SCOTTISH STATUTORY INSTRUMENTS

2005 No.113

LEGAL AID AND ADVICE

The Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005

Made - - - -	*2nd March 2005*
Laid before the Scottish Parliament - - - -	*3rd March 2005*
Coming into force - -	*25th March 2005*

The Scottish Ministers, in exercise of the powers conferred on them by section 33(2)(a) and (3), and 36(1) and (2)(a) of the Legal Aid (Scotland) Act 1986(**1**), and of all other powers enabling them in that behalf, hereby make the following Regulations:

Citation and commencement

1. These Regulations may be cited as the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2005 and shall come into force on 25th March 2005.

Application

2. These Regulations apply only in respect of proceedings concluded on or after 4th April 2005.

Amendment of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989

3. The Criminal Legal Aid (Scotland) (Fees) Regulations 1989(**2**) are amended in accordance with the following Regulations.

4. In regulation 2(1) after the definition of "the 1986 Act" insert–

""the 1988 Act" means the Road Traffic Act 1988(**3**);

"the 1995 Act" means the Criminal Procedure (Scotland) Act 1995(**4**);

(**1**) 1986 c. 47. Sections 33 and 36 were amended for purposes not relevant to these Regulations. The functions of the Secretary of State were transferred is the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46).
(**2**) S.I. 1989/1491 as relevantly amended by S.I. 1990/1035, 1991/566, 1992/374 and 1997/719, and by S.S.I. 2004/264.
(**3**) 1988 c. 52.
(**4**) 1995 c. 46, as relevantly amended by sections 1, 2 and 25 and paragraph 24 of the schedule to the Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5).

"the 1995 Consolidation Act" means the Criminal Law (Consolidation) (Scotland) Act 1995(**5**);

"the 2000 Act" means the Terrorism Act 2000(**6**);".

5. In regulation 10(1) after "appears to" insert–

"the Board, or at taxation".

6. For paragraph 4(b) of Schedule 1 substitute–

"(b) Short formal letters, letters each having a similar nature, intimations and letters confirming telephone calls;".

7. For Schedule 2 substitute the Schedule to these Regulations.

St Andrew's House, Edinburgh
2nd March 2005

HUGH HENRY
Authorised to sign by Scottish Ministers

(**5**) 1995 c. 39.
(**6**) 2000 c. 11.

SCHEDULE Regulation 7

FEES OF COUNSEL

"SCHEDULE 2 Regulation 10

FEES OF COUNSEL

Notes on the operation of Schedule 2

1. Subject to the following provisions of this Schedule, fees shall be calculated by the Board, and in the event of a question or dispute by the auditor, in accordance with the Table of Fees in this Schedule.

2. Where the Table of Fees does not prescribe a fee for any item of work the Board, or as the case may be the auditor, shall allow such fee as appears appropriate to provide reasonable remuneration for the work with regard to all the circumstances, including the general levels of fees in the Table of Fees.

3. In the taxation of counsel's fees–

(a) counsel's fees are allowed only where the Board has sanctioned the employment of counsel or counsel is automatically available;

(b) junior counsel shall only be allowed the fees prescribed in Chapter 1 of Parts I to III of the Table of Fees even where sanction has been granted for the employment of senior counsel in the case, except in any case to which sub-paragraph (c) below applies;

(c) where a senior junior is representing an accused person in a multiple accused case at first instance and where any co-accused is represented by senior counsel, the fees payable to senior junior shall be those prescribed in the Table of Fees for junior as leader, and the fees payable to any junior counsel assisting senior junior shall be those of junior with leader;

(d) except on cause shown, fees for only two consultations in the case shall be allowed;

(e) except on cause shown, fees for senior counsel or, as the case may be, for both senior and junior counsel shall not be payable for attendance at hearings which do not require the attendance of senior or, as the case may be, both senior and junior counsel;

(f) the auditor shall not have regard to any information produced by counsel at taxation which was not made available to the Board at the time the Board made the offer to counsel which is subject to taxation;

(g) although counsel may keep records of professional services based on the number of hours expended on the work, counsel shall not be entitled to fees at an hourly rate in addition to the fees prescribed in the Table of Fees; and

(h) correspondence, telephone calls, written work (other than work for which fees are prescribed in the Table of Fees) and meetings between counsel acting for the same assisted person are not allowable as separate items and shall be subsumed within the fees set out for the conduct of a hearing.

Appeals in the High Court of Justiciary

4. The Board, or as the case may be the auditor, shall have power to increase any fee prescribed in Part II of the Table of Fees where satisfied that, because of the particular

complexity or difficulty of the work or any other particular circumstances, such an increase is necessary to provide reasonable remuneration for the work. This power shall only be exercised in the following circumstances and subject to the following conditions:–

(a) the Board, or as the case may be the auditor, shall have regard to the general level of fees in Part II of the Table of Fees;

(b) the fees prescribed in Part II of the Table of Fees are the fees for a case of average complexity or difficulty requiring the involvement of junior counsel or, where appropriate, senior counsel and includes the level of preparation which would not be considered unusual for such a case;

(c) the factors which shall be taken into account in considering an increase in any fee are–

(i) novelty of the issues of law;

(ii) unusually complex issues of fact;

(iii) issues of considerable legal significance; and

(iv) unusually high level of preparation;

(d) counsel seeking an enhanced fee shall identify and vouch such factors under sub paragraph (c) above as apply to the case, and the Board, or as the case may be the auditor, shall require to be satisfied that the factors identified and vouched had a significant effect on the conduct of the case before allowing such a fee;

(e) in the event of an enhanced fee being allowed after taxation, the auditor shall specify each of the factors in sub paragraph (c) above which justify the enhanced fee, and the extent to which each of those factors justify the fee.

5. Subject to the provisions of paragraphs 6 to 9 below, the maximum fee which the Board, or as the case may be the auditor, can allow for an item of work, set out in paragraphs 1 and 2 of Chapters 1 and 2 of Part II of the Table of Fees, in a case involving the most complex or difficult work, and whatever the circumstances, shall be that set out in Chapter 3 of Part II of the Table of Fees.

6. For a fee set out in paragraph 3 of Chapters 1 and 2 of Part II of the Table of Fees, the Board, or as the case may be the auditor, may allow a percentage increase not exceeding 100 per cent of the fees prescribed for a consultation, subject to the following conditions:–

(a) in determining an appropriate level of fee, regard shall be had to the length of the consultation and any unusually high level of preparation required which has not otherwise been reflected in a claim for an enhanced fee under paragraph 4 above, or for a separate fee for preparation claimed under paragraph 9 below; and

(b) no increase shall be allowed in respect of the travel element of the fees prescribed in paragraph 3 of Chapters 1 and 2 of Part II of the Table of Fees.

7. Any enhanced fee allowed by the Board, or as the case may be the auditor, in respect of paragraphs 4 and 5 above shall be proportionate to the maximum fee, and shall be set between the fee prescribed in Part II of the Table of Fees up to the maximum fee for the most complex and difficult case, the amount by which the fee is enhanced depending on the circumstances of the case.

8. Subject to paragraph 9 below, in any case where an unusually high level of preparation was required because of the particular complexity or difficulty of the work, this preparation shall be included within a claim for an enhanced fee under paragraph 4 above, and the Board, or as the case may be the auditor, shall only consider a claim for an enhanced fee in respect of preparation if the following apply:–

(a) counsel seeking an enhanced fee in respect of preparation shall–

(i) identify which part of the claim for an enhanced fee relates to the factors specified in paragraph 4(c)(i) to (iii) above, and which part relates to preparation; and

(ii) produce records providing a detailed summary of the nature of the work or, if applicable, the nature of the documentation perused, at each stage of the process, the time taken and when and where the work was undertaken; and

(iii) retain and produce, if requested, any contemporaneous record or notes made in the course of preparation; and

(b) in allowing an enhanced fee for preparation the Board, or as the case may be the auditor, must be satisfied that the level of preparation was necessary, reasonable and proportionate in all the circumstances of the case.

9. In exceptional cases involving extraordinary preparation, a separate fee in respect of that preparation may be allowed at the discretion of the Board, or as the case may be the auditor, but subject to the following conditions:–

(a) such a fee shall only be payable to the extent that the preparation in respect of which the fee is claimed is not included in an enhanced fee for preparation under paragraph 8 above;

(b) in allowing such a fee the Board, or as the case may be the auditor, must be satisfied that the level of preparation was necessary, reasonable and proportionate in all the circumstances of the case;

(c) counsel shall produce records providing a detailed summary of the nature of the work or, if applicable, the nature of the documentation perused, at each stage of the process, the time taken and when and where the work was undertaken and shall retain and produce, if requested, any contemporaneous record or notes made in the course of preparation; and

(d) where such a fee is allowed it shall be calculated by dividing the total time allowed into units of 6 hours, each unit payable at the rate of two thirds of the fee prescribed at paragraph 2(a) of Chapters 1 and 2 of Part II of the Table of Fees in this Schedule.

10. The Board, or as the case may be the auditor, shall have power to reduce any fee set out in Part II of the Table of Fees in this Schedule where satisfied that, because of any particular circumstances, a reduced fee is sufficient to provide reasonable remuneration for the work having regard to the general level of fees in the said Part II.

Proceedings in the High Court of Justiciary (other than appeals) and the Sheriff Court

11. Subject to paragraphs 12 to 14 below, the fees prescribed in Parts I and III of the Table of Fees in this Schedule shall include all preparation.

12. A fee for separate preparation shall be allowed only on the following conditions:–

(a) such a fee is allowable only once in any case to junior or senior, or as the case may be junior and senior, counsel representing an applicant or assisted person, notwithstanding that the applicant or assisted person is represented by more than one junior or senior counsel during the course of the case;

(b) in allowing such a fee the Board, or as the case may be the auditor, must be satisfied that the level of preparation was necessary, reasonable and proportionate in all the circumstances of the case; and

(c) counsel shall produce records providing a detailed summary of the nature of the work or, if applicable, the nature of the documentation perused, at each stage of the process, the time taken and when and where the work was undertaken and shall