

***CRIMINAL ACCOUNTS***  
**ASSESSMENT MANUAL**  
**[FIXED PAYMENTS]**



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*Relevant sections of Act and Regulations*

Legal Aid (Scotland) Act 1986 ss21 – 25AB [Part IV] (the “Act”)

The Criminal Legal Aid (Scotland) Regulations 1996 (the “Regulations”)

The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (the “Fees Regulations”)

The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (the “Fixed Payments Regulations”)

Scotland Act 1998 (Consequential Modification) (No.2) Order 1999. [This came into force in June 1999 and such procedure was covered by a determination by the Secretary of State dated 18 May 1999 to fill in the gap between the coming into force of the provisions of the Scotland Act and paragraph (h).]

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 1999 (the “Amendment Regulations”)

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2001 (the “Second Amendment Regulations”)

*Case Law referred to:-*

*Handley -v- Pirie 1976 J.C. 65*

*Mitchell -v- Vannett 1999 S.C.C.R 547*

*Ruxton -v- Borland 2000 SLT 612*

*Millar -v- Dickson 2000 SLT 1111@1117*

## ***WHAT ARE FIXED PAYMENTS?***

Fixed payments were introduced by the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, following the consultation paper issued by the Scottish Office in October 1998. They came into force on 1 April 1999. These regulations marked a radical departure from the former system of time and line accounting. Fixed payments are based on a prescribed “rate for the job” which is designed to ensure remuneration for solicitors undertaking summary criminal legal aid with a degree of “swings and roundabouts” in relation to remuneration for individual cases. Fixed payments were made possible by section 51 of the Crime and Punishment (Scotland) Act 1997 which inserted section 33(3A) into the Legal Aid (Scotland) Act 1986. The then Secretary of State used the powers provided by section 33(3A) of the 1986 Act, as amended by the 1997 Act, to prescribe fixed payments for work done under summary criminal legal aid. Until section 33(3A) was inserted in the Act the only provision was that contained in section 33(1):-

“(1) [Subject to sub-sections (3A) and (3B) below,] any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by him in so acting”.

This manual follows the layout of the Fixed Payment Regulations, starting at regulation 2 and commenting, where appropriate, on the various provisions of the regulations, as amended.

## ***PROCEEDINGS TO WHICH THE FIXED PAYMENT REGULATIONS APPLY***

Fixed payments apply to all criminal legal aid provided by a solicitor in relation to summary proceedings other than those listed below. This includes not only summary criminal legal aid granted by the Board in terms of section 24 of the Legal Aid (Scotland) Act 1986 but also by the Court in terms of section 23(1)(b) of the Act. The exceptions (which remain chargeable on a time and line basis) are as follows:-

### ***2 EXCLUDED PROCEEDINGS***

#### ***(a) summary proceedings arising following a reduction from solemn proceedings;***

Regulation 4 (2) (d) of the Criminal Legal Aid (Scotland) Regulations 1996 provides that the distinct proceedings specified in paragraph (1) shall include “...any proceedings up to and including the first hearing of the complaint where a charge is reduced from solemn to summary proceedings and, if a plea of guilty is tendered, thereafter to the conclusion of the case...”.

Where the accused pleads guilty the Board would expect one time and line account. Where the accused tenders a plea of not guilty and a fresh certificate is granted by the Board the solicitor should prepare two time and line accounts: one in connection with the solemn proceedings and the other in connection with the subsequent summary proceedings. The accounts should be lodged together.

- (b) *proceedings in relation to which legal aid is only available by virtue of section 22(1)(a) of the Act (identification parades held by or on behalf of the prosecutor in contemplation of criminal proceedings);*

The reference to “only” in this paragraph and also 2(c), 2(d) and 2(e) below, clearly indicates that if this work is not the only work and is carried out within the context of a full criminal legal aid certificate the work will form part of the core fixed payment and will not be payable separately by submission of a detailed account.

- (c) *proceedings in relation to which legal aid is only available by virtue of section 22(1)(c) of the Act [except where those proceedings are before a court which has been designated as a drug court by the Sheriff Principal] (assisted person in custody or liberated by police on undertaking to appear);*

*The section in brackets was added by the Second Amendment Regulations (which came into force on 15 October 2001) to provide cover at the initial custody stage in drug court proceedings (see page 25).*

- (d) *proceedings in relation to which legal aid is only available by virtue of section 22(1)(da) of the Act (plea of insanity in bar of trial);*
- (e) *proceedings in relation to which legal aid is only available by virtue of section 22(1)(db) of the Act (examination of facts);*

Again, in all these cases payment is only on a detailed or time and line basis if there is no other work carried out other than the work under automatic criminal legal aid. If it ultimately forms part of a criminal legal aid certificate, it cannot be paid time and line and forms part of the core fixed payment (see page 8).

- (f) *proceedings in relation to which legal aid is made available by virtue of regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996 (matters of special urgency);*

Provision is made in this paragraph for “proceedings” in relation to which legal aid is made available by virtue of regulation 15 to be excluded proceedings allowing a detailed time and line account to be lodged. It does not refer to “that part of the proceedings” nor does it in any way seek to distinguish one part of proceedings from another. Accordingly, in the event that a criminal legal aid certificate is subsequently granted in respect of the same proceedings, it follows that the whole account would be payable on a time and line basis. On the other hand, if the proceedings in respect of which regulation 15 was granted are, for example, deserted *pro loco et tempore* and fresh proceedings are raised, it appears to follow that the fresh proceedings would attract a fixed payment. It depends on the circumstances of the individual case.

[The Fixed Payment Regulations do not strike at paying a time and line account and a fixed payment in respect of separate proceedings arising out of the same incident. They only strike at paying a further core fixed payment and so the question of whether the respective complaints arise out of the same incident do not apply [see Regulation 4 (3). In this example, if further proceedings were raised in the same case i.e. a third complaint, regulation 4(3) would have to be applied.]

(g) *any reference in connection with proceedings under article 177 of the EEC Treaty;*

We are unaware of any case raising this issue.

(h) *any reference on a devolution issue under paragraph 9 of Schedule 6 to the Scotland Act 1998;*

Paragraph (h) was introduced by the Scotland Act 1998 (Consequential Modification) (No.2) Order 1999. [This came into force in June 1999 and such procedure was covered by a determination by the Secretary of State dated 18 May 1999 to fill in the gap between the coming into force of the provisions of the Scotland Act and paragraph (h).]

(i) *proceedings under section 9 of the Extradition Act 1989.*

(j) *proceedings under section 5 of the International Criminal Court Act 2001.*

Sub paragraphs (i) and (j) were added by the Second Amendment Regulations (15 October 2001).

#### *PAYMENT FOR DEVOLUTION ISSUES: “REFERENCE”*

Devolution issues have not been defined as excluded proceedings in terms of Regulation 2 (1) of the Fixed Payments Regulations. As can be seen above, Regulation 2(1)(h) only provides that “any reference” on a devolution issue under paragraph 9 of Schedule 6 of the Scotland Act 1998 is an excluded proceeding. *All work in connection with the raising of a devolution issue before the lower court is included within the core fixed payment.*

In terms of Regulation 4 (1), the solicitor providing relevant criminal legal aid for summary criminal proceedings is paid the fixed payments specified in Schedule 1 to the Fixed Payment Regulations in respect of the professional services provided by him and the outlays as specified in Regulation 4 (2). There is no additional remuneration for a devolution issue, as such. Only work in connection with the “reference” is chargeable on a detailed basis, and therefore all work in connection with the remainder of the case remains within the core payment.

It is the Board’s experience that most procedure before the High Court in connection with devolution issues does not in fact proceed as a reference but, instead, as an appeal taken by either the defence or the Crown depending on the outcome of the proceedings before the sheriff.

#### *PROCEDURAL APPEALS*

Appeals to the High Court against the refusal or the granting of a devolution issue are subsumed within the core fixed payment because they are not appeals against conviction, sentence, other disposal or acquittal within the meaning of section 25(1) of the Act.

Indeed, in all cases, not only those involving a devolution issue, a procedural appeal to the High Court of Justiciary is subsumed within the core fixed payment. A “procedural appeal” is a shorthand.../

shorthand reference to any appeal other than an appeal to the High Court of Justiciary against conviction, sentence, other disposal or acquittal where referred to in regulation 4(f) of the Criminal Legal Aid (Scotland) Regulations 1996, and, thus, not “distinct proceedings” for which an appeal certificate can be made available.

NOTE: Schedule 6 refers to both “reference” and “appeal”. A reference is not the same as an appeal.

### **3 COMMENCEMENT AND TRANSITIONAL ARRANGEMENTS**

Regulation 3 provided for the transitional arrangements and has, of course, become increasingly redundant. However, in the unlikely event you do come across a case still lurking around in which it is relevant, the following will be of assistance.

- The fixed payment regulations apply to all summary criminal legal aid certificates where the effective date of legal aid is on or after 1 April 1999. Whilst the date of issue of the certificate may be later, it is the effective date which indicates the date of grant of criminal legal aid.
- Also, all automatic criminal legal aid, prescribed by Section 22(1)(d) or Section 24(7) of the Act and provided to a client from the morning of 1 April 1999 is affected. The fixed payment of £25 is payable only for work done under automatic criminal legal aid first provided on or after 1 April. Any automatic legal aid work which was in the course of being carried out should be charged on a time and line basis and shall continue to be charged on a time and line basis after 1 April 1999 (see examples below). This means that claims for work done in this crossover period will consist of a detailed account for automatic work plus a separate claim for the fixed payment where legal aid is granted.

**Example:**        Where legal aid granted (basic sheriff court fee)

Pre – 1 April automatic work = Detailed account for automatic work +£500.  
1 April automatic work        = £25 + £475.

Where legal aid refused

Pre – 1 April automatic work = Detailed account.  
1 April automatic work        = £25.

### **4**

Regulation 4 contains the essential provisions underlying fixed payments and an understanding of this regulation is crucial to applying the fixed payments scheme. Before dealing with this regulation some reference should be made to the basis on which you are assessing fixed payment claims.

### **STANDARD OF TAXATION**

The Criminal Legal Aid (Scotland)(Fees) Regulations 1989 continue to apply to the assessment of.../

of Criminal Legal Aid Accounts but are subject to the provisions of the Fixed Payment Regulations. This means that if the terms of the Fees Regulations conflict with the terms of the Fixed Payment Regulations, it is the Fixed Payment Regulations which you require to apply. An example of where conflict exists would be with regard to the application of **Regulation 7**, “Fees allowable to solicitors”, which provides that a solicitor shall be allowed “such amount of fees as shall be determined to be reasonable remuneration for work actually and reasonably done....”.

On the other hand an example of where conflict does not exist is **Regulation 8**. “Outlays allowable to solicitors”, which provides that a solicitor shall only be allowed “outlays, due regard being had to economy” (including the provisions whereby travelling expenses cannot be incurred in travelling to a court in a town or place where the solicitor has a place of business which remain in force). Also, fees allowable to counsel and the general provisions for taxation of fees and outlays all remain intact. As the assessment of outlays remains the same, you should remember to check for appropriate grants of sanction for counsel, expert witnesses or work of an unusual nature or likely to involve unusually large expenditure (see 4.2 below).

#### **4.1 FIXED PAYMENTS ALLOWABLE TO SOLICITORS**

*There shall be made to a solicitor who provides relevant criminal legal aid in summary proceedings, in respect of the professional services provided by him and the outlays specified in paragraph (2) below, and in accordance with the provisions of this regulation, the fixed payments specified in Schedule 1.*

This paragraph provides for what has been termed the ‘core fixed payment’ (although there is no particular reference to a core fixed payment in the Regulations). The regulations provide for a fixed payment relating to the case i.e. £300 for the District Court; £500 for the Sheriff Court; and £550 for a Schedule 2 Court and further fixed payments available in the circumstances of each individual case (which will be dealt with later).

*“relevant criminal legal aid” means criminal legal aid provided by a solicitor in relation to summary proceedings other than excluded proceedings.*

#### **WHAT IS COVERED BY THE CORE FIXED PAYMENT?**

This fixed payment covers “All work up to and including:

- (i) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;
- (ii) the first 30 minutes of conducting a proof in mitigation (other than work done in connection with a grant of legal aid under Section 23(1)(b)\*; and
- (iii) the first 30 minutes of conducting any trial  
**together with any subsequent or additional work other than that specified in paragraphs 2-9 below.”**

[\*Work done under a grant of legal aid under Section 23(1)(b) is chargeable in terms of Schedule 1, paragraph 2 which provides a separate core fixed payment of £25 for the District court and £50 for the Sheriff Court.]

This payment represents the total fee payable for all work carried out by a solicitor in a summary criminal legal aid case except:

- Work for which there is a further prescribed fixed payment e.g. an extended trial or proof in mitigation; a deferred sentence; a bail appeal; or
- Work carried out in excluded proceedings - see regulation 2 (page 4 above) - where a solicitor is entitled to charge on a detailed time and line basis.

For the avoidance of doubt, and this will be dealt with in more detail in this manual, the *only* circumstances in which a solicitor can be paid a time and line fee in summary criminal proceedings which are not excluded from the regulations is the situation where the solicitor is paid a detailed fee for a reference in the High Court. There are no other circumstances in which there is any provision for a mixed fixed payment claim and time and line account.

It follows that there can be work later on in the proceedings which reverts to work being carried out under the core fixed payment. This is a matter which still causes confusion. Solicitors ask whether work outwith the plea of guilty or, alternatively, the first 30 minutes of conducting a proof in mitigation, which is not specifically covered by a fixed payment can be carried out under a time and line account. The answer is to be found in the definition itself (above, in bold type) where it refers to “subsequent or additional work”. *Any work other than work carried out in excluded proceedings or work for which there is a prescribed fixed payment is subsumed within the core fixed payment.*

An example of such work might be an invitation warrant (or warrant proceedings generally) where the client has previously failed to appear and which is not covered by another fixed payment; or a means enquiry where the solicitor is proceeding under the criminal legal aid certificate. (ABWOR is not available for representation at a means enquiry although work in connection with a means enquiry may have been done under advice and assistance.)

- ***Enhanced Core Fixed Payments***

The respective “core” fixed payments may be enhanced by £100 if the assisted person has been remanded in custody at or subsequent to the first calling of the case and is under 21 years old at any time during that remand.

Things to remember:-

- The assisted person must have been remanded in custody at the conclusion of the pleading diet. The enhanced payment is not applicable where the assisted person simply appeared *from* custody at the pleading diet.
- The £100 enhancement is available if the assisted person is remanded in custody *at any time* during the proceedings.

- The assisted person does not require to have been remanded in custody in connection with *these* proceedings (the purpose of the enhanced payment is to enable the solicitor to visit under 21 year olds who are remanded, for whatever reason, because Young Offenders Institutions are few and relatively inaccessible from most of the main cities).

- ***Different Rates For Different Courts***

The fixed payments differ according to whether the case is heard in the district court or in the sheriff court (see Schedule 1). Sheriff court cases and those set down for the Stipendiary Magistrates Court (currently only in Glasgow) attract a higher rate of payment due to the greater sentencing powers available and because such cases are likely to be more complex. The higher rate does not apply to cases which start off in the district court before a Justice but are eventually dealt with by the Stipendiary Magistrate. To attract the higher rate a case must have been *set down* for the Stipendiary Magistrate by the Procurator Fiscal who has marked the papers.

[Cases are marked for the district court, the sheriff court or the Stipendiary Magistrates Court by the Procurator Fiscal when he or she passes papers to the relevant clerk of court. The rate which may be claimed will depend on the court to which the fiscal has marked the case, not the one in which it is eventually heard. It is possible, for example, that a case marked for lay justices will be transferred to the stipendiary magistrates for trial simply because that court is available, but this does not mean it is by nature complex or serious. The papers should be clearly marked but it has been drawn to the Board's attention that this is not always the case, and this has been taken up with the Crown Office.]

*Schedule 2 Courts*

In addition there are a number of courts which, due to a number of factors including their geographical location, attract an enhanced fixed payment (see list below). These courts were increased by the Amendment Regulations.

***LIST OF RURAL COURTS  
FROM 1 APRIL 1999***

Campbeltown  
Dunoon (where procedures have taken place in Lochgilphead)  
Kirkwall  
Lerwick  
Lochmaddy  
Oban  
Portree  
Rothesay  
Stornoway

***FROM 1 OCTOBER 1999 [AMENDMENT REGULATIONS]***

*In addition to above:*

Dunoon (without above qualification)  
Fort William  
Wick

Note: the amendment regulations contain no transitional provisions. The consequence of this is that any “proceedings” which had not been concluded prior to 1 October 1999 and which featured any further appearance, including diet of deferred sentence, after 1 October 1999 qualify for the enhanced fixed payment applicable to Schedule 2 courts.

## 4.2

*The outlays specified in this paragraph are all outlays in connection with-*

- (a) the taking, drawing, framing and perusal of precognitions;*
- (b) the undertaking by another solicitor of any part of the work; and*
- (c) photocopying.*

The outlays specified in this paragraph are outlays which, under the old system, were chargeable as fees, the level of which were taken into account when calculating the prescribed fixed payments. Most issues arise in relation to the application of sub-paragraph (a) relating to the “taking, drawing, framing and perusal of precognitions”.

*...The taking, drawing, framing and perusal of precognitions*

### *WHICH OUTLAYS ARE INCLUDED WITHIN THE FIXED PAYMENT?*

- A solicitor cannot submit a claim for any outlay in connection with the cost of taking precognitions. This includes *travelling expenses* incurred either by the solicitor or an agent relating to the taking of precognitions and, of course, for the services of a precognition agent. Technically, this could affect travel when attending on a client in prison, as the Board would require to make enquiry on each occasion as to whether a solicitor was taking a precognition from the client. The Board identified this issue at a fairly early stage and made it clear to solicitors that it would presume, in all cases, that even if a solicitor was taking a precognition, the prime purpose of a visit to a client would doubtless be to advise and take instructions, and that a solicitor would be entitled to charge the mileage for prison visits. *(The fee element in all these cases is, of course, subsumed within the fixed payment).*
- This provision indirectly struck at outlays in connection with taking a precognition from some doctors and other witnesses who have, unfortunately, taken to charging for giving a factual precognition. Despite the matter being taken up by the Law Society with the BMA, the practice continues unabated and now appears to be spreading to other medical staff and, apparently, firemen. Discussions are presently taking place with the Law Society of Scotland and other interested parties to deal with this problem. The Board cannot reimburse a solicitor for such charges as they are clearly outlays in connection with the taking of a precognition.

- Difficulties arise, from time to time, as to whether work carried out by a solicitor amounts to taking a precognition or obtaining a report from a doctor.

Situations where it appears to be a precognition are as follows:-

- ◆ If a doctor, or other individual, is named on the Crown list, it is hard to avoid the conclusion that a solicitor has taken a precognition from that witness and any payment made to that individual cannot be reimbursed;
- ◆ A witness may just happen to be a citizen who is a doctor and who has witnessed an offence, whether it be within the confines of a hospital or elsewhere.

Situations in which a solicitor is not taking a precognition are as follows:-

- ◆ The provision does not strike at medical reports obtained from a client's GP, psychiatrist or psychologist speaking to a continuing course of treatment which the client has undergone or to the client's general medical condition.
- ◆ Provision does not strike at expert reports.
- ◆ Nor does it strike at the situation where an individual charged with assault claims that he himself has been the victim of an assault. In these situations, a report may be required from a doctor which, apart from indicating that the client was treated on a particular date, will proceed to narrate the injuries suffered by the client. Although not always the case, the fact that such a report may be lodged as a production would certainly be indicative of a report rather than a precognition.

The position is unfortunately, far from clear and further guidance will, no doubt, be required as matters develop. You should check with your Team Leader if there is a problem.

- In the event that a solicitor is unable to obtain a precognition from a witness, there may be provision for obtaining a copy of that precognition from the Procurator Fiscal. The "obtaining" of a precognition in the circumstances does not appear to be covered by the prohibition on charging a separate outlay in connection with "the taking...of precognitions". You would of course have to be satisfied that it was reasonable in the circumstances to revert to the Fiscal for these precognitions especially if a large number of precognitions have been obtained in this way in the case or, within your knowledge, by the same solicitors in a number of cases.

#### *WHICH OUTLAYS ARE NOT INCLUDED WITHIN THE FIXED PAYMENT?*

All other outlays chargeable in criminal cases which are subject to time and line accounting are chargeable in fixed payment cases. The following is a non-exhaustive list of the more common outlays you will come across:

- employment of counsel (where sanctioned)
- witness expenses (cost of travel; loss of earnings)

- sheriff officer's costs in citing witnesses
- cost of expert witnesses (where sanctioned)
- travelling expenses e.g. mileage in attending court (not being a court in the town or place where the solicitor has a place of business), or prison.
- ***Outlays Allowable to Solicitors – “actually and reasonably incurred...”***

The same rules apply generally to a proper assessment of outlays incurred under a fixed payment case as apply in cases which are subject to a detailed account. The following are examples:

- mileage incurred in attending client in prison.
- mileage incurred in travel to a distant court for, say, an intermediate diet or deferred sentence where a local agent could have been used.
- out of pocket expenses, witness expenses and expenses incurred by expert witnesses.

The normal rules relating to the requirement for sanction for work of an unusual nature or likely to involve unusual expenditure remain the same although, of course, sanction can never be granted for any work in such a way as would make any allowance for a fee being payable to a solicitor in excess of the prescribed fixed payments. [A solicitor may seek sanction for 20 witnesses to be precognosed at a total cost of, say, £600. This, of course, should not be granted by the Applications Division. In the unlikely event that it has been granted no payment can be made in excess of the prescribed fixed payments. Solicitors undertaking criminal legal assistance are presumed to be aware of the regulations within which they are working and should be aware that such a grant is *ultra vires* the powers of the Board.]

- ***Outlays Arising from Prison Visits***

As stated above, mileage is a chargeable outlay in connection with attending a client in prison although, being an outlay, it still requires to be actually and reasonably incurred in terms of regulation 8 of the Criminal Fees Regulations.

The mileage incurred as a result of numerous visits to a client in prison or, alternatively, visits to distant prisons still requires to be justified in the event that you consider the resultant outlays to be significant.

- ***Witnesses***

The other provisions of Regulation 8 to the effect that fees paid to witnesses who are not on the Crown List shall not exceed the sums payable from time to time by the Crown to witnesses of the same categories remain the same.

- ***Local Court***

The.../

The same rules apply to the solicitor not being in a position to charge mileage for travel to a court in the town or place where the solicitor has a place of business.

*...The undertaking by another solicitor of any part of the work...*

All fees incurred in the conduct of the case are subsumed within the core fixed payment or such further fixed payments as are prescribed by the regulations. Where another solicitor carries out work on behalf of the nominated solicitor this too is included within the core fixed payment. A solicitor cannot incur an outlay to another solicitor for any work done in connection with the case. The position of an Edinburgh agent in connection with a bail appeal (see page 24) is an example of this regulation in action.

*...Photocopying.....*

All photocopying is subsumed within the core fixed payment and cannot be charged for separately.

### 4.3

*“PROCEEDINGS”: ARISING OUT OF THE SAME INCIDENT*

*Except where proceedings have been brought under section 185 of the 1995 Act, the reference to summary proceedings in paragraph (1) above is a reference to proceedings on a single summary complaint or on complaints which arise out of the same incident.*

This provision has given rise to some confusion.

A clear distinction has to be made between the situations in which a solicitor requires to apply for a **fresh certificate** and the situations in which he will be entitled to a **payment of a further core fixed payment**. These are two quite separate and distinct issues which will be dealt with in turn.

*FRESH CERTIFICATE...*

The normal rules will apply in the event that the Fiscal deserts a complaint and raises another complaint. These are specified in the guidance given in the Scottish Legal Aid Handbook (Sixth Edition) at page A:118 section 15.4.5 (Desertion of Proceedings):- ‘If fresh proceedings concerned with the same matter are subsequently brought, a fresh application for legal aid must be made to the court or to the Board. There are, however, exceptions to this general rule. Firstly, in relation to a case brought initially under summary procedure, where desertion is followed immediately by service of a fresh complaint, and there is insufficient time to make a fresh application to the Board, the original grant will be regarded as covering the fresh complaint. The matter should be reported to the Board as soon as possible’.

**A fresh certificate should applied for as a matter of course. The fact that a fresh certificate has been granted is of no relevance in the question of whether that certificate attracts a further core fixed payment and is not an indication, by itself, that the case will attract a further core fixed payment. Whether it does depends on the issues raised in the next paragraph.**

*FURTHER CORE FIXED PAYMENT*

The reference in the regulation to a ‘single summary complaint or on complaints which arise out of the same incident’ clearly indicates that if the fresh complaint relates to matters which arise out of the same incident the solicitor will not be entitled to a further core fixed payment. The solicitor will, of course, be entitled to the original core fixed payment and will have the opportunity, under the second certificate or subsequent certificates, to claim further fixed payments in respect of extended trials, deferred sentences etc. This is all quite topical at the moment given the tendency by the Fiscal of late to ‘roll up’ different matters into fresh complaints. Clearly if these complaints contain fresh material then a further core fixed payment is payable in respect of these complaints.

*Road Traffic Cases*

A prime example of complaints which arise out of the same incident is to be found in road traffic cases where the Fiscal divides the charges into two separate complaints where one of the charges relates to a charge of driving whilst disqualified. This charge has to proceed on its own as the proof involves the leading of the accused’s previous convictions. All other charges which would have gone on the same complaint form a separate complaint which proceeds separately, perhaps even a separate court. (One complaint could call in the sheriff court and the other in the district court.) However, the complaints invariably arise out of the same incident. Although the solicitor may well apply for and be granted separate criminal legal aid certificates, he or she is only entitled to one core fixed payment in terms of regulation 4.3.

Although only one core fixed payment can be paid to the solicitor, both complaints are capable of attracting further fixed payments prescribed by Schedule 1 depending on the circumstances of each case:

- In the event of both cases proceeding to trial the first 30 minutes of each trial will, of course, be subsumed within the core fixed payment. If one trial did not exceed the 30 minutes but the other trial did, the solicitor will be entitled to the further payments prescribed by paragraphs 3, 4 and 5 for extended trials for the trial which did proceed beyond the core fixed payment.
- The situation is not entirely clear from the Regulations where both cases proceed to trial beyond the first 30 minutes. One option would be to treat them entirely separately which would result, for example, in a “first day” payment for each trial notwithstanding that the solicitor would have actually spent two days (one day for each trial) in court. In fairness, the Board’s policy in this situation is to reflect what it considers to be the actual situation and to pay the solicitor the “first day” payment for the first trial and the “second” (or subsequent) day/s for the second trial. In short, you add the number of days trial in total and remunerate the solicitor accordingly.

*.....which arise out of the same incident.....*

What does this mean? The following are a number of examples which may assist you in applying this test:

*Example 1*

*If the second complaint is exactly the same as the first there is no further core fixed payment payable.*

*Example 2*

*Equally, if it introduces a further charge relating to the original incident then, again, there is no further core fixed payment payable.*

- GC was charged with falsely stating to a shop employee that he had previously purchased a jacket which was defective and induced the employee to provide him with exchange facilities to obtain money for the jacket and obtained £75 of money by fraud. He was subsequently served with a further complaint (the original complaint having been deserted) which contained the fraud charge but also charged GC with stealing the jacket at the same time (immediately prior to taking it to the exchange desk).

Clearly the theft charge was an important omission from the original complaint. Although it was a fresh charge it arose from the same incident and only one core fixed payment was available.

- TDN was charged with possession of drugs between two dates covering a four month period. The complaint was deserted and replaced by a fresh complaint which additionally charged TDN with supplying drugs at the same time and between the same dates. Again, although the charge of supply did not feature in the original complaint, it arose from the same incident.
- BM was charged under one complaint with driving whilst disqualified and with no insurance. He was charged under a separate complaint served on him at the same time and under the same P.F. number with the theft of the motor vehicle (two days previously) and was supplying a controlled drug at the same time as the Road Traffic Act charges. Although the complaints proceeded under the same P.F. number it was considered that the second complaint did not arise out of the same incident, the incident of theft having taken place some two days earlier and, indeed, the charge of supply of drugs having taken place in a different street from the charges under the Road Traffic Act.

*Example 3*

*A second complaint introducing fresh charges from completely separate incidents leads to the payment of a further core fixed payment. These are probably more common. Instead of serving a separate complaint on the same accused, the Fiscal frequently takes the opportunity of serving a complaint including other current charges against the same accused.*

- AK was charged with playing music at excessive volume to the disturbance of his neighbours on 6 July 1999. On 8 September 1999 he was charged with a further offence of committing a breach of the peace again in relation to his neighbours. The initial complaint had been deserted and re-raised containing both charges. Although both courses of conduct affect the same neighbours, clearly both charges arise out of quite separate incidents.

*Example 4*

*If you have two separate complaints containing two separate charges and the same charges feature in a combined third complaint then clearly there can be no further core fixed payment payable in respect of the third complaint as respectively the two charges arise from the same incident as complaint numbers one and two.*

It is as simple as that! It is a matter of the facts and circumstances of each case.

4.4

*Where in such proceedings a solicitor acts for more than one assisted person a separate fixed payment shall be made to him in respect of each such assisted person, in accordance with paragraph (5) below.*

This allows a solicitor to act for more than one assisted person where there is no conflict of interest and to claim reduced fixed payments as dealt with in the next section.

We are unaware of any issues having arisen from this provision.

4.5

*Where a solicitor represents two or more assisted persons he shall be paid in respect of the first assisted person 100% of such of the fixed payments specified in Schedule 1 as are appropriate to that assisted person, in respect of a second assisted person 40% of the appropriate fixed payments, and in respect of a third and each subsequent assisted person 20% of those payments.*

This could be very complicated. The provisions are not entirely clear as to what happens in a situation where one of these assisted persons forms the subject of a transfer. It opens up the possibility of some very confusing maths even if you can work out whether it was the ‘first’, ‘second’ or the ‘third’ assisted person (there is no definition) who has been transferred to another solicitor. Presumably any solicitor would only transfer the ‘third’ (it is his choice!) on the basis that he would still be entitled to the 50% of 20% of the core fixed payment rather than ridding himself of 50% of 100% or even 50% of 40% of a core fixed payment by transferring the ‘first’ or ‘second’. Further guidance will be provided in time if necessary.

4.6

*Where a solicitor represents an assisted person who has been remanded in custody at or subsequent to the first calling of the case and that assisted person is at any time during that remand under 21 years of age the fixed payment specified in paragraph 1 of part 1 of Schedule 1 shall be increased by £100.*

This is a much simpler provision but remains the subject of enquiry by solicitors. The core fixed payment is increased by £100. It is not a separate fixed payment, as such. The provision does *not* apply where the accused simply appears from custody. He must be “remanded in custody at or.../

or subsequent to the first calling of the case”. It applies even where the accused is remanded in custody in respect of some other proceedings after a solicitor’s involvement with the accused (in the case of a transfer). It also applies if *at any time* the accused was 21 years of age.

*Solicitor to whom case is transferred*

Probably the most important taxation issue arising from this paragraph is not so much what the solicitor who transfers the case is entitled to but what the solicitor to whom the case is transferred can claim. The solicitor to whom, say, the “third” assisted person has been transferred is not acting for anyone else. This provision does not apply to him at all. **The solicitor to whom the case is transferred is, in the usual way, entitled to 50% of the full fixed payments payable in respect of those proceedings.**

## 4.7

*Where the Board grants an application for a change of solicitor under regulation 17(3) of the Criminal Legal Aid (Scotland) Regulations 1996 there shall be paid to each of the solicitors who act for the assisted person in the relevant proceedings an equal part of the total amount payable in respect of those proceedings by virtue of paragraph (1) above and for the purposes of calculating that total amount paragraph (5) shall not apply.*

This provision means what it says. Each solicitor involved in the case is entitled to an *equal part of the total amount payable*. The division goes beyond the core fixed payment. It is the total of the final bill including extended trials, deferred sentences, enhanced core fees and anything else. If there are three solicitors the total is divided by three etc. It is for this reason that the Board retains the claims until the conclusion of the proceedings and only then deals with the claims in the light of the final position.

### Conclusion of proceedings

The “conclusion” of the proceedings is a matter of fact. There is clearly a difficulty in assessing at any given time whether the proceedings are indeed concluded and it may well be that payment is made to a solicitor – perhaps in a situation where a warrant has been granted – only to find that further procedure takes place in the proceedings. There does not appear to be any way of avoiding this situation as a balance has to be struck between holding on to make absolutely sure that the proceedings are indeed concluded and, on the other hand, making reasonably prompt payment to all the solicitors concerned in the proceedings.

In the event that further procedure does take place and yet another solicitor becomes involved then, clearly, a re-adjustment requires to be made and a proportion of the sums paid to the other solicitors involved in the earlier stages of the proceedings will require to be repaid to the Board. It is not a tenable position for a solicitor to state that the proceedings are concluded simply because his involvement in them is at an end.

### Outlays

The provision refers to the total amount payable in respect of those proceedings “by virtue of paragraph.../

paragraph one (above)”. Paragraph one actually deals not only with fees but the outlays specified in paragraph two. These particular ‘outlays’ are, of course, subsumed within the fee and do not relate to outlays which are incurred by the solicitor.

Outlays are to be paid to the solicitor who incurred them.

The provision relates to a payment to “each of the solicitors who act for the assisted person in the relevant proceedings...”. It is not clear whether a solicitor from whom a case is transferred and, for some reason is transferred back is entitled to one half or two thirds of the total amount payable. The question has not arisen as yet or, at least, has not been at issue.

### Public Defence Solicitor

It has been suggested that in cases where the certificate is transferred from the Public Defence Solicitor that the solicitor to whom the certificate is transferred should be entitled to the total fixed payment. This argument proceeds on the basis that the PDS is not paid from the Fund. Regulation 4.7 does not distinguish between the PDS and any other solicitor and the second solicitor is only entitled to one half of the total claim.

### *Payment*

On receipt of a claim in connection with a case which has been the subject of a transfer you should make immediate payment of the outlays to the solicitor. Thereafter you should hold onto the claim until the second or subsequent claims are to hand and only then should settlement be made to the extent of one half, one third etc.

## 4.8

*Where the work done by a solicitor constitutes a supply of services in respect of which value added tax is chargeable, there may be added to the amount of payments allowed to the solicitor an amount equal to the amount of value added tax chargeable.*

VAT is added over and above the total claim just as happens in time and line accounting.

## 5

Regulation 5 simply deals with the submission of accounts and has a six month limit unless there is a special reason for late submission. It also allows for payment of fees and outlays under the Criminal Fees Regulations. (See Criminal Accounts Assessment Manual [Solemn Cases and Non-Fixed Payment Summary Cases].)

### **SCHEDULE 1, PART 1**

#### **Paragraph 1**

*“All work up to and including (i) any diet at which a plea of guilty is made and accepted or plea in mitigation is made; (ii) the first 30 minutes of conducting a proof in mitigation other than in the.../*

*the circumstances where paragraph (2) below applies; and (iii) the first 30 minutes of conducting any trial together with any subsequent or additional work other than specified in paragraphs 2-9 below”.*

This deals with the core fixed payment which includes the first 30 minutes of conducting any trial or proof in mitigation.

#### *Trial and Proof in Mitigation*

A case has arisen where there was both a trial and a proof in mitigation. The solicitor was involved in a ‘first day’ in each. The solicitor was not entitled to a ‘second day’ for the proof in mitigation. As you will see from the terms of paragraph 1, trials and proofs in mitigation are treated quite separately and the 30 minute limit applies to both, individually, before proceeding on to a ‘first day’ respectively.

#### *Proof in Mitigation – Deferred Sentence*

Some confusion has arisen in the past regarding whether a solicitor has conducted a proof in mitigation or a deferred sentence. There is no specific provision in the Criminal Procedure (Scotland) Act 1995 for a proof in mitigation. The case is adjourned for a proof in mitigation under section 201 which provides for the court to “adjourn the case for the purpose of enabling enquiries to be made or of determining the most suitable method of dealing with [his] case”. Where it is clear that what took place was, in fact, a proof in mitigation, the solicitor should, of course, be paid for a proof in mitigation and not a deferred sentence.

#### **Paragraph 2**

*“All work done in connection with a grant of legal aid under section 23(1)(b) of the Act including the first 30 minutes of conducting a proof in mitigation”.*

#### *Board’s original view....*

Paragraph 2 relates to section 23(1)(b) proceedings and has also been the cause of some concern. It specifically provides a fixed payment for ‘all work done in connection with a grant of legal aid under section 23 (1)(b)...’. The second part of the regulation refers to the first 30 minutes of conducting a proof in mitigation which one would think would lead on to paragraphs 3, 4 and 5 and, therefore, by extension, to paragraph 6 relating to deferred sentences. However the terms of paragraph 2 appear to be quite clear in providing one payment for *all work*.

#### *Board’s concluded view....*

The first part of the regulation appeared to provide one fixed payment for *all work* done under a section 23(1)(b) certificate and this, indeed, is the interpretation the Board had placed on the provision. On the other hand, the second part did appear to indicate that it might not be exhaustive of all work which could be carried out in such a case. It was decided by the Board, after some discussion, that there was scope for interpreting the provision less restrictively and that there were sufficient “grey areas” to justify what could be considered a broader approach.

The interpretation which the Board now places on this provision is that solicitors will be paid the fee prescribed by paragraph 2 for all work done under a section 23(1)(b) certificate including appearance at the first diet. In addition, however, all attendances at a diet of deferred sentence (as defined in the regulations) will attract the fixed payment prescribed by paragraph 6 of Schedule 1, and a proof in mitigation extending beyond the first 30 minutes will attract the further fixed payments prescribed by paragraphs 3, 4 and 5 of Schedule 1. Any other appearances which do not fall within the scope of the further fixed payments prescribed by paragraphs 3-9 of the Schedule will be included in the core fixed payment prescribed by paragraph 2.

This applies to all cases where work has been carried out under the fixed payment regime from 1 April 1999.

### ***Paragraph 3***

*“All work done in connection with conducting a trial or proof in mitigation for the first day (after the first 30 minutes)”.*

#### *“The Trial”*

The great debate, of course, has been the definition of a trial where the paragraph refers to ‘conducting any trial’. The regulations came into effect in April 1999, one month before the case of *Mitchell –v- Vannett* 1999 SLT 934. The earlier case of *Handley –v- Pirie* 1976 JL 65 had dealt with the situation at the hearing where evidence was about to be led i.e. the first witness was being sworn when the trial was adjourned. The significance of *Mitchell –v- Vannett* was that the principle established in *Handley* was applied to the calling of the case at the first trial diet. It was put to the Board that this had always been the law and to a certain extent solicitors were correct. A decision such as this represents not only what the law is now but what the law is deemed always to have been. *Mitchell* was a very significant statement of the law which, unfortunately, post-dated the introduction of the Fixed Payment Regulations. The question, of course, was not primarily to do with the commencement of the trial but whether attendance at a trial diet at which the trial did not proceed was ‘conducting a trial’ in terms of the regulations. This particular issue was never resolved and did not proceed to taxation.

More importantly, from a practical point of view, the Board’s position was that the first 30 minutes was included within the core fixed payment and that the full 30 minutes would have to be exhausted – over a number of adjourned diets, if necessary – before paragraph 3 came into effect i.e. the first day (the first day being defined as commencing ‘after the first 30 minutes’).

#### *“Conducting a Trial...”*

“Conducting” is the advocacy time involved in the conduct of the case. Reference is made to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989, Schedule 1, paragraphs 1 and 2 which govern normal time and line accounting in non fixed payment cases.

Paragraph 1 provides the fee for “any time up to the first half hour spent by a solicitor conducting a trial in court or conducting another hearing. This is the advocacy rate.

In a situation where a solicitor tenders a plea of guilty on behalf of his client and sentence has been deferred to the conclusion of a trial diet where the co-accused is/are proceeding to trial, the solicitor would not be entitled to a fee for “conducting the trial”.

*Board’s concluded view.....*

These arguments were substantially laid to rest by the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 1999 which came into force on 1 October 1999 and which defined a trial as ‘taken to commence when the first witness is sworn’. There was some confusion as to whether the amendment regulations had come into force or, alternatively, whether they had been withdrawn. They did come into force and remain in force, and affect all proceedings in existence as at 1 October 1999.

*Pre – 1<sup>st</sup> October 1999.....*

The case of *Ruxton -v- Borland* 2000 SLT 612 has now resolved the question of a trial fairly conclusively, effectively overruling both *Handley -v- Pirie* and *Mitchell -v- Vannett*.

The effect of this is that *Borland* not only represents what the law is now; it represents what the law is deemed always to have been, as discussed in the case of *Millar -v- Dickson* 2000 SLT 1111 at 1117. For the purpose of dealing with accounts where the conduct of the ‘trial’ is an issue, the decision of *Borland* does not only state what the law is from the date of the decision but what it has been since the Fixed Payment Regulations came into force. Broadly stated, the decision in *Borland* is that a trial commences when the first witness is sworn.

The Board is of the view that the question of what fees are payable under the regulations requires to be determined at the date on which the payment is being made and that the law according to *Borland* should, therefore, be applied to all cases which raise the issue of the definition of a “trial” prior to the first witness being sworn. In any case in which payments under the regulations are being claimed it follows that any payments for “first” or subsequent days of trial will only be due if the trial had actually commenced, i.e. the first witness having been sworn. This will affect all cases where payment has not been made.

The Board’s position is supported by the Opinion of Senior Counsel.

***Paragraph 4***

*“All work done in connection with conducting a trial or proof in mitigation for the second day”.*

***Paragraph 5***

*“All work done in connection with conducting a trial or proof in mitigation for the third and subsequent days (per day)”.*

These provisions all allow for further fixed payments after the first 30 minutes for the first, second and subsequent days of a trial or proof in mitigation. The Board is quite clear that there has to be a first day before proceeding to a second day. This may appear obvious but it has been stated.../

stated that you can conduct a trial for ten minutes and then by virtue of the fact that the proceedings are adjourned to another day, that that day becomes the second day. This is not what the schedule says. It specifically states in paragraph 3 ‘conducting a trial or proof in mitigation for the first day after the first 30 minutes’. As defined, the first day only ‘kicks in’ after the first 30 minutes of conducting a trial is exhausted whether that 30 minutes takes place in one calendar day or more than one such day. It is possible to proceed to trial at, say, 4.45pm and on the court adjourning at 5.00pm to conclude the first 30 minutes the next day and only be paid the ‘first day’ fixed payment on that day (the second calendar day).

### ***Paragraph 6***

*“All work done in connection with representation in court at a diet of deferred sentence”.*

This paragraph deals with representation in court at a diet of deferred sentence. A solicitor is entitled to the fee of £25 or £50 for each deferred sentence. It is not framed in the same way as the provision for bail (below) which covers all work and which means that a continued bail appeal, for example, would still be included in the £50 fixed payment.

A deferred sentence was originally defined as being a Deferred Sentence, properly so called, in terms of section 202 of the Criminal Procedure (Scotland) Act 1995. After discussions of the Tripartite Group (the Executive, the Law Society and the Board) the interpretation was broadened to include all adjournments under sections 201, 202 and 203 and this actually became the definition of ‘diet of deferred sentence’ in the Amendment Regulations which came into force on 1 October 1999. The Board, however, has applied that definition to all deferred sentences from 1 April 1999.

It is possible that solicitors will ‘tick’ the deferred sentence box in anticipation of attending a diet. We should not pay for the deferred sentence at this stage and a supplementary account will be appropriate. Part B of the account synopsis can be used to identify the date of the deferred sentence.

### *Continued Diet*

It has been confirmed by the Scottish Court Service that where a sheriff simply continues a deferred sentence diet until a later part of the day’s proceedings that this is not to be construed as a further formal adjournment and only one fixed payment of £35 or £50 is due to be paid the solicitor. It is viewed by the court as the same diet which has been continued to a later part of that day’s proceedings and must be viewed by the Board accordingly. On the other hand, more than one deferred sentence calling at the same time can be remunerated separately (see ‘Bail Appeals’ below).

### ***Paragraph 7***

*“All work done where the accused is in custody and has tendered a plea of not guilty until determination of the application for legal aid”.*

Paragraph.../

Paragraph 7 provides a fixed payment of £25 for all work carried out under automatic criminal legal aid i.e. the ‘invisible certificate’. Some people have mistaken this for advice and assistance, presumably because the £25 coincides with the minimum fee under advice and assistance.

The £25 figure is simply a device to ensure that no matter when the work is done in a summary case the total fee remains £300 or £500 respectively. This is achieved by reducing the core fixed payment to £275 and £475 respectively. Accordingly the fixed payment for automatic work could be £25 or 25 pence. It is simply a figure to coincide with the equivalent reduction in the core fixed payment – a device to rationalise payment for work done, no matter when it is done.

### ***Paragraph 8***

*“All work done by virtue of section 24(7) of the Act until determination of the application for legal aid”.*

### ***Paragraph 9***

*“All work done in connection with a bail appeal under section 32 of the 1995 Act”.*

This paragraph provides a fixed payment for a bail appeal under section 32 of the 1995 Act. As has already been indicated this fee includes all work carried out by the nominated solicitor and the Edinburgh agent in respect of a bail appeal whether the bail appeal is heard on the first day or requires to be continued to a second day. It is for the bail appeal, unrelated to the time taken.

On the other hand it sometimes happens that bail appeals are proceeding at the same time in respect of quite separate complaints, in which case the £50 applies to each individual case. This can happen in fixed payments. Although travel and other outlays must always be apportioned, the fixed payment in respect of a bail appeal – or deferred sentence – is payable no matter what work is done if it arises in the proceedings. The result is that you can have two or three deferred sentences at the same time – or bail appeals – and all are payable at the full rate. [No one complains about this.]

### ***Section 201 Bail Appeal***

There is no specific provision for a section 201 bail appeal i.e. where the accused is remanded in custody after conviction and prior to sentence. This work is subsumed within the core fixed payment.

### ***Bail Review***

A bail review should not be confused with a bail appeal and is, again, subsumed within the core fixed payment.

## **SCHEDULE 2**

Lastly, there is a list of ‘Specified Sheriff Courts’ in Schedule 2. The Amendment Regulations added.../

added two more courts to this list i.e. Fort William and Wick. Because the Board has applied the terms of the Amendment Regulations to all proceedings in force as at 1 October 1999 the further payment is payable even though the proceedings were already in force prior to 1 October. The Board has not simply applied the amendment provisions to certificates granted on or after 1 October 1999.

The amendment also took out the qualification in parenthesis after Dunoon Sheriff Court resulting in all proceedings taking place in Dunoon Sheriff Court attracting the enhanced core fixed payment.

### **GLASGOW DRUG COURT PILOT**

The Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2001 (which came into force on 15 October 2001) amended the Fixed Payments Regulations by adding at the end of the existing regulation 4 the following:-

“(9) Where a solicitor represents an assisted person in a court which has been designated as a drug court by the Sheriff Principal –

- (a) Part I of Schedule 1 shall apply to those proceedings; and
- (b) where that assisted person has been remanded in custody at or subsequent to the first calling of the case and is at any time during that remand under 21 years of age, there shall be payable in addition to the fixed payment specified in Part II of Schedule 1 a payment of £100.”

The existing Schedule 1 has now been renamed Part I of Schedule 1 and a new Part 2 (dealing with drug court payments) has been added (see Appendix 1 to this manual).

There are two fixed payments:-

1. *All work done under section 22(1)(c) of the Act up to and including the first appearance of an assisted person* (a fixed payment of £100 is prescribed).

This payment is intended to remunerate the solicitor for all work carried out at the custody appearance and includes the first appearance before the drug court a few weeks later. (The custody court before which the individual appears is not the drug court. The proceedings are adjourned for reports to a specific court designated as a drug court and presided over by a Drug Court Sheriff.)

The way in which legal aid cover has been made available without reference to either the Board or the court at the initial stages is to extend the automatic legal aid provided by section 22(1)(c) of the Act and which has, until now, been entirely restricted to the work undertaken by the Duty Solicitor. The client’s solicitor of choice will admit the individual to advice and assistance to provide cover for taking the client’s instructions and the discussions which will take place during the course of the morning with various agencies as to whether that person is an appropriate person to be referred to the drug court. The solicitor can claim under the advice and assistance certificate in the event of the client not being referred to the drug court. In the event of the client being.../

being referred to the drug court, all this work will be covered by the £100 fixed payment (which also is intended to cover the first appearance at the drug court proper). The advice and assistance certificate should be marked “no claim” unless prior work was done under it (see below).

In the event that the solicitor is remunerated under the Fixed Payment scheme, the payment covers all work done at court on the day including taking instructions, advising the client and discussing the case with the various agencies, not just the appearance itself. This is because the fixed payment covers all work done under section 22(1)(c) of the Act which provides automatic criminal legal aid “where [the accused] is being prosecuted under summary procedure...”.

On the other hand, although the solicitor is not entitled to claim separately for advice and assistance given during the course of the morning, this would not include advice and assistance previously given to the client under the same certificate, for example, in the police station during the previous evening or weekend. Clearly that work would not have been covered by section 22(1)(c) provisions as the client was not being prosecuted at that stage.

The individual having been remitted to the Glasgow Drug Court, it is understood by the Board that arrangements may be made with the Fiscal for other cases involving the accused also to be referred to the drug court. These cases would not automatically qualify for this fixed payment. The fixed payment only relates to work done under section 22(1)(c) where the client is being prosecuted under summary procedure and is in custody (or has been liberated on an undertaking to appear). Any other work would require to be covered either by any existing legal aid or ABWOR certificate relating to that case or, indeed, *pro bono* if that was the basis on which the solicitor was representing the client in an associated case.

2 “All work done (other than work done in terms of paragraph 1) in connection with any appearance of an assisted person (per appearance).” (The prescribed fee is £50.)

This provision has given rise to some comment. The question has been raised as to whether the fixed payment relates to the appearance itself or to each case calling before the drug court. (If 10 cases had been referred, the solicitor would be entitled to 10 x £50 for each hearing.) The Board’s view (and this has been expressed to the Drug Court Steering Group and to the Glasgow Bar Association) is that the £50 fixed payment applies to the appearance regardless of the number of cases which have been referred to the drug court.

The ethos of the drug court is that it deals with the offender and not the offence. This has been reflected in the wording of the fixed payment prescribed by Schedule 1, Part 2, paragraph 2. It is framed differently to the provisions of Part I, paragraphs 6 (deferred sentence) and 9 (bail appeals). Both these provisions relate to the proceeding and not to the appearance (see pages 22 and 24 above and, also, Appendix 1 annexed).

#### *Under 21*

A similar provision to that allowed in other fixed payment cases provides for an enhanced ‘core’ fixed payment where the client is remanded in custody (not appearing from custody) and is at any time during that remand under 21 years of age (see page 9 above).

**CURRENT FIXED PAYMENTS - TABLE OF FEES – SCHEDULE 1  
PART 1**

**1. All work up to and including:**

	<i>District Court</i>	<i>Sheriff/ Stipendiary Magistrates Court</i>	<i>Rural Courts (See list on page 4)</i>
(i) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;	£300 (£275*)	£500 (£475*)	£550 (£525*)
(ii) the first 30 minutes of conducting a proof in mitigation other than in the circumstances where paragraph (2) below applies; and			*Where automatic legal aid has been made available. (see page 22)
(iii) the first 30 minutes of conducting any trial together with any subsequent or additional work other than specified in paragraphs 1-8 below.			

*Note :* The above core payments can each be increased by £100 in cases where the solicitor has represented an assisted person who has been remanded in custody at or subsequent to the first calling of the case and he/she is at any time during the remand, under 21 years of age.

**All work done in connection with:**

2. A grant of legal aid under section 23(1)(b) of the Act including the first 30 minutes of conducting a proof in mitigation.	£25	£50	£50
3. Conducting a trial or proof in mitigation for the first day (after the first 30 minutes).	£50	£100	£100
4. Conducting a trial or proof in mitigation for the second day.	£50	£200	£200

(continued.../)

5. Conducting a trial or proof in mitigation for the third and subsequent days (per day).	£100	£400	£400
6. Representation in court at a diet of deferred sentence	£25	£50	£50
7. All work done where the accused is in custody and has tendered a plea of not guilty until determination of the application for legal aid.	£25	£25	£25
8. All work done by virtue of section 24(7) of the Act until determination of the application for legal aid.	£25	£25	£25
9. All work done in connection with a bail appeal under section 32 of the 1995 Act.	£50	£50	£50

***PART 2***

*Where professional services are provided in relation to proceedings in a sheriff court which has been designated as a drug court by the Sheriff Principal*

1. All work done under section 22(1)(c) of the Act up to and including the first appearance of an assisted person;	£100
2. All work done (other than work done in terms of paragraph 1) in connection with any appearance of an assisted person (per appearance);	£50