fee, rounded to the nearest five pence.

Consultation

The Board, which administers the 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. The Board is content with the proposals. The Law Society of Scotland, while content with the provisions so far as they address the Appeal Court's concerns, is of the view that the cost of these new provisions should not be met by a reduction in detailed solemn fees. The Society wishes additional money to be allocated by Scottish Ministers to the Fund's expenditure rather than to have the cost be borne by the legal profession.

Impact Assessments

An equality impact assessment has been completed on the instrument and is attached. No negative impacts were identified. The Board will continue to monitor the effect of the 1989 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 there will be a greater degree of flexibility in the fees that solicitors can charge for solemn criminal proceedings. This includes the option of seeking exceptional case status to be paid in detailed fees rather than in the block fee system. The estimated cost to the Legal Aid Fund of this new flexibility is £260,000 to £380,000 but detailed fees will be reduced by 3.65% rounded to the nearest five pence to offset these costs, making the provisions as a whole cost-neutral to the Fund. While the fees payable for individual cases will change as a result of the reduction, the overall amount of fees being paid to solicitors as a group for solemn criminal legal aid work will not.

Scottish Government
Justice Directorate
November 2013

ANNEXE A

WRITTEN SUBMISSION FROM THE LAW SOCIETY OF SCOTLAND

Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013

I am writing regarding the above instrument laid on Wednesday 13th November.

The instrument has been laid following comments of the Appeal Court in the recent case of HMA v McCrossan (9 August 2013) HCJAC 95 (available at: http://www.scotcourts.gov.uk/opinions/2013HCJAC95.html)

The Appeal Court found that a number of aspects of the current solemn criminal legal aid fee structure for solicitors may not be wholly compliant with the European Convention on Human Rights ("ECHR").

Existing Arrangements

Under the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 ("the 1989 Regulations") there is no provision to allow a solicitor:

- to recover the block preparation fee if the proceedings against his or her client terminate without a trial;
- to claim a prescribed fee for preparation for a plea in bar of trial; or
- to apply to have a solemn case designated as an exceptional case in order for it to be paid, as a result, detailed fees rather than a fixed payment.

An element of inequality of arms is introduced by the above exclusions: the prosecution has the whole resources of the state to develop its case but the solicitor acting for the accused is restrained by the resources allowable under the legal aid regulations. Where a solicitor undertakes work which is not funded by the regulations he or she will do so on a pro-bono basis.

Lady Paton, delivering the opinion of the Appeal Court, said:

"In our opinion, the legal aid regulations applicable in the present case (solemn criminal procedure) lack the flexibility which is necessary for compliance with the Convention."

Proposed Changes

The Scottish Government intends to address these points in the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013.

Funding the Proposed Changes

However, the instrument goes beyond making the regulations compliant with ECHR. It seeks to alter the detailed fees in Part 1 of the Table of Fees in Schedule 1 of the 1989 Regulations. The changes reduce certain fee levels.

Paragraphs 28 and 29 of the Policy Intention document, accompanying the draft regulations state:

"The Fund is under great financial pressure. It is therefore vital that any changes to the 1989 Regulations as regards fees for solicitors for solemn proceedings do not result in additional expenditure to the Fund. Regulation 5 of the instrument, therefore, reduces the amounts of the detailed fees in Part 1 of the Table of Fees in Schedule 1 in order to offset the costs of the other provisions in the instrument which are aimed at improving the flexibility of the feeing system and making fees for preparation and research more available. The reduction in the amounts of the fees is the equivalent of approximately 3.65% of the current fee, rounded to the nearest five pence.

The instrument as a whole is therefore expected to be cost neutral to the Fund."

Society Position

The Cost of Ensuring ECHR Compliance

The Society recognises that the legal aid fund is under financial pressure. Over the last few years we have assisted the Scottish Government in identifying areas where savings could be made and in supporting the profession even when this meant a reduction in fee levels.

However, we do not believe it is acceptable or responsible for the Government to pass the cost of ECHR state-compliance on to the solicitor profession.

Dangerous Precedent

This "offsetting of costs" is a departure from previous Government policy. The Government did not take this course of action in the provisions required as a result of the decision of Cadder v HMA (2010) UKSC 43 or the necessary amendments to the summary ABWOR regulations following the decision in McGowan v Marshall (2013) SCCR 271.

We believe that this new approach sets a dangerous precedent that could see the Government moving consistently towards ECHR non-compliance.

Responsibility of the State to Ensure Compliance

The Scottish Government is responsible for ensuring that legal aid legislation is compatible with ECHR. The instrument seeks to address deficiencies in the regulations that the Government should have foreseen. If the Government is

accepting that it has failed in that duty it is for the Government to make and fund the necessary changes.

The instrument places the burden of the state's responsibilities to ensure ECHR compliance on solicitors. In this regard, it is the equivalent of a discriminatory stealth tax on a section of the community to pay for the Government meeting an international obligation it owes to benefit the whole population.

Potential for Further ECHR Issues

The Society cannot predict whether there will be further ECHR challenges in relation to the structure of solemn fees.

However, the instrument merely shifts the problem to another area of the system. For example, if fees are reduced in one part of the system in order to subsidise fee levels in another area that creates the risk of ECHR non-compliance in the first area. In other words, if the Government reduces the fees of solicitors every time there is an ECHR breach then that creates the conditions for a subsequent ECHR breach. This will create a spiral of non-compliance.

As such, we believe that this instrument, in itself, may not be compliant with ECHR and we would urge the Committee to undertake a full ECHR assessment.

No Quantification of Costs Provided

The instrument provides that the Scottish Legal Aid Board will have discretion in determining when the solicitor is entitled to certain fees. The true cost of the instrument is dependent on how often the Scottish Legal Aid Board grants this additional funding.

In the absence of any statistical data, the Society cannot be satisfied that the reductions in fees, which apply to every case where the relevant fee is payable, can be restricted to simply offsetting the additional costs of exceptional cases. If the true policy intent is to generate savings to the legal aid fund then that has not been made transparent.

In conclusion, the Society cannot support these regulations.

Ian Moir
Legal Aid Committee Convener
Law Society of Scotland
22 November 2013

ANNEXE B

Negative instruments: procedure

Negative instruments are instruments that are "subject to annulment" by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

Each negative instrument appears on the Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:
http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64215.aspx