

## Justice Committee

### Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017 [draft]

#### Written Submissions Received

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## Written submission from the Minister for Community Safety and Legal Affairs

### Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017

As the draft affirmative regulations for Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations are laid, I thought it might be useful to provide the Justice Committee with some background information regarding stakeholder engagement on police station duty fees and how the proposed fees in the regulations were reached.

#### Background

I wrote to the committee in October 2016 and highlighted that my predecessor had instructed the Scottish Legal Aid Board, SLAB, to conduct a review of three strands of work:

- Identifying opportunities to streamline, simplify and modernise the legal aid system
- Update the Code of Practice for Criminal Legal Assistance
- Review the operation of police station advice

The implementation of the Criminal Justice (Scotland) Act 2016 (CJ(S)A) provided the ideal opportunity for us to work with stakeholders to review the police station duty scheme, identify and introduce changes to streamline the system and investigate the restructure of the fee system.

Meetings were held with key stakeholders to investigate possible changes and discuss fee reform. Discussions included not only the level of fees, but also the introduction of a block fee system and the simplification of the system around solicitors claiming payment for police station advice.

An initial offer around fees was made to the Law Society of Scotland (LSS) at meetings on the 8 and 14 March. The LSS responded with counter proposals on the 21 March. These counter proposals were carefully considered and changes were made to our original offer on the fee levels.

The Scottish Government agreed to:

- **Amend the times when an anti-social hours premium would be applied**
- **Apply the anti-social premium to travel time**
- **Apply the anti-social premium to telephone calls**
- **Increase the block fee levels from the original proposal**

Details are as follows:

#### 1. Definition of anti-social hours

##### Law Society Proposal

The LSS sought a change to the current interpretation of anti-social hours' work that would attract an additional premium of 33%. Current regulations specify that, for example, Christmas Day does not attract an anti-social hours premium.

### Scottish Government Position

We agreed to redefine anti-social hours as follows:

- 1900 to 0700 all days of the week, including weekends
- All day at weekends – Saturday and Sunday
- Public Holidays – 8 days per year

This will have a significant impact on the fees paid for police station advice. That measure alone will realise potential income of over £360,000 for solicitors undertaking police station advice.

## **2. Telephone call fees**

### Law Society Proposals

LSS sought a fee of £50 for telephone calls and suggested that currently the fee for telephone calls is £34. It was not clear the basis on which the figure of £34 was reached. Telephone advice is currently paid on a time and line (detailed) basis. For example, under advice and assistance fees:

- A 30 minute phone call - £23.20
- A minimum payment of £30.94 for phone calls after 22:00
- Calls of up to 4 minutes are paid at £2.64, over 4 but less than 10 minutes, £6.60 and over 10 minutes, £11.60 per quarter hour

### Scottish Government Position

Proposed fee of £30 compares well to other jurisdictions and represents a substantial increase on the current fee of £11.60 paid for calls up to 15 minutes (159%) and the £23.20 paid for calls up to 30 minutes (29%). In addition, there are many calls that are currently unclaimed as under the time and line arrangements, many solicitors do not consider it worthwhile to submit an account.

As part of the package of fee proposals, a new simplified process will be introduced that will make it very simple to claim the flat fee and this, along with the £30 flat fee, will lead to a significant increase in the level of fees paid for telephone calls.

In addition, a commitment has been made to include an anti-social hours premium to the flat fee, which will provide for an additional 33% to be paid for telephone calls.

## **3. Attendance fee for personal attendance**

### Law Society Proposals

LSS sought fees in line with those payable for VIPER parades, which are identification parades for witnesses, and suggested this is £114 per hour. The figure of £114 applies only to solemn work, and hence more serious crimes, and is an enhanced fee for particular circumstances of ID parades under the old system. The enhancement

includes the antisocial aspect of the work and there is no further antisocial fee element. The LSS would also wish to claim an antisocial payment of 33% on top of the already enhanced fee.

#### Scottish Government Position

We responded positively to the strong views that the initial fee rates were not sufficient, and made an improved offer.

- Up to 2 hours – from £100 to £115. This represents an increase on the current time and line payments e.g. for 20 minutes work this would be a 396% increase on current rates and for just under 2 hours' work it would be an increase of 42%. Plus an additional 33% antisocial premium
- 2 to 4 hours – from £175 to £200. This represents an increase on the current time and line payments e.g. for just over 2 hours' work the increase would be 92% and for 3 hours 50 minutes it would be an increase of 8%. Plus an additional 33% antisocial premium.
- Beyond 4 hours' work - £200 plus £50 for each hour (or part of hour) thereafter. Cases up to 6 hours would see an increase of 16% on average. Plus an additional 33% antisocial premium.
- All fees increased by 33% if the advice falls within anti-social hours. This includes telephone calls and travel.

#### **4. Travelling Time**

##### Law Society Proposal

LSS asked that the current rate of half time for travel be changed to providing full time rate for travel.

##### Scottish Government Position

The current rate is in line with other jurisdictions such as England and Wales where half time is the norm. It is considered reasonable that half pay is paid for travelling time, which is considerably less arduous than the work involved with giving advice to a client in custody or appearing in court. A point to note is that while travelling time is payable at half rate we have not changed the payment arrangements in respect of waiting time, and in other jurisdictions that is also routinely payable at half rates.

While we do not think it reasonable to apply full fee rate for travel we will apply the antisocial premium to travel fees where any part of the attendance takes place during anti-social hours.

#### **5. Challenges to investigative liberation/bail conditions and post charge questioning**

##### Law Society Proposal

LSS proposed that the block fee payable when a matter does not proceed to court should be increased from £50 to £75 and that the fee for work when a matter does

proceed to court should be increased from £75 to £125. Further, that there should be an additional payment of £50 for each subsequent court hearing.

### Scottish Government Position

The current fee proposal of £50 represents a fair remuneration for up to one hour of work. This fee is consistent with the payment arrangements for certain court diets under the fixed payment regime. It is anticipated that court appearances are likely to be fairly infrequent and of very short duration and, where that is not the case, there will be the opportunity to apply for exceptional case status which is time and line fees.

However, we agreed to improve on our initial proposal to add an additional payment of £50 for each additional hearing.

### **Summary**

The current spend on police station advice is in the region of £300k. The introduction of block fees which are higher than the current time and line rates, simplification of the system to claim for police station advice and the new processes to be covered by legal aid will equate to an investment of £3.1m per annum.

There are both financial and administrative benefits to the proposals put forward by the Scottish Government:

- **Eased and simplified application and payment process**

Removing the need for the current two stage advice and assistance application and time and line accounts process. Instead a simplified, one stage fee claim process after the work has been done will be introduced.

- **Higher Fee claim rate**

At present, solicitors only claim about 30% of all cases referred to them under the advice and assistance regime. The new arrangements will mean it will be much easier for solicitors to make claims. This will reduce the proportion of relevant work undertaken by solicitors that goes unclaimed.

- **Increased Fees on a predominantly fixed or block fee basis**

Changing the fee structure to block fees is more efficient for the profession and SLAB. Where comparisons can be made, the new fees offer some significant increases on the current Advice and Assistance regime. An estimated **£3.1 million** fees and outlays is expected to be paid to solicitors.

- **No financial eligibility test**

Advice given to people in police stations is free and automatic. That means there is no financial eligibility test, nor are there any client contributions. This reduces the administrative burden on solicitors.

- **Extension of anti-social hours – 1900 to 0700 weekdays, all weekend, 8 public holidays per year and for travel time.**

Our proposals contained in the Legal Assistance (Miscellaneous Amendments) Regulations 2017 and set out above will make a significant investment in fees payable to solicitors who provide police station advice. We moved substantially from our original proposals which were costed at around £2.8 million to this final offer. We put

forward improvement in every aspect of the fees, both on the current situation and the original offer.

The cost of the LSS proposals would be around **£4.3 million** which is simply not affordable at this time of severe financial pressures.

An effective Police Station Duty scheme is vital to ensuring all those who are in police custody have access to legal advice and I am hopeful solicitors will realise that in these times of significant financial pressure the offer made by SG is a good one.

I am happy to meet with the Justice Committee to discuss and clarify the contents of this letter and, if required, the draft regulations.

Annabelle Ewing  
Minister for Community Safety and Legal Affairs  
29 November 2017

## **Written submission from Dunfermline District Society of Solicitors**

### **Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017**

I refer to the above and to the invitation to respond to the consultation process in advance of the regulations being debated by the Justice Committee on 12/12/17. A Faculty meeting was held to discuss the proposed regulations.

For the following reasons it was the unanimous view of those present at the Faculty meeting that if the regulations are laid in the present form then no firm will participate in the Police Duty Scheme.

Part 1 of the Criminal Justice (Scotland) Act 2016, due to be implemented in January 2018, is clearly designed to allow appropriate legal advice to be tendered to all of those in custody when they are particularly vulnerable. The changes to the existing system will have a significant impact on the practical operation of criminal justice in Scotland. In particular a significant increase in terms of police station work and attendances is predicted.

The fee structure proposed is not fit for purpose and will result in an economically unviable situation for the employers of solicitors providing advice at police stations and significant consequences for the personal and professional lives of the solicitors themselves.

The result of the proposed amendments coupled with the draft code of conduct drawn up by the Scottish Legal Aid Board is that firms will require to provide a member of staff to be on call at all times. In particular those on the Police Station Duty Scheme will require to provide both an employee on call and a back-up solicitor.

As far as employers are concerned this creates significant difficulties. Employers cannot arbitrarily change terms of employment. Employees would be entitled simply to refuse to provide cover. Significant restrictions will be placed on persons on call. They will require to be available to attend at police stations shortly after receiving a call. Person on call will therefore require to remain within easy travelling distance of relevant police stations and will not be able to attend social functions, commit to childcare or to other care and responsibilities. The likely consequence of this will be that those who are on call will be considered for employment law purposes to be employed during the period they are on call. The provisions do not provide remuneration for simply being on call. Employers will therefore be put in a position where they cannot force employees to perform this function and those employees who voluntarily agree to perform the function will require to be remunerated which is not viable under the proposed system.

Additionally, there are likely to be significant duty of care implications if an employer asks an employee to be on call after working a full day with potential attendance at a police station and inadequate sleep.

As far as employees are concerned, proposals mean that they are placed in the unenviable position of being asked to perform work with no remuneration being provided.

There is also a significant issue in terms of sex and equality discrimination. The effect of the lack of remuneration for those being placed on call is that no provisions can be made by them to fund childcare nor to provide care for ill or infirm dependents. These are not abstract concerns but are the realities which will be faced by many members of our Faculty who despair at the potential consequences for them and their families.

Concerns have been raised that firms in the future will be drawn to recruiting only those who do not have children, are unlikely to have children and who do not have any caring responsibilities.

Additional concerns raised by members of the faculty relate to the operation of the Police Station Duty Scheme in this jurisdiction. At present four firms undertake police station duty work. This would mean firms being required to carry out police station duty on call at least once per month and additionally providing cover for their own clients. This will place an unduly onerous obligation on both firms and their employees.

Chris Sneddon  
6 December 2017

## Written submission from the Law Society of Scotland

### Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 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).<sup>1</sup>

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

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.

### **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 million<sup>2</sup>. 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 Line<sup>3</sup> and the Public Defence Solicitors Office)

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

<sup>3</sup> 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.

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.

- 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.

Law Society of Scotland  
7 December 2017

**Written submission from the Society of Solicitors and Procurators of Stirling  
Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations  
2017**

The Society of Solicitors and Procurators of Stirling does not believe that the remuneration levels provided for in the proposed Regulations are sufficient to allow for the effective and practical protection of the rights of suspects and we urge the Committee to reject the Regulations. The Scottish Government should revisit the matter so as to allow the making of appropriate arrangements.

The Society adopts the arguments and responses of the Law Society of Scotland.

Kenneth A R Dalling  
Dalling Solicitors  
5 December 2017

## **Society of Solicitors in the Supreme Courts of Scotland**

### **Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017**

For over 230 years the Society of Solicitors in the Supreme Courts of Scotland (“SSC”, hereafter in this paper “the Society”) has been a significant part of the Scottish legal landscape. It has been involved in legal education and training and its members have contributed to upholding the integrity and distinctive nature of Scots Law. While based in Parliament House in Edinburgh, it draws its membership from all parts of the country and its members have appeared in every court in Scotland. The Society is a constituent part of the College of Justice in Scotland.

Its aims include participation, as Collegiate members of the College, in seeking to maintain the highest possible standards of professional conduct and expertise in the conduct of business before the Supreme and Inferior Courts, and helping to strengthen and uphold the Law of Scotland and to encourage members both in public and professional life. It welcomes the opportunity of responding to the Scottish Legal Aid Board’s consultation although it is concerned to note that, in respect of draft legislation issued to the profession on 5<sup>th</sup> December, responses are expected by 7<sup>th</sup> December. Given the length of time during which the issues regarding solicitor attendance at police stations has been under consideration, and given that the date of 25<sup>th</sup> January 2018 as the inception of the new scheme was announced several weeks ago, it is extremely concerning that the Justice Committee expects full representations on this entirely new fee structure to be issued within barely 48 hours. In future, the Society and the profession will expect the government to allow a considerably longer time to make representations.

As the Society has previously observed, compliance with these requirements by those also conducting court work will unquestionably be onerous. This is particularly the case where solicitors have child care responsibilities or responsibilities to family members that are elderly or disabled. Interviews are likely to take place at all hours, day or night. The police officers who conduct an interview in the early hours of the morning will virtually never expect to have spent all of the previous day or the next day giving evidence in court. The same cannot be said of the solicitor. In order for the statutory provisions to function as designed, solicitors will be expected to provide legal services around the clock.

In March 2017, we observed “In the absence of proper funding, similar to that offered to police casualty surgeons and other workers in essential services, the work will have to be carried out by court practitioners. This appears likely to conflict with employee rights granted in terms of the Working Time Regulations 1998”.

In addition, the Society noted previously that a significant percentage of persons arrested on warrant have been subject to bail. In those cases, the Crown will almost always prosecute for a contravention of Section 27 (1) (a) of the 1995 Act. Even where the accused adduces a reasonable excuse for their failure to attend court and a trial diet is assigned, legal aid is not available for representation in the failure to attend proceedings. Despite this, it is now to become the duty of the solicitor to offer advice, including where requested face to face advice, immediately upon arrest.

## Remuneration

When we last responded to consultation we observed that the level of remuneration for solicitors is not a matter that has fallen within the Society's competence for many years, and we thus made no comment upon each of the specific fees as proposed and reported to the profession on 8<sup>th</sup> March 2017. We observed that those practising in the criminal courts have undertaken many years of study before qualifying, have undertaken in-office training before appearing in court and are required to provide evidence to their professional body of completion of a set amount of continuing professional development each year. In carrying out their duties to clients and to the courts they must be presumed to do so with a high degree of professionalism and integrity, and as such they are entitled to be remunerated at a level commensurate with their skill and responsibility. In particular, where professional legal advisers are expected to be available to offer advice to persons deprived of their liberty, and where this duty impacts upon their personal lives, they must expect proper reward.

We note that the present fee proposals represent an increase from the previous ones, although there must remain some concern as to whether practitioners will in general be happy to accept an increase of 33% for unsocial hours work, when 50% would generally be regarded as the minimum increase in fees for work of this nature. The Society is aware that the Law Society of Scotland's Criminal Legal Aid Committee, which has undertaken research into the social benefits of legal aid and of the potential financial impact of these proposals upon its members, will be submitting its own response. As that body has more experience of the likely effect of the proposals upon both urban and rural legal aid practitioners, we propose that Ministers and the Justice Committee have regard to this information and any representations.

The Society is encouraged to note that the new definition of "unsocial hours" encompasses all times outwith 7.00am to 7.00pm on normal working days that are not public holidays. This is likely in itself to be acceptable to many of our members, although it must be reiterated that inadequate time has been provided for proper consultation. If someone is expected by an organ of the state to waive their ECHR article 8 right to a private and family life by virtue of being a legal aid lawyer, they must expect in return that the state will provide them with a proper benefit in return. This is especially so where the person is expected to provide a proper professional service to a person in custody facing serious consequences. One member of this Society was recently obliged to leave home at 11.50pm to attend a police station for consultation in connection with a serious allegation. Following consultation, it emerged that the police doctor would not be in attendance for some hours and the interview with the suspect could not resume until he had taken scientific samples, consent for which was given after consultation. The result of this was that the practitioner, who was duty solicitor, left the police station after 6.15am and required to be in court before 10.00am.

It can never be appropriate for such a massive disruption to normal living patterns, where the advice may be crucial to liberty and livelihood of a suspect/accused person, to attract remuneration at a level actively discouraging to the qualified professionals tasked with providing the service.

David Lamb  
Secretary  
6 December 2017