

THE SCOTTISH LEGAL AID BOARD

GUIDELINES FOR USE BY DUTY SOLICITORS 2015/2016

1. INTRODUCTION

1.1 These guidelines contain details of the statutory provisions relating to duty solicitors, and information on the current duty solicitors' payment arrangements. These guidelines also contain details of the administrative provisions relating to duty and alternate duty solicitors, and outline the services to be provided by duty solicitors.

1.2 The Board conducted a review of the operation of the court duty scheme in 2010, and consulted on various proposals to change the way the court duty schemes operate in 2011. As a result of this review and consultation various changes to the eligibility criteria, the introduction of annual plans in all areas, and the way duty allocations are made have now been introduced. Details of these changes are contained in these guidelines.

2. STATUTORY PROVISIONS RELATING TO DUTY SOLICITORS

Regulation 5 of the Criminal Legal Aid (Scotland) Regulations 1996:

5 (1) The Board shall make arrangements for there to be available, in each sheriff court district and district court district, at all times throughout the year, when required, solicitors, hereinafter referred to as "duty solicitors", for the following purposes: -

- (a) attending (other than in the circumstances specified in sub-paragraph (b) below) whether in person or by means of a representative who is a solicitor, at any identification parade referred to in section 21(4)(b) of the [Legal Aid (Scotland) Act 1986] at which the services of the duty solicitor are required;*
- (b) attending on any person who has been taken into custody on a charge of murder, attempted murder or culpable homicide and who requires the services of the duty solicitor, and advising and acting for such a person until he is admitted to bail or is committed until liberated in due course of law;*
- (c) advising and acting for any person in custody (other than a person referred to in sub-paragraph (b) above) whose case is being prosecuted under solemn procedure, on the date when that person is first brought before a sheriff for examination and thereafter until he is admitted to bail or is committed until liberated in due course of law;*
- (d) advising and acting personally for any person who is being prosecuted under summary procedure and who is either in custody or has been liberated under section 22 (1) (a) of the [Criminal Procedure (Scotland) Act 1995] (liberation by police on undertaking to appear) on the day when that person is first brought before a court to answer to any complaint and thereafter –*
 - (i) until the conclusion of the first diet at which he is called upon to plead and in connection with any application for liberation following upon that diet; and*
 - (ii) where he has tendered a plea of guilty at that diet until his case is finally disposed of.*

(2) The reference to 'advising and acting' in regulation 5(1) shall include the services of the duty solicitor at any preliminary plea to the competency or relevancy of the petition or complaint and at any plea in bar of trial or any mental health proof.

(2A) *The duty solicitor shall not be available for the purpose described in sub-paragraph (d) of paragraph (1) above, where the proceedings described in that sub-paragraph take place before a court which has been designated as a drug court by the sheriff principal.*

(3) *Where a duty solicitor is available by virtue of arrangements made by the Board in accordance with sub-paragraph (d) of paragraph (1) above, section 31(1) of the Act shall not apply, and criminal legal aid for the purposes specified in the said sub-paragraph (d) shall be provided only by such solicitor unless the proceedings take place before a court which has been designated as a youth court by the sheriff principal.*

3. DUTY SOLICITOR PAYMENT ARRANGEMENTS

3.1 The payment arrangements for duty solicitors are as set out in the Criminal Legal Aid (Scotland) (Fees) Regulations 1989(as amended). Significant changes to these arrangements were made as part of the reforms of summary criminal legal assistance, which were implemented on 30 June 2008.

3.2 There shall be allowed to the duty solicitor representing accused persons in the sheriff or district court fees on the following scales: -

- Duty solicitors appearing in either the sheriff and stipendiary magistrate's or JP courts will be paid **£70** for work done for each accused appearing from custody or on an undertaking for which a plea of guilty is tendered. (This replaces the existing system of standard and subsequent *per capita* appearance fees.)
- for attendance at the first session of a court for the day, a sessional fee of £63 for the first case and £9.00 for each additional case where a plea of not guilty is tendered, subject to a maximum total fee of £140 for the session until its termination on completion of business for the day or on adjournment by the court, whichever is the earlier;
- for attendance at any other session of that court on the same day, a sessional fee of £63 for the first case and £9 for each additional case where a plea of not guilty is tendered, subject to a maximum total fee of £93 for each such other session:

3.3 Provided that the fee according to the foregoing scale shall cover the appearance in court of the duty solicitor on behalf of the accused as well as any interview or interviews with the accused or others whether such interview or interviews takes place during the same or another session.

Sessions

3.4 There is no definition of a "session". The former regulations provided for a solicitor to ask the court to declare a new session. This is not contained in the current regulations. It does seem to be clear, however, that "session" has a particular meaning in the context of the fees regulations and that seems to be a block of work carried out at any given time terminating only on completion of business for the day or on an adjournment by the court. It would not appear to be open to a duty solicitor to unilaterally "declare" a new session simply because of the number of accused persons seen in relation to the per capita fees. A solicitor should only seek remuneration for an actual session before the court or should ask the court to declare a new session if the court considers it appropriate to do so.

Duty Follow Up Fees

3.5 Where, following a plea of guilty, one or more adjournments are ordered by the court, and the duty solicitor requires to appear again, then an additional fee shall be payable for -

- (a) additional interviews with the accused or others; and
- (b) attendances at court other than during the course of the duty solicitor's period of duty,

The amount of such additional fee calculated on the basis of the fees set out in schedule 1 shall be such sum not exceeding £150 as shall form reasonable remuneration having regard to the additional work and time involved. This duty follow-up limit of £150 includes the initial £70 payment in respect of the initial guilty plea. The enhanced guilty plea payment is **discounted** from the follow-up cap. However, the Board does have the 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, fax or by letter for prior authorisation.

Preliminary pleas and pleas to the competency/relevancy

3.6 There shall be allowed to the duty solicitor making, for an accused person in the sheriff or district court, a preliminary plea to the competency or relevancy of the petition or complaint, or conducting any plea in bar of trial or any mental health proof, an additional fee to be calculated on the basis of the fees set out in schedule, the amount of such additional fee to be such sum not exceeding £150 as shall form reasonable remuneration having regard to the additional work and time involved. However, the Board does have the discretion to lift this cap in appropriate cases.

Youth Court/Domestic Abuse Court

3.7 Where the duty solicitor represents an accused person before a court which has been designated a youth court by the sheriff principal, the maximum fees prescribed in Regulation 6(2) shall not apply.

Clients Released Prior to any Court Appearance

3.8 If 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, there is still the provision for payment to be made to the duty agent. The duty agent is performing the function intended by the Act and regulations and can charge the per capita fee of £9, as appropriate.

3.9 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.

Failure to Appear Cases

3.10 The £70 payment for a guilty plea in connection with section 27(1) (a) or section 28 can be made, but only if there is a separate complaint. However this fee cannot be claimed if the accused already has criminal legal aid or a grant of ABWOR in the proceedings in respect of which he failed to appear.

Appointed Solicitor Arrangements

3.11 The duty solicitor cannot “put a client through” on behalf of the appointed solicitor. 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.

3.12 On 22 March 2011, changes were introduced to reduce by half the prescribed fees in Schedule 1 and 1A of the principal Regulations in the following circumstance: where the accused person appears from custody, is represented by the duty solicitor (whether or not the case is subsequently taken forward by the duty solicitor), a plea of not guilty is tendered and that plea is then changed to guilty before the start of the trial.

Prevaricating Witnesses

3.13 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, the duty agent would only be entitled to provide advice and assistance in this situation. A duty claim cannot be made as the witness did not appear 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.

4. ELIGIBILITY CRITERIA FOR INCLUSION ON THE DUTY PLANS

4.1 Solicitors must hold a practicing certificate with no restriction affecting their entitlement to provide criminal legal aid as at the closing date for applications.

4.2 Solicitors must be accepted on to the Criminal Legal Assistance Register.

4.3 At the time of applying for inclusion on the plans, solicitors must have a place of business within the sheriff court area for which the duty plan is being prepared and conduct the majority of business within that area. However, this requirement can be disregarded where local circumstances necessitate it.

4.4 Duty solicitors must be able to provide professional services which are of a quality which could reasonably be expected of any competent solicitor conducting criminal business. In order to meet this definition, prospective duty solicitors must be able to demonstrate that they are regular, competent and knowledgeable criminal practitioners. Such values would normally be demonstrated by reference to, for example:

- the number of criminal instructions taken in the High Court, Sheriff Court and JP court;
- the number of criminal trials carried out per month;
- the number of appearances in the criminal court on a weekly / monthly basis
- their continuing professional development record;
- their continuing compliance with the Code of Practice;
- their quality assurance compliance record;

4.5 A solicitor must be able to demonstrate, on application for inclusion on the duty plan and if called upon, that they practice in the criminal courts in a significant way; have regimes in place to keep abreast of developments in criminal law, procedure and practice; and meet the requirements of the quality assurance and compliance schemes.

4.6 If a solicitor moves from one firm to another, the respective shares of the duty plan(s) will remain the same until new plans are drafted. If the new firm features on a court duty plan, that solicitor will still be entitled to provide duty services for the new firm.

4.7 A solicitor will be entitled to apply for inclusion on both the Sheriff & JP court plans (there is no longer the requirement to serve 1 year on the JP court).

4.8 A solicitor and their firm can normally only be included on a duty plan for one sheriff court district at any one time, unless the firm has more than one place of business in different court areas, where allocations can be made on each plan based on the eligible solicitors conducting their business at each office. However, this requirement can be disregarded where local circumstances necessitate it.

5. ADMINISTRATIVE PROVISIONS RELATING TO DUTY AND ALTERNATE DUTY SOLICITORS

5.1 The Board prepares the duty plans which will now run from 1 April to 31 March each year for each sheriff and JP court in Scotland. The plans allocate certain periods to each duty solicitor's firm providing details of the duty and an alternate duty solicitor for each period.

5.2 Allocations on the various plans will be made to Solicitors' firms on the basis of the number of eligible solicitors who apply and meet the criteria.

5.3 Firms will be able to use internal systems to allocate a solicitor to attend at court as a duty solicitor when required, but court appearances can only be made by solicitors who have been accepted by the Board on to the duty plan. Each individual solicitor from the firm needs to make a separate application to the Board for inclusion on the plan, and satisfy the eligibility criteria. Similarly, solicitors can delegate attendance or the provision of advice to a solicitor in another firm, but again the solicitor to whom the duty work is delegated must also have been accepted onto a court duty plan.

5.4 These powers of delegation should not be abused. The role of duty solicitor is a responsible one. Advice can be given to an accused person to the prejudice of that person. Examples include an inappropriate plea, a plea to the relevancy or competency which is not identified or failure to challenge the special capacity in which a person is accused. To avoid such abuse, any solicitor called upon to perform the functions of a duty solicitor in whatever circumstances must have the minimum qualifications relating to solicitors seeking inclusion in a duty plan outlined in paragraph 4.4 of these guidelines.

5.5 Your firm may exchange a period of duty with another firm on the same plan, but you must tell us of any change, as we in turn will notify the police and court officials and record the change for our Accounts Assessment Division.

5.6 Subject to any follow-up duties required, a duty solicitor's period of duty begins at 12.01 a.m. on the first day of the period shown on the plan (or each period if there is more than one) and ends at midnight on the last day of the period or periods. However, as duty solicitor you may be called out to attend upon an accused person who is in custody on a charge of murder, attempted murder or culpable homicide. If so, you must continue to give the accused any other services a duty solicitor should provide, following such attendance, even though you may have to do so outwith the period of duty shown on the plan.

5.7 As duty solicitor you must:

- give priority to the performance of these services
- be available when the particular court requires it (even if the papers are not ready) to perform these services during each sitting by the court that you are attending as duty solicitor.

5.8 If two or more accused persons are entitled to the services of the duty solicitor, and you consider a conflict of interest exists between them, you should call on your alternate. If the alternate is not available, you can call on any other solicitor eligible to undertake legal aid work

who is willing to act as duty solicitor to render these services. That solicitor will be deemed to be acting as duty solicitor for the purposes of the duty plan.

5.9 In the absence of any other arrangement, you are responsible for assessing the workload each day. You may call upon the alternate duty solicitor, or any other solicitor shown on the Plan if required, and you are responsible for notifying us accordingly.

5.10 If you fail to attend to your duties without making provision for another solicitor to attend to them, you may be considered unsuitable for inclusion in a future duty plan. Any other solicitor who, in these circumstances, is required by the police, court or Board officials to substitute for you is deemed to be acting as duty solicitor for the purposes of the plan.

5.11 If you wish to withdraw from the plan for any reason you must give us at least one month's notice, or undertake the duties you have agreed to carry out.

6. SERVICES TO BE PERFORMED BY THE DUTY SOLICITOR

6.1 The duties to be performed by the duty solicitor include the following:

- Attendance at any identification parade at which your services are required.
- Attendance on anyone who has been taken into custody on a charge of murder, attempted murder or culpable homicide. It is our practice to allow any solicitor to perform this function in respect of the serious charges and to be remunerated as if they were the duty solicitor.
- Advising and acting for anyone in custody whose case is being prosecuted under solemn procedure, on the date when they are first brought before a sheriff for examination and thereafter until they are admitted to bail or committed until liberation in due course of law.

6.2 You should tell accused persons about their right to select their own solicitor. However, it is part of your function as duty solicitor to represent the interests of an accused person even if they will be represented by another solicitor. Where that solicitor is not present at court and has not helped the accused person complete the application form, you should complete the solemn criminal legal aid application form and get the accused person to sign it.

6.3 As soon as practicable (and no later than the full committal) you should forward the papers including the petition and a note of the procedural position, to the nominated solicitor. In cases where you have been given specific authority from the nominated solicitor and criminal legal aid is not automatically available, you may sign the application form on behalf of the nominated solicitor to indicate their willingness to act. Otherwise, you should forward the application form to the nominated solicitor who must sign the form to indicate their willingness to act.

- Advising and acting personally for any person who is being prosecuted under summary procedure, who is either in custody or on an undertaking to appear, on the day when they are first brought before a court to answer any complaint:
 - until the conclusion of the first diet at which that person is called upon to plead, and
 - in connection with any application for liberation following upon that diet;¹ and
 - where they have tendered a plea of guilty at that diet until their case is finally disposed of.

6.4 Where the accused person is tendering a plea of not guilty, you have an obligation to continue to tell them about their rights to select their own solicitor. It is part of your function as

duty solicitor to represent the interests of an accused person even though they will be represented by another solicitor.

6.5 Where another solicitor is nominated, the nominated solicitor should take the client's instructions and in terms of the Criminal Legal Aid (Scotland) Regulations 1996, has 14 days from the pleading diet to lodge the application with the Board. If there is a delay in forwarding documentation to the nominated solicitor, it is open to them to argue that there is good reason for the criminal legal aid application form not having been lodged timeously.

6.6 You should send the nominated solicitor all papers, including the complaint or petition, and a note of the procedural position including information supplied to the court in respect of a bail appeal and the dates of future diets. It is poor practice to hand their complaint or petition back to a liberated or, worse, remanded accused person, advising them to make their own arrangements for contacting their own solicitor.

6.7 We have issued guidance on the definition of "in custody"² and clarified the position about a solicitor who is not the duty solicitor giving advice and assistance. A solicitor representing an accused in custody should inform the duty solicitor as soon as possible that they are intending to do so. In smaller courts this may save the duty solicitor a needless trip to court, and in large courts it will prevent needless duplication of effort. As duty solicitor you cannot charge separately under advice and assistance for any work which forms part of the services required of a duty solicitor. In particular, you cannot charge for meetings, correspondence and telephone conversations etc., arising in connection with the follow-up duties.³

1 *The Scottish Legal Aid Handbook B: 71 Note 9: Where accused person in custody has tendered a plea of not guilty and made an application to the Board, bail reviews and bail appeals are matters which can be dealt with by the duty solicitor and can also be dealt with by the nominated solicitor.*

2 *The Scottish Legal Aid Handbook B: 15 Note 15: The term "in custody" relates to the particular offence in respect of which the accused is presently in custody and not to any other matter which may be current.*

3 *The Scottish Legal Aid Handbook B: 14 Note 14: Also Criminal Legal Aid (Scotland) (Fees) Regulations 1989 Regulation 6 (2).*

7. CONSULTATION WITH LOCAL FACULTIES ON THE OPERATION OF LOCAL PLANS

7.1 It is the Board's responsibility to operate the duty schemes. While we cannot accept any changes to the basic eligibility criteria which limit the ability of experienced solicitors to apply for inclusion on the plans, we recognise the value and importance of engaging with local faculties. We will tailor local schemes to reflect particular local circumstances where this is appropriate. Examples of these issues are:

- How a duty period is delegated to someone else if the duty solicitor is unavailable;
- When the alternate duty solicitor is required (usually the next firm on the list);
- The exact starting time of a period of duty;
- The basis of allocations to firms;
- Arrangements for covering undertakings by alternate duty solicitors;
- Combined plans for both sheriff and JP courts where this is appropriate.