

Summary criminal legal assistance reform



Frequently asked questions guidance

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Appearance from custody

1. Appointed solicitors

Q Can I act as an appointed solicitor in an undertaking or cited case?

A No. You can only act as an appointed solicitor for an accused person appearing from custody in answer to a complaint and then only if you meet the above criteria and your client is eligible on means. You act as the nominated solicitor for a person appearing in a cited case or on an undertaking to appear, applying a means and merits test.

Q When can I act for a client in a custody case as an appointed solicitor?

A You can act as an appointed solicitor and provide ABWOR for a client appearing from custody where the person appearing in answer to the complaint has (or has had) a solicitor and client relationship with you in circumstances apart from those relating to the appearance. This means that you must have acted for, or personally advised the client before in another case and have some knowledge of the client from that case.

If your client is normally represented by your firm, but another solicitor deals with the client, you can only provide ABWOR if you have had personal dealings with the client before. A client can establish a solicitor/client relationship with more than one of the firm's solicitors so long as each solicitor has had dealings with the client before. The relationship can also be established through civil or children's work for the client as well as criminal.

In addition, you must take instructions directly from the client and must be able to act immediately in person or through the services of another solicitor (other than the duty solicitor) at the pleading diet when the accused person first appears from custody in answer to a complaint. This means that you can only provide ABWOR if you have personally taken instructions about the case, and then you personally appear at the pleading diet, or have this appearance delegated to another solicitor.

You cannot provide ABWOR if both the instructions and the appearance are delegated to another solicitor. Another solicitor, to whom the representation has been delegated, cannot claim to be the appointed solicitor; you are only acting on behalf of the appointed solicitor.

Q Does this mean that a first offender cannot get ABWOR from an appointed solicitor?

A No, if there is a prior solicitor/client relationship. If a solicitor has acted for the client in relation to other matters such as civil proceedings, or perhaps advice in connection with children's panel issues, then a clear solicitor/client relationship does exist, and ABWOR can be provided by the appointed solicitor.

However, if there have been no dealings whatsoever with the client before this case, then ABWOR cannot be provided. As before, the only form of representational legal aid that the client can receive is through the duty solicitor, although advice and assistance can still be given to the client.

Q *If I am recommended to a client, and they wish to instruct me in this case, can I provide ABWOR as the appointed solicitor?*

A No, ABWOR can only be provided if a solicitor/client relationship has existed in circumstances apart from those relating to the appearance.

Q *Can I act as an appointed solicitor where the accused has been represented by the duty solicitor or, where he was not represented, at any stage after the pleading diet?*

A No. You are, as an appointed solicitor, providing a type of ABWOR (see regulation 6A of the 2003 ABWOR regulations) which "shall involve the attending upon, advising and acting for any person who appears from custody on the day when the person is first brought to court to answer the complaint."

You cannot, under any circumstances, purport to provide ABWOR as an appointed solicitor after the event or on any other basis.

Q *What happens if the client is seen in police custody, but is then released on an undertaking, or otherwise?*

A The fee is not chargeable. You can only appear and be paid as an appointed solicitor when the accused appears from custody on the day when the person is first brought to court to answer the complaint.

Q *Can I act as an appointed solicitor to an accused appearing from custody on a contempt of court matter?*

A No. There is specific provision at Section 30 of the Legal Aid (Scotland) Act 1986 for legal aid in connection with proceedings for contempt of court where a person is liable to be dealt with for contempt of court during the course of or in connection with any proceedings. ABWOR cannot be provided where legal aid is available in terms of the Act. Fees are chargeable on a detailed basis in terms of schedule 1 of the Legal Aid in Contempt of Court Proceedings (Scotland)(Fees) Regulations 1992.

Q *Can I act as an appointed solicitor to an accused appearing from custody on a warrant where criminal legal aid has been applied for and refused?*

A No. You cannot provide ABWOR to a person who has previously applied for criminal legal aid. If there has been a change in circumstances, you may be in a position to make a further application for legal aid.

Q *Can I act as an appointed solicitor where a person appears from custody on a warrant where there is no complaint?*

A No. Firstly, there must be a complaint. Secondly, it must be when the accused is first brought to court to answer it. By way of example, where an accused person fails to attend at the pleading diet and subsequently appears from custody on a warrant, you may be in a position to act as an appointed solicitor in connection with the original complaint if this is the first opportunity the client has had, having been brought to court, to answer

the complaint. You cannot separately be paid for any work in connection with the failure to appear unless, separately, it forms a substantive charge on a separate complaint.

Q *Can I always act as appointed solicitor when an accused person appears from custody on a warrant where there is a complaint?*

A Where an accused person is appearing from custody with a complaint for failure to appear under section 27(1)(a) or section 28 of the 1995 Act, you can act for the accused as an appointed solicitor, if appropriate, unless the accused already has a grant of summary criminal legal aid or ABWOR, chargeable as a fixed payment; this work is part of the "proceedings" for which ABWOR or legal aid is already available (see section 19, "Duty scheme").

Q *Where an accused appears in answer to an invitation warrant, is this a custody case and can I act as an appointed solicitor?*

A No. There are many circumstances in which the Crown will allow an accused to answer a warrant. Invites can be issued by the Crown for a variety of warrants, the circumstances of the warrant being obtained and the accused being offered an invitation by the Crown being a matter for the Crown. The essential feature is that the accused person is not being required to surrender to custody in answer to the warrant and does not appear from custody. You cannot provide ABWOR as an appointed solicitor.

Q *Can a second-year trainee be an appointed solicitor?*

A Yes. If the trainee has a practising certificate and has had a previous solicitor/client relationship with the accused person then the trainee can act as an appointed solicitor.

Q *What is the appointed solicitor paid in a situation where an accused appears before the stipendiary magistrate, a plea of guilty is tendered and the case is disposed of?*

A The ABWOR fee depends on which court the case is "set down" for, reflecting the seriousness of the charge(s). Where the PF marks the case for the stipendiary magistrate's court, the higher stipendiary magistrate's fee will be paid.

Where the case has been set down for the JP court, the lower fee will be paid even if the client first appeared from custody before the Stipendiary Magistrate or, for one reason or another, the case is disposed of before a Stipendiary Magistrate.

2. Circumstances where ABWOR can be provided where a not guilty plea is accepted by the PF

Q Can I provide ABWOR and be paid for representing a client in a cited or undertaking case as a nominated solicitor where early discussions and negotiations with the PF, ostensibly under ABWOR, result in a plea of not guilty being accepted, bringing the case to an end?

A Unfortunately, you cannot provide ABWOR in these circumstances. You are providing the type of ABWOR set out in regulation 6(1)(a) of the 2003 ABWOR regulations. The situations in which you can provide ABWOR (apart from a plea to the competency/relevancy or plea in bar of trial, not relevant for the purposes of this question) are:

- at any diet to which the case has been adjourned under section 145 of the 1995 Act
- at any diet at which there is tendered, on behalf of an accused who has not previously tendered a plea of not guilty, a plea of guilty to the charges against the accused, or a plea of guilty to part thereof, which partial plea is accepted by the prosecutor, and thereafter until the case has been finally disposed of
- at any diet at which the court is considering the accused's plea of guilty to the charges and where there has been no change of plea, and thereafter until final disposal of the case

- at any diet at which the court is considering the accused's changed plea of guilty to the charges, provided that no application for criminal legal aid has been made, and thereafter until final disposal of the case; and
- at any diet where the judge orders a proof in mitigation, and thereafter until final disposal of the case.

This list does not cover the situation where a plea of not guilty has been tendered.

Q Can I provide ABWOR and be paid as an appointed solicitor where early discussions and negotiations with the PF result in a plea of not guilty being accepted, bringing the case to an end.

A Yes. You are not providing the types of ABWOR set out in regulation 6(1)(a) of the 2003 ABWOR regulations which are hedged with various qualifications including the nature of the hearing and the plea made.

As indicated in the answer immediately before this, you are providing ABWOR as set out in regulation 6A and as long as you are providing ABWOR in circumstances where you have taken direct instructions, attended upon and advised the person appearing from custody on the day when that person is first brought to court to answer the complaint in person or through the services of another solicitor, then you are in a position to provide ABWOR as an appointed solicitor. ABWOR can be so provided whether the plea is one of guilty, not guilty or the case is deserted by the PF following a continuation under section 145 of the 1995 Act.

3. Duty solicitors

Q *Does the increase in the duty follow-up limit of £150 include the initial £70 payment in respect of the initial guilty plea?*

A Yes. The enhanced guilty plea payment is discounted from the follow-up cap.

However, we now have discretion to increase the cap in exceptional cases - for example where a significant ECHR point has arisen. In these cases you should contact the Criminal Applications Department by phone or by letter for authorisation.

Q *Can I claim the £70 payment for a guilty plea over and above the session fees?*

A Yes. There is no limit to the number of £70 payments that can be claimed. The £70 payment is not a *per capita* fee restricted to the level of the session fee limit.

Q *Can I claim the £70 payment for a guilty plea in connection with section 27(1)(a) or section 28?*

A Yes, if there is a separate complaint but not if the accused already has criminal legal aid or new ABWOR in the proceedings in respect of which he failed to appear.

Q *Can the duty solicitor "put a client through" on behalf of the appointed solicitor?*

A No. The appointed solicitor regulations clearly provide that the duty solicitor

cannot be asked to provide representation for a client on behalf of an appointed solicitor. There is a clear separation between these two forms of representation: once a duty solicitor is acting, the case cannot be transferred to an appointed solicitor; once an appointed solicitor is acting, the case cannot be dealt with by a duty solicitor.

Q *Where a prevaricating witness is sent to the cells for a period, the duty agent sees him but there is no plea of guilty, not guilty or CWP and the witness is given his liberty, what is the duty agent paid?*

A The duty agent would only be entitled to provide advice and assistance in this situation, the witness not having appeared from custody or on an undertaking to appear. Contempt of court legal aid under section 30 of the Act may be available depending on the circumstances.

Q *The duty agent sees a client in custody but prior to any court appearance the client is released, transferred or agrees to accept a fine. Is there any provision for payment of the duty agent and how is a claim to be made?*

A The duty agent is performing the function intended by the Act and regulations and can charge the *per capita* fee of £63 or £9, as appropriate.

The disposal box in the claim form, instead of being marked "NG" or "CWP" should be completed "released", "transferred" or "accepted fine", or any other disposal.

4. Availability of ABWOR or legal aid for failure to appear charges

Q Can I provide ABWOR as an appointed solicitor or act as a duty solicitor to a client who appears from custody on failure to appear charges?

A Under the old arrangements, if the client appeared on a contravention of section 27(1)(a) or section 28 of the 1995 Act, ABWOR could only be provided if no legal aid was in place for the original case.

Under the new arrangements, where a grant of ABWOR or summary criminal legal aid is made for the original case, this subsumes all work and appearances in connection with breach of bail under section 27(1)(a) or section 28. No further grant of ABWOR or summary criminal legal aid can be made. The £70 fee for a plea of guilty under the duty provisions is not chargeable: criminal legal aid (or ABWOR) is already available.

If the client appears on a contravention of Section 27(1) (b) of the Criminal Procedure (Scotland) Act, ABWOR can be provided, or a new application for summary criminal legal aid can be made. In sheriff and stipendiary magistrates' court cases, the single disposal fee in these cases, is half the usual fee, namely, £257.50. In JP and district court cases, the summary criminal fee is £157.50, and the ABWOR fee is £150. The £70 fee would be available for a guilty plea.

(There was an error in the drafting of the regulations which specified the ABWOR fee incorrectly at £75. It is hoped that this will be corrected retrospectively after the Parliamentary recess).

Advice and assistance/ ABWOR

5. New advice and assistance/ABWOR authorised expenditure limits

Q The new fixed payments for ABWOR cases are £515 and £150, yet under the new regulations the initial limits are £550 and £165. Why are these figures different?

- A For ABWOR cases the initial limits for expenditure applicable can be - £185, £550, £165 or £90 depending on the type of ABWOR. These limits allow for the work contained in the block fee plus, in some cases, some add-on fees.
- £185 applies for ABWOR cases paid on a fixed payment basis in JP court cases. This is the £150 fee plus the £25 fee if either of the first two deferred sentences considers the SER and the case is disposed of, plus £10 for any outlays.
 - £550 applies for ABWOR cases paid on a fixed payment basis in sheriff court and stipendiary magistrate's court cases. This is the £515 block fee plus £25 fee if either of the first two deferred sentences considers the SER and the case is disposed of, plus £10 for any outlays.
 - £165 applies for ABWOR cases for Parole Board proceedings, or where a second or subsequent diet has been ordered by the court for any other case where ABWOR is available on a detailed fees basis.

- £90 relates to ABWOR for any other summary criminal matter.

For straight advice and assistance cases, the initial limit of expenditure will be either £35 or £90. £35 applies if advice has been given before the complaint or direct measure is served, or if the direct measure is accepted. The £90 limit applies where advice has been given after a summary complaint is issued or if the direct measure is to be challenged.

Q Where I am providing ABWOR in a fixed payment case, do the £185/£550 initial limits cover any additional work, add-ons etc.

- A No. The only additional fee included within the initial limits is the £25 fee payable if the case is disposed of on the availability of an SER during a first or second deferred sentence. You must *always* seek an increase in authorised expenditure before undertaking any additional work. For example, the initial limit will not include conducting a proof in mitigation for the first day (after the first 30 minutes), a bail appeal or a special reasons proof in the JP court nor, in the sheriff or stipendiary magistrate's courts will it cover third or subsequent deferred sentence hearings.

Although fixed payments have been extended to ABWOR, the same basic rules apply to advice and assistance/ABWOR as did under the old system: you always require to have a sufficient increase in current authorised expenditure to be paid for the work, whether it be detailed fees or fixed payments.

Q *If the £35 limit applies, and the complaint is subsequently issued, do I need to apply for an increase in expenditure to £90?*

A No. In these circumstances, you are automatically working within the £90 authorised expenditure without applying to us for authority to do so. However, any contribution your client pays will change from the general scale to the standard scale. Your client only has to pay one contribution in these circumstances.

In the event that you do not have cause to seek an increase in authorised expenditure above £90 (in which case you can update the position in the AA/INC/CRIM), you can simply tick the appropriate boxes in section A of the criminal accounts synopsis form to indicate the final initial limit of authorised expenditure and level of contribution.

Q *When does the £90 standard initial limit apply?*

A It applies where:

- a complaint has been served
- a direct measure is to be challenged.

It does *not* apply where the client is in police custody or prison. You need to apply for an increase in authorised expenditure according to circumstances.

Q *What is the initial limit of authorised expenditure where I give advice to a client where no complaint has been issued but the client is being held on suspicion of what would be a solemn matter?*

A The initial limit is £90, being the limit applicable to advice and assistance on a solemn matter. In the event that the alleged offence is not clearly solemn in nature it would be best to err on the side of caution and seek an increase in authorised expenditure as otherwise the lower initial limit for general advice and assistance (£35) would apply.

6. Advice and assistance in solemn criminal cases

Q Can I still provide advice and assistance in solemn criminal cases?

A Yes. The standard limit of authorised expenditure of £90 applies for solemn cases, and increases in authorised expenditure can be applied for beyond that level.

When you submit the AA/APP/CRIM form for a solemn case, please indicate that this is a solemn case in the subject matter box on page 2, section D, question 2 of the form. At section L on page 11, please check the second box for the £90 initial limit of authorised expenditure, and mark "solemn" against it.

7. Verification of a client's financial circumstances in advice and assistance and ABWOR cases

Q Have any changes been made in the way that solicitors apply the financial test?

A No. The financial eligibility test for all criminal advice and assistance and criminal ABWOR has not changed as a result of the summary criminal reforms. There are new questions on the application form looking for details of bank, building society or post office accounts for checking purposes. Forms will not be returned if you are not able to get this information.

Q What evidence of financial circumstances do I have to see from the client?

A We would expect you to see documentary evidence of the client's financial position in the vast majority of cases. We would recommend that you should see, wherever practicable, the following:

For income:

- where the client is employed, a recent wage slip or bank statement
- where the client is receiving benefits, an up-to-date letter of award, benefit book (in the few cases where payment is made in this way) or a bank statement (which might simply be an ATM receipt showing the credit).

We are currently working towards the introduction of a direct link with the DWP, which will allow us to check all benefits cases ourselves, and remove

the need for solicitors to see any verification of benefits.

We hope to have this automatic link available by September 2008.

For capital

- a bank statement/passbook for each account held, and certificate for savings/shares/investments as appropriate.

and therefore ABWOR, where provided, we may not pay your account.

Please refer to section 7 of the guidelines (issued with summary criminal mailing 3 and available on our website) for more information on applying the financial test and what documentary evidence we recommend you see to satisfy yourself that the client is financially eligible.

Q *What should I do if I am not able to see evidence of financial circumstances?*

A We appreciate that in some circumstances, clients may not have documentary evidence available when consulting a solicitor, where for example they are in custody. If you have not seen any evidence, and your client is in custody, please explain on the form how you are satisfied that the client is financially eligible from the limited information available to you, for example, your knowledge of the client's financial circumstances from recent cases. Not seeing vouching does not mean we will return the form.

However, where the case is continued you should use the opportunity that presents to seek the necessary verification from your client. If you subsequently apply for an increase in authorised expenditure, you will have the chance to confirm that you have seen verification at that stage.

Likewise, when submitting your final account for payment, you will need to confirm what verification you have seen at that stage. If we are not satisfied that you have taken reasonable steps to satisfy yourself that the client was financially eligible to receive advice and assistance

8. Client contributions for general advice and assistance cases (£35)

Q What are the contribution arrangements for the new general advice and assistance?

A In these cases, a different contribution scale applies. For general advice and assistance, the maximum contribution any client has to pay is £35. A sliding scale, based on a simplified version of the structure for standard cases, sets out contribution levels for different bands of disposable income. This contribution payable is less than for standard advice and assistance. The general scale is included in the Keycard 2008, and is shown in the table below. As with standard advice and assistance, you carry out the eligibility test and collect any contribution assessed at that stage.

General advice and assistance - disposable income range	Maximum contribution
Not exceeding £95	No contribution to pay
Exceeding £95 but not exceeding £123	£7
Exceeding £123 but not exceeding £151	£14
Exceeding £151 but not exceeding £179	£21
Exceeding £179 but not exceeding £200	£28
Exceeding £200 but not exceeding £223	£35

Q What happens if general advice and assistance subsequently becomes standard advice and assistance, once the complaint has been issued?

A Where you have already admitted a client to general advice and assistance at the early stage of a case, if this is likely to proceed further once the complaint has been issued, you should assess and enter on the application form the contribution due under both general and standard advice and assistance. You then apply the appropriate contribution depending on what happens - and only one contribution is payable.

You do not need to complete form AA/INC/CRIM (unless seeking a further increase in authorised expenditure, and simply complete the appropriate boxes (£85/£90/contribution due) in the accounts synopsis form.

Q What happens if an increase in authorised expenditure is granted on a general advice and assistance case?

A The lower contribution remains in place, even where the level of authorised expenditure is raised beyond £35. The higher contribution will only replace the lower contribution in cases where standard advice and assistance is available, when the complaint is issued, or a direct measure is to be challenged.

Q What happens if a contribution is payable by the client in connection with advice and assistance which is ultimately subsumed within a legal aid certificate rather than an ABWOR certificate? Should I repay the contribution, if collected, to the client?

A No. The contribution remains payable by the client and the fixed payment or the fee payable under a detailed account will be paid to you net of the contribution. Advice and assistance has been made available and the contribution has been assessed. Although you are not entitled to a further payment under advice and assistance, the advice and assistance has been subsumed within the criminal certificate and the contribution assessed by you at the outset remains payable.

For example, general advice and assistance is made available to the client. The contribution is £35. A complaint is served and, with the availability of standard advice and assistance, a contribution of, say, £50 is assessed. The criminal account is paid net of contribution ie. £465.

9. Subsuming advice and assistance into grants of ABWOR and summary criminal legal aid

Q Can I submit my advice and assistance account for payment where the case proceeds to ABWOR or summary criminal legal aid?

A No. We can only make a single payment in a summary criminal case. Where more than one relevant type of criminal legal assistance is given to the same person for the same matter, any entitlement to payment of fees and outlays attributable to the provision (or payment of any fixed fee) is restricted to the subsequent grant of ABWOR or criminal legal aid, in that order. We are therefore obliged to disregard any claim by a solicitor for payment in respect of advice and assistance. The only part of an advice and assistance account which can be paid in addition to an ABWOR or legal aid account is that relating to an exceptional police station visit.

Q A solicitor signs up a client pre-complaint (and this could also happen post-complaint) and provides advice and assistance. The solicitor then discovers that, since then, the client has sought the services of another solicitor who gives the client either ABWOR or criminal legal aid. Can the first solicitor be paid for the initial advice and assistance?

A No. Regulation 7 of the Criminal Legal Assistance (Fees and Information etc) (Scotland) Regulations 2008, compels the Board to make a single payment in summary criminal cases reflecting the one summary process. Regulation 7(2),

provides details of the "relevant types" of criminal legal assistance (in order from first to third) -

- (a) advice and assistance (whether concerning a fixed penalty, compensation or work offer under section 302, 302A or 303ZA of the Criminal Procedure (Scotland) Act 1995 or any complaint or otherwise);
- (b) assistance by way of representation in relation to summary criminal proceedings;
- (c) criminal legal aid in relation to summary proceedings.

In terms of regulation 7(3) and (4), where more than one relevant type of criminal legal assistance is made to the same person in respect of the same matter, any entitlement to payment in respect of fees and outlays attributable to the provision (or payment of any fixed fee) is restricted, where advice and assistance and ABWOR is granted, to payment only in respect of a subsequent grant of ABWOR. Where advice and assistance, ABWOR and criminal legal aid is granted, payment is restricted to payment only in respect of the criminal legal aid certificate.

In terms of regulation 7(7) the Board may disregard any claim by a solicitor for payment in respect of the first type (in this case advice and assistance) until such time as it believes that the provision of any subsequent ABWOR or criminal legal aid grant will be required in respect of the same matter.

Advice and assistance, including work in attendance at a police station has been subsumed within the £70 ABWOR fee (originally £50) since 1987. Now it is not only subsumed within the £150 (JP court) and £515 (sheriff/stipendiary magistrate's

court) ABWOR fees, but also the equivalent legal aid fees (£315/£515).

General advice and assistance (£35) will not be chargeable if another solicitor subsequently provides ABWOR or criminal legal aid in connection with the same matter. Also, in the event that your client requests your attendance at a police station and yet instructs another solicitor at the pleading diet who proceeds to provide ABWOR, or applies for legal aid, the consequence is that you will not be entitled to payment under advice and assistance. The appointed solicitor provisions should, however, assist in this regard.

This outcome is less likely post-complaint where, in a cited or undertaking case, you can provide ABWOR or apply for criminal legal aid at the point of instruction.

Q *Is advice and assistance subsumed within a grant of criminal legal aid only where it is a fixed payment case?*

A No. Work done under advice and assistance, except for an exceptional police station visit, is subsumed within all criminal legal aid in summary proceedings, whether subject to fixed payments or an exceptional case or excluded proceedings, chargeable on a detailed basis. On the other hand, advice and assistance is only subsumed within ABWOR in relation to summary criminal proceedings which are chargeable by way of fixed payments. Technically, an advice and assistance account is payable in addition to ABWOR chargeable on a detailed basis, although in normal circumstances, all work would form part of the ABWOR account.

Q What happens to outlays incurred under an advice and assistance (or ABWOR) certificate which is subsumed within a criminal legal aid certificate?

A Regulation 7 of the fees and information regulations (above) provides that you are not entitled to fees and outlays attributable to the provision of advice and assistance where ABWOR is made available, or advice and assistance and ABWOR where criminal legal aid is made available. The exception to this rule is the attendance at a police station which, including reasonable and proportionate time for travel to and from the police station takes more than two hours. No other payment by way of fees or outlays can be made to the solicitor in connection with his or her costs.

However, the provision only relates to payment of the solicitor and, in the Board's view, does not affect the entitlement of a third party whose expenses form a vouched outlay or disbursement in the solicitor's account. So, for example, the expenditure of money by the solicitor in connection with an interpreter/translator or a report from a psychiatrist/doctor is payable but costs incurred by a solicitor on travel eg. mileage, train fare, subsistence is not payable.

Payable outlays should simply be claimed, under the ABWOR or legal aid certificate, in the single criminal accounts synopsis form.

10. Exceptional police custody visits

Q How do I get approval for an exceptional police custody visit?

A We do not grant approval for an "exceptional police custody" visit as such in advance; any work charged in connection with a police station visit may be allowed in a case which does not proceed to ABWOR or legal aid. You may still need to apply for an increase in authorised expenditure under advice and assistance to cover the visit in the first place. You can do this by phoning the Board during office hours or the Helpline in the evening or at weekends. As before, you need to clearly demonstrate to us that neither a local agent nor the duty solicitor was available to advise a client in police custody in relation to the matter.

All advice and assistance, including work undertaken in connection with a police custody visit, is subsumed into any subsequent grant of ABWOR or summary criminal legal aid for the case. However, where the custody visit exceeds two hours, this work may not be subsumed. These two hours include any reasonable and proportionate travelling time.

As a guide, we feel that, in normal circumstances, the greater part of the time expended should relate to the attendance with the client and that the more extensive the travel, the more the Board will look at the extent to which the travel element was reasonable and proportionate in the whole circumstances of the case. However, where the time involved with the client at the police station is more than this, we may give authority for this. We do not have the

discretion to allow for separate payment in any other circumstance where the client is being held in custody, eg. in prison (see below).

Q *It has been suggested that a "local agent" is not allowed by law to attend upon a client who has specifically requested the attendance of an appointed (or nominated) solicitor. Even in circumstances where it is recognised that the crime was relatively minor in nature the solicitor requested is obliged to attend. What is the Board's view on that?*

A The legislation does not preclude an appointed or nominated solicitor from attending on a client in a distant location. However, the solicitor is only entitled to an increase in authorised expenditure in situations where it is reasonable to incur the additional costs in the whole circumstances of the case.

Q *Does the Board interpret the provisions for "exceptional police station visits" as applying equally to any client held in prison custody and where a fresh complaint has been issued to that client?*

A We do not have the discretion to interpret the legislation in this way. The terms of regulation 7(5) (a) of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 are specific. We only have the power to make a separate payment in respect of "attendance at a police station in relation to the provision of advice and assistance to, or representation of the assisted person which (along with reasonable (and proportionate as compared to the amount of time involved in the attendance) time for travel to and from the police station) takes more than 2 hours."

ABWOR issues

11. Providing ABWOR as the nominated solicitor

- Q If an accused tenders a plea of guilty and the case is continued/ adjourned/ deferred to give the accused the opportunity of being represented by a solicitor, can ABWOR be provided at that stage?*
- A You can provide ABWOR, under regulation 6(1)(d) of the 2003 ABWOR regulations, “at any diet in which the court is considering the accused’s plea of guilty to the charges and where there has been no change of plea, and thereafter until final disposal of the case”. If these are the circumstances in which you propose to provide ABWOR, then you can do so.

The question has been put as to whether you “can grant ABWOR for a deferred sentence”. Clearly if the deferred sentence is in the above circumstances then you can, but you cannot start to provide ABWOR at a deferred sentence under section 202 of the 1995 Act where the court has already considered the accused’s plea of guilty and the issue before the court is whether the client has, in the interim period, been of good behaviour.

- Q Can ABWOR be provided where an accused pleads guilty by letter, and then sentence is deferred for a personal appearance?*
- A Yes, as long as in the circumstances the representation falls within regulation 6(1)(d) set out in the previous answer.

- Q Can ABWOR be provided where an accused person appears on an invitation warrant?*
- A Yes. The circumstances of the warrant in question being obtained and the accused being offered an invitation by the Crown is a matter for the Crown. The accused, not being required to surrender to custody in answer to the warrant, does not appear from custody and so summary criminal ABWOR, on the application of the means and interests of justice tests, may be available.

You will no doubt be obtaining a detailed procedural history from the client for the purposes of representation and it is important that this is set out in the application/intimation to the Board in the event that you consider that you are in a position to provide ABWOR to the client. It may well be that the client was originally due to appear in a cited case or on an undertaking.

As with all warrants, of course, if a plea has already been tendered or the case has been continued without plea, you should be careful to satisfy yourself that the person is not already in receipt of either criminal legal aid or ABWOR provided under the new fixed payment arrangements. In these circumstances, this work forms part of the “proceedings” already covered by legal aid or ABWOR.

- Q Can I provide ABWOR before a complaint has been served?*
- A No. ABWOR is representation and you cannot provide representation until such time as there are proceedings.

12. Applying the ABWOR means and merits tests

Q In what circumstances do I need to apply the means and merits tests for ABWOR cases?

A The financial and interests of justice tests need to be applied in ABWOR cases as follows:

- if the client is appearing from custody, and you are providing ABWOR as an appointed solicitor, you need to apply the financial test, but not the interests of justice test
- if the client is appearing as a cited case, or on an undertaking to appear, you need to apply both the financial and the interests of justice tests
- if the client is appearing on a post-conviction hearing where ABWOR is available under regulations 3 or 4 of the ABWOR regulations (such as breach of probation, or community service), then only the financial test is required. There is no interests of justice test for you to apply.
- if the client is appearing on a warrant for detention or extension under the terrorism act, no financial or interests of justice tests need to be applied
- if the client is seeking representation for removal of a disqualification from driving, or for proceeds of crime proceedings, where he/she was not the accused person, you need to apply the financial test. You also need to seek Board approval before providing ABWOR.

13. Templated increases in authorised expenditure

Q What do the new templated increases cover?

A Four new templates have been introduced in ABWOR cases as follows:

- six further appearances for DTTO hearings chargeable on a time and line basis - an additional £600
- three further appearances for other post-conviction hearings, chargeable on a time and line basis - an additional £300
- three further appearances for the third or subsequent deferred sentence hearings in the sheriff or stipendiary magistrate's court - an additional £175. This covers three appearances at the fixed fee of £50 per case with an additional £25 to cover any outlays required.
- three further appearances for the third or subsequent deferred sentence hearings in the JP court - an additional £100. This covers three appearances at the fixed fee of £25 per case with £25 to cover any outlays if required.

Q How do I apply for a templated increase?

A You should use the new AA/INC/CRIM increase form. On page 4, section F, question 5 you can indicate which of the 4 templates apply. The amounts in the templates are additional to the existing level of authorised expenditure.

We intend to expand the use of templates, and would welcome suggestions for the types of case which could be included in future.

14. Withholding payments in advice and assistance and ABWOR cases

Q The Board can now withhold payment after a grant of advice and assistance or ABWOR has been made. How and when will I know about this?

A The Board can withhold payment where we are not satisfied that the provision of advice and assistance or ABWOR was justified due to inadequate assessment or verification of any relevant factor. This can happen where it is not clear how you were satisfied that a client was financially eligible, or where, in ABWOR cases, we do not consider that the interests of justice test (where this is needed) has been appropriately applied.

In a case where you submit an account, and you still have not seen evidence of financial circumstances, you need to explain how you were satisfied that the client was financially eligible. If no satisfactory explanation is supplied at this stage, your account will be returned to you.

In ABWOR cases, where you have applied the interests of justice test, these cases will be checked by Board staff after the grant of ABWOR has been intimated to us.

You will always receive an accounts synopsis form for these grants of ABWOR, but if we are not satisfied that the interests of justice test has been appropriately applied, we will tell you right away. This will allow you to clarify, or provide more information on why you felt it was appropriate to provide ABWOR.

If we are still not satisfied that this was an appropriate grant, then ultimately,

any account you may submit for the case will be returned to you.

It is important that you complete the relevant sections of the ABWOR forms in sufficient detail to support your decision.

15. Transfers of agency in ABWOR cases

Q Can I now apply for a transfer of agency in all ABWOR cases?

A No. You can only apply for a transfer of agency in an ABWOR case paid under the new fixed payment arrangements, that is custody, undertaking or cited cases where the new fixed payments of £150 and £515 apply.

You can apply for this using the new transfer form CRIM/TRANSFER. This form needs to be signed by the client and give details of the reasons for the transfer. A copy of this form also needs to be sent to the first solicitor.

Transfers of agency cannot be applied for in other ABWOR cases, eg breach proceedings, DTTO, Proceeds of Crime etc. In these cases a new ABWOR application can be submitted, and the Board will consider whether a second grant of ABWOR can be made depending on the circumstance behind the client wishing to be represented by another solicitor.

16. Breach of probation order, community service order, etc. proceedings

Q Are "breach cases" and those that were previously charged on a detailed basis now covered by the case disposal fee/fixed payments?

A No. Cases which were previously excluded from the £70.00 block ABWOR fee should continue to be charged on a detailed basis. These cases remain completely unaffected by the summary reforms. They do not attract the new fixed payments because this is not ABWOR "in relation to summary criminal proceedings". (Regulation 3 of the 2003 ABWOR regulations).

ABWOR has always been available for "breach proceedings" whether or not the client appears from custody. This remains the case.

You cannot act as an appointed solicitor or a duty solicitor.

17. Pleas in bar of trial

Q What cover is available for a plea to the competency or relevancy of a complaint or a plea in bar of trial?

A There is no additional payment for a plea in bar of trial if ABWOR is being provided. The sheriff/stipendiary magistrate's court ABWOR fee of £515 and the JP court fee of £150 covers all the work set out in Schedule 1B. It will therefore include all preliminary pleas, pleas in bar of trial and continuations without plea.

However, these fees do not cover an appeal to the High Court under S174(1) of the 1995 Act against the decision on a preliminary plea matter. In these cases, the work in the High Court in these appeals can be paid on a time and line basis. Counsel's fees can also be claimed separately. An increase in authorised expenditure will need to be submitted under the ABWOR reference number to cover this work.

Q Where a case is continued without plea at the first appearance, and where a guilty or not guilty plea has not been recorded, in circumstances where the court is determining whether the client is insane so that his trial cannot proceed or continue, can I provide ABWOR rather than automatic criminal legal aid under section 22(1)(da) of the Act?

A No. Although ABWOR is now available where a case is continued under section 145 of the 1995 Act, it is not available in these circumstances.

The reason automatic criminal legal aid is made available in relation to these proceedings is because it appears that the client may not be fit to plead or to give instructions and therefore not be in a position to give instructions or, where appropriate, to make application for advice and assistance or ABWOR. Notwithstanding that the proceedings may be continued under section 145, for the relevant reports, only automatic criminal legal aid can be provided until the matter is determined. This also applies to proceedings relating to an examination of facts held under section 55 of the 1995 Act. Accordingly, this applies where the mental health provisions are invoked prior to a plea of guilty or not guilty being recorded.

ABWOR cannot be provided in these circumstances either as a nominated solicitor to a client appearing in a cited or undertaking case or, where appearing from custody, as an appointed solicitor.

18. Cases reduced from solemn to summary procedure

Q What happens if the court grants legal aid for a solemn case, and the case is then reduced to summary complaint, can ABWOR be made available?

A There is no change in the arrangements here. If the client pleads guilty the grant of legal aid made by the court continues in force until the case is disposed of. Payment can then be made under the original grant of legal aid on a detailed basis.

If the client pleads not guilty to the new summary complaint, then a fresh application for summary criminal legal aid needs to be made. If granted, the fixed payments will not apply. Payment for the case will be made on a detailed basis, but always under criminal legal aid.

You can still provide summary criminal legal aid even though solemn legal aid was available.

Fixed payment issues

19. Bail appeals

Q Will I get paid for bail appeals?

A An additional payment for a bail appeal is available:

- in district and JP court cases, and
- where the single case disposal fee is not being paid in sheriff and stipendiary magistrate's court cases, ie. a trial proceeds beyond 30 minutes.

An additional payment for a bail appeal is *not* available:

- where the single case disposal fee of £515 applies in ABWOR and in a summary criminal case which does not go beyond the first 30 minutes of trial. It is important to realise that it was only possible to set the fee at this level because it includes a number of the previous separate "add-on" payments.

A summary of the different arrangements for bail appeals is shown below:

- ABWOR - district/JP court. The £150 fee does not include a bail appeal, for which a £50 fee is available.
- ABWOR - sheriff/stipendiary magistrate's court. The £515 single disposal fee includes a bail appeal.
- Summary criminal legal aid - district/JP court. The £315 core payment does not include a bail

appeal, for which a £50 fee is available.

- Summary criminal legal aid - sheriff/stipendiary magistrate's court. Where the single disposal fee of £515 applies (where the case is resolved before the first 30 minutes of the trial) this fee includes any bail appeal. However, where the single disposal fee is replaced by the core fixed payment (where a case goes to trial beyond the first 30 minutes), all the current non-core add-on payments, such as the £50 payment for a bail appeal continue to apply.

Counsel's fees in respect of the bail appeal continue to be chargeable separately in all cases.

20. Supplementary payments for clients under 21 on remand, and in rural courts

Q In what circumstances will I be paid for these supplements?

A The additional £100 supplement, where the assisted person has been remanded in custody at or subsequent to the first calling and is at any time during that remand under 21, is payable in all summary criminal legal aid cases in the JP court, and any sheriff/stipendiary magistrate's court where a case goes to trial beyond the first 30 minutes. It is not paid where:

- the case disposal fee is chargeable
- the half fee is prescribed in section 27(1)(b) cases.

The rural court supplement is payable in any specified rural sheriff court where a case goes to trial beyond the first 30 minutes but again not in section 27(1)(b) cases, where the prescribed fee in Schedule 1 is the same as in any other sheriff court.

21. Travelling expenses to rural courts

Q What arrangements are there for covering travelling expenses to rural courts?

A Under the former system, where fixed payment criminal legal aid was available, the fees incurred in travelling, like any other fee, was built into the fixed payments. This remains the case and these arrangements have now been extended to the type of ABWOR in summary criminal proceedings payable by way of fixed payments.

As regards the cost of travel, you are not entitled to charge mileage, or any other costs, in travelling to or from your local court. Again, this provision has been extended to fixed payment ABWOR. You are entitled to mileage or other costs of travel eg. train fare for travel to and from a court other than your local court or in any other circumstances eg. travel to a prison, except where it is in connection with the taking of a precognition, the latter costs being built into the principal fixed payments.

22. Acting for more than one accused person

Q What payments are made if I act for more than one co-accused in a case?

A The payment rates for acting for more than one accused where legal aid is being provided in any case have not changed. You are entitled to 100% of the fee for the first accused, 40% for the second accused and 20% for third or subsequent accused persons. The fixed payments will continue to be paid at the same proportions as before for co-accused persons being represented by the same solicitor.

Importantly, the same arrangements will now also apply to ABWOR cases where ABWOR has been made available on or after 30 June 2008 and where the new fixed payments apply.

Pilot courts

23. Legal aid arrangements for pilot courts

Q Have the legal aid arrangements changed for the various pilot courts?

A The special arrangements introduced for the Drug Courts in Glasgow and Fife, the Youth Courts in Airdrie and Hamilton, and the Domestic Abuse Court in Glasgow have not changed.

However, the criminal legal assistance arrangements introduced for the summary justice pilot courts in Aberdeen, West Lothian and Edinburgh have now all been superseded by these wider reforms to summary criminal legal assistance. The provisions that have been revoked are to be found first in the affirmative regulations (that is, the Advice and Assistance (Limits, Conditions and Representation) (Scotland) Regulations 2008 under the heading of Assistance by Way of Representation at regulation 4(2) (b).

The previous arrangement under which representation was available under ABWOR to an accused person following a finding of guilt where we had not granted criminal legal aid has now been removed. That is, regulation 6(2) (c) has been revoked to remove reference to the summary justice pilot court.

Also, under the previous arrangement, if summary criminal legal aid was refused and there was a change of plea, ABWOR could be made available to the accused person for representation in respect of

that change of plea. Now, under regulation 4(4) of the 2008 regulations, ABWOR is no longer available - that is, regulation 6B of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 has been revoked.

Finally, in the negative regulations (that is, the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008, regulation 3(8) (a) removes the fee previously payable of £44.40 for tendering a not guilty plea in the summary justice pilot court. However, regulation 3(8) (b) substitutes the case disposal fee of £515 in respect of appearances from custody by the appointed solicitor.

New forms

24. New application forms

Q Why have the forms grown to so many pages?

A The advice and assistance/ABWOR intimation form (AA/APP/CRIM) form is now 12 pages as it covers intimations of advice and assistance or ABWOR in six different scenarios:

- telling us you have granted general advice and assistance (£35)
- telling us you have granted standard advice and assistance (£90)
- telling us you have granted ABWOR for a JP court case on a fixed payment basis (£150), and on what basis
- telling us you have granted ABWOR in the sheriff court or stipendiary magistrate's court case (£515), and on what basis
- telling us you have granted ABWOR for Parole Board proceedings or other breach of proceedings (£90 or £165 as appropriate)
- asking for our approval to provide ABWOR in a case involving removal of a disqualification from driving, or Proceeds of Crime.

We thought it was preferable to deal with these six different situations on one single form, rather than replacing the old criminal advice and assistance/ABWOR form with up to six new separate forms. You will not have to complete all 12

pages for any single case. For example, where you are just giving either general or standard advice and assistance, you do not have to complete much more information than you would previously have entered on the existing AA/APP/CRIM form.

Similarly the new AA/INC/CRIM form is now eight pages, as it can be used for three separate purposes:

- applying to the Board for an increase in authorised expenditure
- telling us you are now giving ABWOR following an initial grant of advice and assistance; and
- seeking our approval for a grant of ABWOR.

Again, one bigger form was felt preferable to separate forms for each of these different scenarios.

The form also allows you to apply for four new templated increases which have been introduced for ABWOR cases covering deferred appearances for DTTO hearings, other post-conviction hearings, and blocks of three deferred sentences for the third and subsequent deferred sentence where our block fee ABWOR in sheriff/stipendiary magistrate's court cases and JP court cases.

The new forms have also been designed to be compatible with the Board's new IS systems which incorporate scanning technology, which determines the size of the individual field boxes, and the increased font sizes. In addition, we have also created more space for the answers

to be filled in for the interests of justice questions on the form, without the need for separate covering letters or statements to be attached. All this has added to the length of the forms.

We are aware that solicitors often want to keep photocopies of the forms after submission to the Board. In light of the increased number of pages, we accept that more selective copying of the forms would be in order.

Q The new advice and assistance/ABWOR and summary criminal forms ask for details of the client's National Insurance number, and bank account details. Will forms be returned if this information is not supplied?

A No. This information should be completed where possible, but we will not return any forms where these fields are left blank. This information can be forwarded later, where it is practicable to obtain it.

25. Summary criminal legal aid applications - details of negotiations with the Crown

Q Why does the application form now ask for details regarding negotiations with the Crown?

A It was made clear by the Board at the various seminars that this information is sought purely for research purposes in order to assist the evaluation and review of the summary justice reforms. Any answer provided in this section does not impact on the "interests of justice" factors applicable in deciding whether to make legal aid available.

This question is deliberately separated from the section of the form, section O, which deals with "Interests of Justice". This information is not mandatory for an application to be processed and is entirely at the discretion of agents should they wish to provide details.

26. Summary criminal legal aid applications - details of pleas offered by the Crown

Q Why does the application form ask for details of any plea offered by the fiscal in connection with the charges?

A It is entirely appropriate to seek such information in exercising its function as to whether or not to make public funds available. The Board has always considered such information, where available, when applying the interests of justice test and believes it should be disclosed when applicable.

By way of example, if an accused appears on a complaint alleging a charge of assault and breach of the peace, and the accused accepts his behaviour amounted to a breach of the peace, but denies the assault charge, it is an entirely relevant consideration when establishing if it is in the interests of justice to make legal aid available to know that the Crown is prepared to accept that plea. It also focuses the application on what is actually at issue and whether it is in the interests of justice to defend only the breach in the circumstances rather than the charges on the face of the complaint.

Section 34 of the Act prohibits the Board from disclosing any information provided to it by an applicant or agent. Section 34 provides a statutory exemption to disclosure under the FOI provisions. The Board is mindful of its responsibilities in this regard.

27. Summary criminal legal aid applications - disclosable summaries

Q The disclosable summary of evidence does not need to be submitted with the application form, yet the interests of justice factors on the form all refer to this document. The Board has also advised that it may continue a case for sight of the summary of evidence. Why is this?

A The disclosable summary of evidence contains relevant and material information relating to the alleged commission of an offence. The information contained in a summary represents what the Crown believes to be the salient strands of evidence against an accused person; it is the Crown case.

The Board will not afford the information found in a disclosable summary of evidence any greater importance, credibility or reliability or such like, than:

- information on the Crown case otherwise supplied by solicitors as a matter of course in support of an application; or
- information provided by an accused in support of his defence to the charges.

The function of the Board is not to establish which version of events to believe, but rather to obtain as much information as it is reasonable and practicable to obtain to satisfy itself that the grant of criminal legal assistance - be it ABWOR granted by the solicitor or summary legal aid granted by the Board - is properly made by reference to the factors.

In the case of an application for summary criminal legal aid, the role of the Board is to seek such information as to determine, by identification of the factors in light of the test set out at section 24(3) of the Act, if it is in the interests of justice that legal aid be made available - the need for representation. In performing this function, it is fully appreciated that there may be significant discrepancies between the Crown and defence version of events.

Except where there is a dispute in law, it will almost invariably be the case that an accused person disputes some of what is contained in a disclosable summary: if this were not the case the accused would be pleading guilty.

The Board is of the view that the information contained in the disclosable summary will actually assist defence solicitors in obtaining a grant of legal aid as it will highlight areas of dispute between the Crown and the defence and thus will help in addressing the relevant interests of justice factors.

28. New transfer of agency form and procedures

Q Why have the new mandate procedures been introduced for transfers of agency in criminal cases?

A The new form has given us a chance to resolve concerns which have been expressed to us about the current transfer arrangements. Following discussions with the Law Society of Scotland, it was agreed to change the transfer form so that it would effectively include both the client mandate and the reasons for the transfer. It was also agreed that the form would be signed by the incoming solicitor and the applicant, and a copy sent to the existing nominated solicitor who could continue to act to preserve the client's position until we made our decision. It was felt that this position would bring a more open and transparent process.

Although we still have to consider whether a "good reason" exists for the transfer (as required by regulation 17(3) of the Criminal Legal Aid (Scotland) Regulations 1996), this new process at least makes the first solicitor aware that the client is seeking representation elsewhere. At present, the first time a solicitor may know about this is when the letter granting the transfer arrives from the Board.

Q What happens if I object to the reasons: can I contact the Board at that stage?

A We still have to take a decision based on the information the second solicitor gives us on the form. However, knowing that this information has to be signed and agreed by the client, and then passed to

the first solicitor, may mean that more appropriate reasons are advanced on these application forms.

Q If my client cannot read, how can they sign the transfer form agreeing to reasons being put forward?

A Like any other application form, if a client cannot read, it would be up to the solicitor to fully explain the information on the form before asking them to sign the mandate.

Q If I object to the reasons being presented, how can I complain about this?

A Like before, if you have reasons to believe that the information given to us about the transfer of agency is not correct, you should refer the matter to the Law Society of Scotland. If you think there may be compliance issues we would wish to investigate, please draw these to our attention.

Monitoring

29. Monitoring and review of the reforms

Q What arrangements are in place for monitoring and reviewing the impact of the reforms?

A Kenny MacAskill MSP, the Cabinet Secretary for Justice has agreed to meet with representatives of the Law Society of Scotland and the profession in December 2008 to review the impact of the reforms.

A summary justice criminal legal aid monitoring and evaluation group with representatives from the Law Society, the Scottish Government, COPFS and the Board has also been set up to consider the monitoring and review arrangements. This Group has already met on two occasions. This Group will meet regularly to establish the availability of robust, meaningful data on the impact of the reforms, test the assumptions used in the Summary Justice Reform system model, and consider what adjustments might be recommended to enhance the workings of the criminal legal assistance system.