

Summary criminal legal assistance reform



# Criminal fixed payments guidance

Post-summary criminal legal assistance  
reform - 30 June 2008

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## Chapter 1

# Introduction to summary criminal fixed payments

*Unless otherwise stated, “the Act” or “the 1986 Act” means the Legal Aid (Scotland) Act 1986, “the criminal regulations” means the Criminal Legal Aid (Scotland) Regulations 1996, “the criminal fees regulations” means the Criminal Legal Aid (Scotland) (Fees) Regulations 1989; “the fixed payments regulations” means the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999; “the advice and assistance regulations” means the Advice and Assistance (Scotland) Regulations 1996”; and “the ABWOR regulations” means the Advice and Assistance (ABWOR) Regulations 2003.*

*The “1995 Act” means the Criminal Procedure (Scotland) Act 1995.*

## 1.1 Introduction

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Fixed payments were introduced by the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. They came into force on 1 April 1999. These regulations marked a radical departure from the system of detailed accounting subject to a standard of taxation of work actually and reasonably done, due regard being had to economy.

The fixed payments<sup>1</sup> arrangements proceed on a prescribed “rate for the job” for conducting a summary criminal case (within the range of cases to which they apply) involving a degree of “swings and roundabouts” across the range of cases rather than remuneration for each and every item of work in the circumstances of an individual case.

Section 33(3A) of the 1986 Act allows the Secretary of State, by way of regulations, to prescribe fixed payments to be made to a solicitor in respect of professional services in providing criminal legal assistance, and such outlays as may be so prescribed. Criminal legal assistance means “criminal legal aid and advice and assistance in relation to criminal matters”. ABWOR is a type of advice and assistance. The Secretary of State initially used these powers to prescribe fixed payments for work done under summary criminal legal aid only.

Since 1999 a solicitor providing relevant criminal legal aid in summary proceedings has been entitled to the fixed payments specified in Schedule 1. “Relevant criminal legal aid” means criminal legal aid provided by a solicitor in relation to summary proceedings other than excluded proceedings.

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<sup>1</sup> Fixed payments were made possible by section 51 of the Crime and Punishment (Scotland) Act 1997 which inserted section 33(3A) and (3B) into the Legal Aid (Scotland) Act 1986.

## 1.2 Summary criminal legal assistance reform

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Changes to summary criminal legal assistance will come into effect on Monday 30 June 2008. These changes are designed to support the wider Summary Criminal Justice Reforms, essentially by front-loading the system and, specifically, designed to help encourage early effective preparation and, where appropriate, the earlier resolution of cases.

Central to the reforms is the extension of the availability of ABWOR for procedure by way of a continuation without plea with a view to securing informed pleas, and a significant increase in the ABWOR fees.

Following an extended period of consultation with representatives of the profession, it was agreed that the fixed payments regime would be extended to ABWOR and what is now referred to as "relevant ABWOR" be subject to the same regulatory regime as the current legal aid fixed payments, as set out in the fixed payments regulations.

## 1.3 The new provisions

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The main changes to the existing scheme are as follows:

- the extension of the fixed payments structure to ABWOR in summary criminal proceedings
- the creation of a case disposal fee in the sheriff and stipendiary magistrates courts prescribing the same fee (£515) to ABWOR or to criminal legal aid, the latter where the case does not proceed to trial beyond thirty minutes
- the provision of a new interests of justice test, rather than the former twin test, to ABWOR in relation to summary criminal proceedings
- the ability to transfer a "relevant ABWOR" certificate, ABWOR to which the interests of justice test is applied
- the extension of the prohibition on charging for travel to a court in a town or place where a solicitor has a place of business to ABWOR
- the creation of a £150 ABWOR fixed payment in the JP court (the former £70 block fee)
- an increase in the criminal legal aid core fixed payment in the JP court to £315.

Differentials remain in the JP court with the £150 ABWOR fee and £315 legal aid fee.

The fee payable in most sheriff and stipendiary magistrate's court cases will be the case disposal fee chargeable where ABWOR is being provided to the accused person appearing from custody by the appointed solicitor, or otherwise by the solicitor providing ABWOR to the accused in a cited case or an undertaking.

The fee covers all work up to and including the sentencing stage but is chargeable, on the disposal of the case, at any stage.

## **1.4 Effective date of new arrangements**

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The new feeing arrangements, introduced by the Criminal Legal Assistance (Fees and Information etc) (Scotland) Amendment Regulations 2008 will apply to all ABWOR and criminal legal aid granted or available on or after **30 June 2008**.

Also, all work undertaken under an advice and assistance certificate, granted by a solicitor on or after 30 June 2008, subject to an exceptional police station visit, will be subsumed within any subsequent ABWOR or criminal legal aid account.

Equally, in the event of ABWOR being made available for the purposes of a continuation without plea resulting in a plea of not guilty and criminal legal aid thereafter being made available, both work undertaken under advice and assistance and ABWOR will be subsumed within the criminal legal aid grant.

## **1.5 Proceedings to which the fixed payments regulations apply**

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Fixed payments now apply to all criminal legal aid and ABWOR provided by a solicitor in relation to summary criminal proceedings except:

- excluded proceedings (Chapter 2)
- cases, where criminal legal aid is available, in which exceptional case status is granted
- miscellaneous ABWOR eg removal of a disqualification [Regulation 3(g), (h), (i), (m) and (r) of the ABWOR regulations]
- post-conviction procedures under the 1995 Act eg breach of probation, DTTO [Regulation 4]
- proceeds of crime (client other than an accused person) [Regulation 5].

So fixed payments now apply to:

- summary criminal legal aid granted by the Board in terms of section 24 of the 1986 Act
- summary criminal legal aid granted by the Court, in terms of section 23(1)(b) of the Act
- automatic criminal legal aid in circumstances where a legal aid certificate is granted in connection with the proceedings

- ABWOR in summary criminal proceedings [Regulation 3(a) and 6 of the ABWOR regulations] where you apply the interests of justice test<sup>2</sup>
- ABWOR provided by the appointed solicitor.

The exceptions remain chargeable on a detailed basis, applying either Schedule 1 to the criminal fees regulations or, where ABWOR is available, Part I, Schedule 3 of the A & A regulations.

## **1.6 The new schedules**

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The introduction of a case disposal fee and the extension of fixed payments to ABWOR has necessitated the introduction of two new schedules, in addition to the existing Schedule 1.

What may be called the principal fixed payments available under the extended fixed payments regime are as follows:-

- Schedule 1 continues to prescribe the core fixed payment where criminal legal aid is made available but now only where the case proceeds to trial beyond the first 30 minutes
- Schedule 1A prescribes the case disposal fee where criminal legal aid is made available but the case does not proceed to trial as above
- Schedule 1B prescribes the fixed payment in the JP Court and the case disposal fee in the sheriff and stipendiary magistrate's court where ABWOR is being provided.

Schedules 1 and 1A are alternate fees, Schedule 1A relating only to sheriff and stipendiary magistrate's court procedures.

A trial must exceed 30 minutes in length and generate the "first day" fee before the core fixed payment is chargeable. Otherwise, the case disposal fee (Schedule 1A is the appropriate fee).

## **1.7 Charging fixed payments and detailed fees**

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The general rule is that where you provide any criminal legal assistance, either criminal legal aid or ABWOR, in respect of which a fixed payment has been prescribed in regulations made under sub-section 33 (3A) of the 1986 Act, you shall not be entitled to any other payment out of the Fund in respect of the professional services and outlays mentioned in that sub-section, but you will be entitled to reimbursement of any other outlays properly incurred.

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<sup>2</sup> Regulation 7 of the ABWOR regulations

Where you claim a fixed payment for any part of the process, you are not entitled to any other fee for professional services<sup>3</sup> except in the following circumstances where the excluded proceedings take place outwith the summary court:

- any reference in connection with proceedings under Article 134 of the EEC Treaty
- any reference on a devolution issue under Paragraph 9, Schedule 6 to the Scotland Act 1998
- proceedings under Section 5 of the International Criminal Court Act 2001
- proceedings in an appeal to the High Court under Section 174(1) of the 1995 Act.

Proceedings under Section 174 are the only ones, in practice, likely to arise in the course of a case.

## 1.8 Different rates for different courts

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The fixed payments differ according to whether the case is heard in the JP court or in the sheriff court (see Schedule 1).

Sheriff court cases and those set down for the stipendiary magistrate's court (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 from custody in the stipendiary magistrate's court but is marked for the JP court, or which start off in the JP 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.

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<sup>3</sup> Section 33(3B) of the Act

## Chapter 2

# Proceedings not chargeable by way of fixed payments

*Unless otherwise stated, the “amendment regulations” means the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 1999 and the “second amendment regulations” means the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2001.*

## 2.1 Excluded proceedings

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The following types of case are “excluded proceedings”. Fixed payments do not apply and you should lodge a detailed account with us, the Board.

### (a) Summary proceedings arising following a reduction from solemn proceedings

Regulation 4(2)(d) of the criminal regulations 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 person pleads guilty, we will expect one detailed criminal account for *all* the work undertaken in the case.

Where the accused tenders a plea of not guilty, and we grant a summary certificate, you should prepare two detailed criminal accounts: one in connection with the solemn proceedings, 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)

This and the following provisions concern the availability of automatic criminal legal aid. The reference to “only” in this paragraph, and also 2(c), 2(d) and 2(e) below, is crucial. If this is the only work undertaken, it is chargeable separately on a detailed basis. If the work is not the only work and is ultimately carried out within the context of a criminal legal aid certificate, the work will form part of the principal fixed payment chargeable. If an exceptional case, the work will form part of the detailed account.

You cannot lodge a separate detailed account for payment in addition to claiming a fixed payment. This is entirely consistent with the terms of section 33(3B) of the 1986 Act, above.

- (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)

This is the form of automatic legal aid under which the duty solicitor makes legal aid available.

The reference to the drug court was added<sup>4</sup> to provide cover by way of fixed payments at the initial custody stage in drug court proceedings where the role of the duty solicitor has been removed.

- (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 work is only chargeable on a detailed basis if no other work other than the work under automatic criminal legal aid is carried out. It cannot be paid on a detailed basis if ultimately it forms part of an ABWOR or criminal legal aid certificate.

- (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)

This paragraph provides for “proceedings” in relation to which legal aid is made available by virtue of regulation 15 to be excluded proceedings allowing you to lodge a detailed account. It does not refer to “part” or “that part of the proceedings”, nor does it in any way try to distinguish one part of proceedings from another. It follows that the whole account is payable on a detailed basis in the event that a criminal legal aid certificate is subsequently granted in respect of the same proceedings.

On the other hand, if the proceedings for 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. The fixed payment regulations do not strike at paying a detailed 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 or case disposal fee. So the question of whether the respective complaints arise out of the same incident in terms of regulation 4(3) does not apply.

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<sup>4</sup> second amendment regulations coming into force on 15 October 2001

In this example, if further proceedings were to be raised in the same case (a third complaint), regulation 4(3) would apply, "relevant criminal legal aid" having already been provided in connection with the second complaint.

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

We are unaware of any case raising this issue. In the event that such proceedings arise, we are satisfied that these would be separate proceedings outwith the summary court, chargeable by way of a detailed account, in addition to any fixed payments due.

**(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.<sup>5</sup> However, most devolution matters, in the Board's experience, proceed to the High Court on appeal and the work involved is included within the fixed payments (Section 2.2).

In the event that a devolution issue does proceed by way of a reference, you should prepare and lodge a detailed account. All work in connection with the raising of a devolution issue forms part of the lower court proceedings and is included within the principal fixed payment. Only the work in the High Court is separate and chargeable.

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

You should prepare and lodge a detailed account for all work undertaken in an extradition case. Such a case is not "relevant criminal legal aid" and is not subject to fixed payments.

**(j) proceedings under section 5 of the International Criminal Court Act 2001<sup>6</sup>**

Again, in the event that such proceedings arise, they are separate proceedings outwith the summary court, chargeable by way of a detailed account in addition to any fixed payments due.

**(k) proceedings in relation to which legal aid is only available by virtue of section 22(1)(dd) of the Act (solicitor appointed by court for person accused of sexual offence)**

Again, in these circumstances work is only chargeable on a detailed basis if no other work other than the work under automatic criminal legal aid is undertaken. The general rule applies that an account cannot be paid on a detailed basis if ultimately it forms part of an ABWOR or criminal certificate.

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<sup>5</sup> This provision 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).

<sup>6</sup> Sub-paragraphs (i) and (j) were added by the second amendment regulations, coming into force on 15 October 2001.

**(I) proceedings in an appeal to the High Court under section 174(1) (appeals relating to preliminary pleas) of the 1995 Act**

ABWOR is available<sup>7</sup> for the purposes of an appeal to the High Court under Section 174(1) arising from a plea to the competency, relevancy or plea in bar of trial.

The work in connection with the proceedings in the High Court is separately chargeable by way of a detailed account in addition to the fixed payment prescribed in Schedule 1B. All work in connection with the plea in the lower court is included within the fixed payments.

## **2.2 Payment for devolution issues: “a reference”**

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It is our experience that most procedures before the High Court in connection with a devolution issue do 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.

Proceedings arising from a devolution issue 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) provides only that a “reference” on a devolution issue under paragraph 9 of Schedule 6 of the Scotland Act 1998 is an excluded proceeding.

In terms of regulation 4(1), the solicitor providing “relevant” criminal legal aid or ABWOR in summary criminal proceedings is paid the fixed payments prescribed in Schedules 1, 1A and 1B to the fixed payments regulations in respect of the professional services and the outlays provided as specified in regulation 4(2).

There is no additional remuneration for a devolution issue proceeding to the High Court by way of appeal. Only work in connection with a “reference” is chargeable on a detailed basis, and therefore all work in connection with the remainder of the case remains within the principal fixed payments.

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

## **2.3 Procedure appeals**

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An appeal to the High Court against the refusal or the granting of a devolution issue is subsumed within the principal fixed payments because it is not an appeal against conviction, sentence, other disposal or acquittal within the meaning of section 25(1) of the Act.

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<sup>7</sup> See regulation 6(1)(a) of the ABWOR regulations.

Equally, any other appeal to the High Court of Justiciary, not falling within this category, is subsumed within the principal fixed payments. These would include a Bill of Suspension challenging a warrant or, in certain circumstances, a Bill of Advocation challenging a procedural irregularity which may deprive the accused of a fair trial prior to the verdict being pronounced.

A “procedural appeal” is a 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 regulations, and, thus, not “distinct proceedings” for which an appeal certificate can be made available.

## Chapter 3

# Fixed payments allowable to solicitors

### 3.1 Fixed payments - the new structure

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Instead of provision for a core fixed payment under the existing Schedule 1 of the regulations, there are now three principal fixed payments chargeable according to circumstances: two, alternative fees, where criminal legal aid is being provided, and one where ABWOR is being provided.

They are:

- the core fixed payment (315/£515) where criminal legal aid is being provided and the case proceeds to trial beyond the first thirty minutes [Schedule 1]
- the case disposal fee (£515), in the sheriff and stipendiary magistrate's court, where criminal legal aid is being provided and the case does not proceed to trial beyond the first thirty minutes [Schedule 1A]
- the ABWOR fixed payment in the JP court (£150) and case disposal fee in the sheriff and stipendiary magistrate's court (£515) where ABWOR is being provided [Schedule 1B].

Regulation 4(1A) provides that fixed payments are payable only under one of Schedules 1 or 1A, as alternatives to each other and this provision is restated at regulation 4(7A) in the circumstances of a transfer of certificate.

We will deal with the three principal fixed payments in order.

### 3.2 The "core" fixed payment

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Regulation 4(1) provides for payment of the core fixed payment. (There is no reference to a "core fixed payment" in the regulations but the expression serves to distinguish this fixed payment from the additional payments for trial, deferred sentence etc set out in Schedule 1, the relevant Table of Fees). This fixed payment attaches itself to the case:

- £315 for the JP court
- £515 for the sheriff and stipendiary magistrate's court
- £565 for a Schedule 2 (rural) court.

In the JP court, the core fixed payment will continue to be chargeable as in the pre-existing arrangements. There is no change apart from a slight increase in the fee.

In the sheriff or stipendiary magistrate's court, the core fixed payment is now only payable where the case proceeds to trial beyond 30 minutes. Put another way, the case has to generate the "first day" fee before the core fixed payment is chargeable. Otherwise, the appropriate fee is the case disposal fee (Section 3.8)

### 3.3 What is covered by the core fixed payment?

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This fixed payment covers all work up to and including:

- any diet at which a plea of guilty is made and accepted or plea in mitigation is made
- the first 30 minutes of conducting a proof in mitigation or a proof of a victim statement, other than work done in connection with a grant of legal aid under Section 23(1)(b)
- the first 30 minutes of conducting any trial
- a first or second deferred sentence
- advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal,

together with any subsequent or additional work other than that set out in paragraphs 2 to 14 of Schedule 1.

This payment represents the total fee payable for *all* work, where fixed payments apply, undertaken by you in connection with a summary criminal legal aid case, from beginning to end, except work for which there is a further fixed payment set out in the Table of Fees eg. a bail appeal, an extended trial or proof of mitigation, third or subsequent deferred sentence etc. These further fixed payments, set out in Schedule 1, are available in the circumstances of each individual case.

It follows from a plain reading of paragraph 1, Schedule 1 of the Table of Fees that there can be work later on in the proceedings, even after the first 30 minutes of a trial, which reverts to work chargeable under the core fixed payment. An example of such work might be warrant proceedings

where the client has previously failed to appear and which is not covered by another fixed payment.

### 3.4 Section 27(1)(b) proceedings (breach of bail)

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A half core fixed payment, subject to the same provisions as set out in section 3.3, is available in proceedings arising from Section 27(1)(b).

### 3.5 Section 23(1)(b)

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Work done under a grant of criminal legal aid under Section 23(1)(b) of the Act is chargeable under Schedule 1, paragraph 2 which prescribes a separate fixed payment of £25 for the JP court and £50 for the sheriff or stipendiary magistrate's court. The core fixed payment is not chargeable in these circumstances.

The first part of the feeing provision states that the fee is payable for "all work done" in connection with the grant. On the other hand, the second part clearly indicates that it might not be exhaustive of all work which might be carried out in the case. You are entitled to be paid the prescribed fee 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 or in connection with a proof in mitigation or a proof of a victim statement, after 30 minutes, will attract the fees set out for these hearings.

Again, this fee includes all other work which does not fall within the scope of the further fixed payments prescribed in Schedule 1.

No enhancements, as set out in sections 3.6 and 3.7, are payable in addition to these fees.

### 3.6 Enhanced core fixed payment - under 21 supplement

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The core fixed payment 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.

Remember:

- the assisted person must have been remanded in custody at the conclusion of the pleading diet. The enhanced payment is not available where the assisted person simply appeared *from* custody at the pleading diet
- the 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.

### 3.7 Schedule 2 courts

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In addition there are a number of courts which, due to a number of factors; including their geographical location and level of business, attract an enhanced fixed payment of £50. These courts are:

- Campbeltown
- Dunoon
- Kirkwall
- Lerwick
- Lochmaddy
- Oban
- Portree
- Rothesay
- Stornoway
- Fort William
- Wick.

### 3.8 Case disposal fee

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The case disposal fee, applicable only to the sheriff and stipendiary magistrate's court, is the appropriate fee where criminal legal aid has been made available and either,

- the case does not proceed to trial; or
- the case proceeds to trial but not beyond the first 30 minutes.

In these circumstances the case disposal fee set out in the new Schedule 1A is chargeable and covers all work up to and including:

- (a) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;
- (b) the first 30 minutes of conducting any trial;
- (c) a first or second diet of deferred sentence; and
- (d) advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal, together with any subsequent or additional work other than that of the kind specified in paragraphs 10 to 12 of Part 1 of Schedule 1 (above).

The underlying basis of this fee is that it covers *all* work up to and including the sentencing stage. The under 21 and rural court supplements are not chargeable in addition to this fee.

The range of fixed payments chargeable in addition to the case disposal fee are more limited than in the circumstances where the core fixed payment is chargeable. Only the fixed payments at paragraphs 10 to 12 of Schedule 1 are chargeable in addition to the core fixed payment. These relate to a further deferred sentence (effectively a third and subsequent deferred sentence) and the additional payment (£25) where the court considers an S.E.R. and the case is disposed of within either of the first or second deferred sentences.

On the other hand, the case disposal fee is chargeable at any time, including the pleading diet or an intermediate diet, on the final disposal of the case.

The fee is available to,

- the appointed solicitor representing a client from custody
- a solicitor representing a client in a cited case or on an undertaking to appear.

The case disposal fee is only chargeable in connection with proceedings before the sheriff or a stipendiary magistrate's court.

### **3.9 Section 27(1)(b) (breach of bail)**

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A half case disposal fee, subject to the same provisions as set out in section 3.8, is available in proceedings arising from section 27(1)(b).

### **3.10 The ABWOR fixed payment (JP court)**

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Where ABWOR is being provided, the relevant and only schedule is schedule 1B.

In the JP court the ABWOR fixed payment covers all work prior to, and attendance at:

- (a) any diet at which a plea to the competency or relevancy of the complaint or proceedings, or a plea in bar of trial, is tendered
- (b) any diet at which a question within the meaning of Rule 31.1 of the Act of Adjournal (Criminal Procedure Rules) 1996 is raised
- (c) any diet from or to which the case has been adjourned under section 145 of the 1995 Act
- (d) any diet at which there is tendered a plea of guilty or a plea in mitigation is made
- (e) 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

(f) any diet at which the court is considering the accused's change to plea of guilty to the charges, and where no application for criminal legal aid has been made, together with:

- (i) the first 30 minutes of conducting a proof in mitigation
- (ii) a first or second diet of deferred sentence
- (iii) any subsequent or additional work other than that specified in paragraphs 4 and 8 to 13 of Schedule 1B.

This payment represents the total fee payable for *all* work, where fixed payments apply undertaken by you in connection with a summary case where ABWOR is being provided, from beginning to end, except work for which there is a further fixed payment set out in the Table of Fees. These are,

- conducting a proof in mitigation for the first day (after the first 30 minutes)
- a third or subsequent deferred sentence
- the additional fee (£25)
- a bail appeal
- a special reasons proof or hearing on exceptional hardship; and
- a back duty proof.

### **3.11 The ABWOR case disposal fee (sheriff court etc)**

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The case disposal fee, applicable only to the sheriff and stipendiary magistrate's court, is the appropriate fee where ABWOR has been made available.

This fixed payment covers all work up to and including:

- (a) any diet at which a plea of guilty is made and accepted or plea in mitigation is made
- (b) the first 30 minutes of conducting a proof in mitigation, or a proof of a victim statement, other than in the circumstances where paragraph 3 below applies
- (c) a first or second diet of deferred sentence; and
- (d) advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal,

together with any subsequent or additional work other than that specified in paragraphs 8 and 9 of Schedule 1B.

The case disposal fee, as with its legal aid counterpart in Schedule 1A (section 3.8), includes *all* work up to and including the sentencing stage.

The only fixed payments, payable in addition, are those relating to:

- a third or subsequent deferred sentence
- or the additional fee (£25).

On the other hand, the case disposal fee is chargeable at any time, including the pleading diet or a CWP hearing, on the final disposal of the case.

### **3.12 Section 174(1) appeal**

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Proceedings in the High Court by way of an appeal under section 174(1) of the 1995 Act are separately chargeable in addition to the principal fixed payment available (Section 2.1(l)).

## Chapter 4

# Outlays

### 4.1 Outlays included in the fixed payments

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The following outlays are outlays which were chargeable as fees under the former system and taken into account when calculating the initial prescribed fixed payments,

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

You cannot submit a claim for any outlay in connection with the cost of taking a precognition. This includes travelling expenses incurred either by you or a precognition agent relating to the taking of precognitions.

Arguably, this could affect travel when attending on a client in prison, as we would have to make enquiry on each occasion as to whether you were taking a precognition from the client. Even if you take a precognition there is an assumption in all cases that the prime purpose of a visit to a client is to advise and take instructions. You are entitled to charge mileage for a prison visit.

The fee element in connection with travel is always subsumed within the fixed payments.

This provision also strikes at outlays in connection with taking a precognition from a doctor and any other witness to fact who seeks to charge for giving a precognition. We cannot reimburse a solicitor for such charges as they are clearly outlays in connection with the taking of a precognition (section 4.2).

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

Since all fees incurred in the conduct of the case are subsumed within the principal fixed payments 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 principal fixed payments. 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 is an example of this regulation in action.

The criminal fees regulations state that where you require another solicitor, whether an Edinburgh agent in connection with an appeal or a solicitor local to a prison or court or for the purpose of local precognitions, nevertheless only one account can be submitted by you, payment of the other solicitor's account being a matter between you and the other solicitor. This principle is carried forward in this provision.

- **Photocopying**

Photocopying remains a fee prescribed in Schedule 1 of the criminal fees regulations and part I, Schedule 3 of the A & A regulations included within the fixed payments. It is not separately chargeable.

## 4.2 Precognition or report?

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The question can arise as to whether work carried out by a solicitor amounts to taking a precognition or obtaining a report from a doctor. One is included within the fee, the other chargeable as an outlay. Full disclosure by the Crown in summary cases may reduce the incidence of such questions.

Situations where it appears a solicitor is taking a precognition include:

- where 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 for providing that precognition cannot be reimbursed
- where a witness essentially speaking to the facts happens to be a doctor. This arises most frequently in circumstances where the individual witnesses an offence within the precincts of an accident and emergency department.

Situations in which it appears a solicitor is not taking a precognition include:

- where a medical report is 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
- where it is an expert report
- where an individual charged with assault claims that he himself has been the victim of an assault. 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.

Such witnesses in these examples will not tend to be Crown witnesses.

### **4.3 Which outlays are not included within the fixed payment?**

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All other outlays normally chargeable in a criminal or ABWOR case which are subject to detailed accounting are chargeable in fixed payments cases. The more common outlays likely to be incurred include:-

- employment of counsel (where sanctioned)
- witness expenses (cost of travel/loss of earnings)
- sheriff officer's costs in citing a witness
- cost of an expert witness (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; and
- subsistence and accommodation.

### **4.4 General regulations and standard of taxation**

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The criminal fees regulations and A&A regulations continue to apply to the assessment of criminal legal aid and ABWOR accounts but are now subject to the provisions of the fixed payments regulations. This means that if the terms of the criminal fees regulations and the advice and assistance regulations, to the extent that they are relevant, conflict with the terms of the fixed payments regulations, it is the fixed payments 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) of the criminal fees regulations 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, due regard being had to economy" and the equivalent provision, regulation 17 of the A & A regulations, to the extent that it applies to fees.

On the other hand, there are a range of situations where conflict does not exist and the principal regulations remain in full force and effect.

Regulation 8 (Outlays allowable to solicitors) of the criminal fees regulations provides that a solicitor shall only be allowed "outlays, actually and reasonably incurred, due regard being had to economy" (including the provisions whereby traveling expenses cannot be incurred in traveling to a court in a town or place where the solicitor has a place of business) which continue to apply. Equally, given the extension of the fixed payment structure to summary criminal ABWOR, regulation 17 of the A & A regulations, to the extent that it deals with outlays, provides that a solicitor shall only be allowed "outlays actually, reasonably and necessarily incurred, due regard being had to economy" .

The same rules apply generally to a proper assessment of outlays incurred under a fixed payments case as apply in a case, either under advice and assistance or criminal legal aid, subject to a detailed account. Examples include:

- mileage incurred in attending a 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.

Whilst mileage is a chargeable outlay in connection with attending a client in prison, being an outlay it still requires to be actually and reasonably incurred in terms of regulation 8 of the criminal fees regulations or regulation 17 of the A & A regulations.

Mileage incurred in attendance at numerous visits to a client in prison or a visit to a distant prison still requires to be justified.

Where criminal legal aid is available, the provisions of regulation 8, to the effect that fees paid to witnesses who are not on the Crown list shall not exceed such sums as are considered by the Board to be reasonable having regard to the sums payable from time to time by the Crown to witnesses of the same categories, continues to apply.

You cannot charge mileage for travel to a court in the town or place where you have a place of business. This rule has now been extended to ABWOR where a fixed payment is chargeable.

## 4.5 Employment of counsel and expert witnesses

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The provisions for the employment of counsel and expert witnesses continue to apply as do the arrangements for taxation of counsel's fees and the fees and outlays allowable to an expert witness. As the assessment of outlays remains the same, you should remember to ensure that sanction is in place for the employment of counsel, expert witnesses or work of an unusual nature or work likely to involve unusually large expenditure, and that you are within the limits of any authorised expenditure set at the time sanction was granted.

## 4.6 Sanction for unusual work or unusually large expenditure

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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 to the extent that it would purport to make any allowance for a fee being payable to a solicitor in excess of the prescribed fixed payments.

In the unlikely event that sanction in these terms is 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 and such payment are *ultra vires* the powers of the Board.

# Schedule 1

## Part 1

## Regulation 4

<i>Where professional services are provided in relation to proceedings in the JP Court (other than where proceedings are set down to proceed before a Stipendiary Magistrate)</i>	<i>Where professional services are provided in relation to proceedings in the Sheriff Court (other than proceedings in a Court specified in Schedule 2) or the District Court (where proceedings are set down to proceed before a Stipendiary Magistrate)</i>	<i>Where professional services are provided in relation to proceedings in the Sheriff Court and those proceedings are brought in a Court specified in Schedule 2</i>
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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, or a proof of a victim statement, other than in the circumstances where paragraph 3 below applies; (iii) the first 30 minutes of conducting any trial; (iiia) a first or second diet of deferred sentence; and (iv) advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal, together with any subsequent or additional work other than that specified in paragraphs 2-13 below.	£315 (where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 below £290)	£515 (where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 below £490)	£565 (where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 below £540)
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2. All work mentioned in paragraph 1 above that is done in connection with a complaint under section 27(1)(b) of the 1995 Act.	£157.50	£257.50	£257.50
3. 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, or a proof of a victim statement.	£25	£50	£50
4. Conducting a trial or proof in mitigation for the first day (after the first 30 minutes)	£50	£100	£100
4A. Conducting an adjourned trial diet, during which no evidence is led, where there was no intention nor anticipation that evidence would be led, the only matter in consideration being the determination of the further procedure of the trial proceedings.	£25	£50	£50
4B. Conducting an adjourned trial diet, during which no evidence is led, where there was an intention and an anticipation that the trial would proceed through the continued leading of evidence.	£50	£100	£100
5. Conducting a trial or proof in mitigation for the second day.	£50	£200	£200
6. Conducting a trial or proof in mitigation for the third and subsequent days (per day).	£100	£400	£400

<p>7. Representation in court at a continued diet following a victim statement having been laid before the court where the court determines sentence or fixes a proof of a victim statement, or adjourns such a proof without hearing evidence.</p>	-	£50	-
<p>8. Conducting a proof of a victim statement where there has been no trial or proof in mitigation for the first day (after the first 30 minutes), and thereafter for subsequent days (per day).</p>	-	£200	-
<p>9. Conducting a proof of a victim statement at a continued diet following a concluded trial or proof in mitigation (per day).</p>	-	£200	-
<p>10. Representation in court at a diet of deferred sentence or per appearance in a court which has been designated as a youth court by the sheriff principal, at a hearing in respect of a community supervision order, or per appearance at a hearing in a court which has been designated as a domestic abuse court by the sheriff principal.</p>	£25	£50	£50
<p>10AA. Representation at a first or second diet of deferred sentence (one only) at which the court considers a report required under section 203 of the 1995 Act and where the case is disposed of (as an additional payment).</p>	£25	£25	£25

11. 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
12. All work done by virtue of section 24(7) of the Act until determination of the application for legal aid.	£25	£25	£25
13. All work done in connection with a bail appeal under section 32 of the 1995 Act, or an appeal under section 201(4) of the 1995 Act.	£50	£50	£50
14. All work done in connection with an application for bail subject to a movement restriction condition under section 24A of the 1995 Act.	-	£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

# Schedule 1A

	<i>Where professional services are provided in relation to proceedings in the Sheriff Court or the JP court (where proceedings are set down to proceed before a Stipendiary Magistrate)</i>	<i>Where professional services are provided in relation to proceedings in the Sheriff Court and those proceedings are brought in a Court specified in Schedule 2</i>
1. All work up to and including-	£515	£515
(a) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;	(where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 of Part 1 of Schedule 1 above, £490)	(where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 of Part 1 of Schedule 1 above, £490)
(b) the first 30 minutes of conducting any trial;		
(c) a first or second diet of deferred sentence; and		
(d) advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal, together with any subsequent or additional work other than that of the kind specified in paragraphs 10 to 12 of Part 1 of Schedule 1 above.		
2. All work mentioned in paragraph 1 above that is done in connection with a complaint under section 27(1)(b) of the 1995 Act.	£257.50	£257.50

# Schedule 1B

## Part 1

<i>Where professional services are provided in relation to proceedings in the JP court (other than where proceedings are set down to proceed before a Stipendiary Magistrate)</i>	<i>Where professional services are provided in relation to proceedings in the Sheriff Court or the JP court (where proceedings are set down to proceed before a Stipendiary Magistrate)</i>
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1. All work up to and including-	£515
(a) any diet at which a plea of guilty is made and accepted or plea in mitigation is made;	
(b) the first 30 minutes of conducting a proof in mitigation, or a proof of a victim statement, other than in the circumstances where paragraph 3 below applies;	
(c) a first or second diet of deferred sentence; and	
(d) advising, giving an opinion and taking final instructions on the prospects of an appeal against conviction, sentence, other disposal or acquittal,	
together with any subsequent or additional work other than that specified in paragraphs 8 and 9 below.	

2. All work prior to, and attendance at: £150

- (a) any diet at which a plea to the competency or relevancy of the complaint or proceedings, or a plea in bar of trial, is tendered;
- (b) any diet at which a question within the meaning of Rule 31.1 of the Act of Adjournal (Criminal Procedure Rules) 1996 is raised;
- (c) any diet from or to which the case has been adjourned under section 145 of the 1995 Act;
- (d) any diet at which there is tendered a plea of guilty or a plea in mitigation is made;
- (e) 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
- (f) any diet at which the court is considering the accused's change to plea of guilty to the charges, and where no application for criminal legal aid has been made,

together with-

- (i) the first 30 minutes of conducting a proof in mitigation;
- (ii) a first or second diet of deferred sentence;
- (iii) any subsequent or additional work other than that specified in paragraphs 4 and 8 to 13 below.

3. All work mentioned in paragraph 1 or 2 above that is done in connection with a complaint under section 27(1)(b) of the 1995 Act.

£75

£257.50

4. Conducting a proof in mitigation for the first day (after the first 30 minutes).	£50	£100
5. Representation in court at a continued diet following a victim statement having been laid before the court where the court determines sentence or fixes a proof of a victim statement, adjourns such a proof without hearing evidence.		£50
6. Conducting a proof of a victim statement where there has been no proof in mitigation for the first day (after the first 30 minutes), and thereafter for subsequent days (per day).		£200
7. Conducting a proof of a victim statement at a continued diet following a concluded trial or proof in mitigation (per day).		£200
8. Representation in court at a diet of deferred sentence or, per appearance, in a court which has been designated as a youth court by the Sheriff Principal, at a hearing in respect of a community supervision order, or per appearance at a hearing in a court which has been designated as a domestic abuse court by the Sheriff Principal.	£25	£50
9. Representation at a first or second diet of deferred sentence (one only) at which the court considers a report required under section 203 of the 1995 Act and where the case is disposed of (as an additional payment).	£25	£25
10. All work done in connection with a bail appeal under section 32 of the 1995 Act, or on appeal under section 201(4) of the 1995 Act.	£50	£50
11. All work done in connection with an application for bail subject to a movement restriction condition under section 24A of the 1995 Act.		£50

12. Conducting a special reasons proof or hearing on exceptional hardship (where both, they to be regarded as one only even if conducted separately).	£150	£150
13. Conducting a back-duty proof (but only if in the case no fee is payable under paragraph 12 above).	£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 in connection with any appearance of an assistance person (per appearance).	£50
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