

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

The Criminal Legal Aid (Fixed Payments and Assistance by Way of Representation) (Scotland) (Miscellaneous Amendments) Regulations 2014

## **Purpose and intended effect**

### **Background**

The Scottish Government remains committed to maintain a fair, high quality and equitable system which maintains public confidence at an affordable and sustainable level of expenditure. It is imperative, therefore, that savings are made wherever possible.

Reflecting the drop in Scotland's overall budget as a result of the UK Government's spending reviews, budgets will be increasingly challenging for the foreseeable future. By 2014-15, the legal aid fund budget will fall to £132.1 million. The current spend is expected to exceed the budget, which is not a sustainable position. Being demand led and in the current financial climate, the Scottish Legal Aid Fund ("the Fund") is under considerable strain to allow access to justice to be provided for those who need it most.

Various changes were made to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 ("the 1999 Regulations") by the Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2011. There is a need to revisit some of the changes made to the 1999 Regulations and make some necessary amendments to secure the estimated savings envisaged at that time and to clarify and tidy up the regulations.

We have also taken the opportunity to make a minor amendment to the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 ("the 2003 Regulations")

### **Objective**

- The legal aid system contributes to the 'Safer and Stronger' Strategic Objective. In particular, it contributes to the national outcome of "strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others" by ensuring that individuals can be held to account for their actions and can enforce their own legal rights through the effective functions of our civil and criminal courts.

The Scottish Government's intention is to allow sufficient flexibility in the 1999 and 2003 Regulations by ensuring that solicitors are reasonably remunerated for work done and that any changes to the regulations produce savings to the Fund.

The Scottish Government's intention is achieved by amending the 1999 and 2003 Regulations to:

## **Savings**

- widen the range of circumstances which can be treated as a single matter in failure to appear proceedings;
- apply a sliding scale of fees for assistance by way of representation to be paid in cases with multiple charges and complaints;
- extend the application of the half-fee where a duty solicitor tenders a not guilty plea, but this subsequently changes to a plea of guilty, in a complaint with multiple charges;

## **Clarification**

- ensure that the first two deferred sentence diets do not attract an additional fee, as that work is included in the case disposal fee;
- where a person fails to attend a diet of deferred sentence, widen the circumstances in which an additional deferred sentence fee is not paid for any subsequent adjournment;
- amend the terminology 'set-down' for cases relating to Stipendiary Magistrates courts to make sure fees are paid based on the level at which the case is to be prosecuted, not on the court in which it appears (which can be affected by a number of factors, including purely administrative ones);
- allow the fee for cases continued without plea to be paid, where the solicitor has to prepare for such a diet/hearing and negotiate with the PF but is not called before the court;
- because the 'half fee' for breach of bail conditions was not reduced when the principal fee was, return the reduced fee for breach of bail conditions to half of the principal fee;
- remove redundant text about fees in the Tables of Fees;

## **Exceptional case status**

- Widen the availability of exceptional case status to cover any fees chargeable under any Schedule of the 1999 Regulations, allowing a solicitor to apply to claim detailed fees (rather than fixed payments) for work done in more complex cases.

- **Rationale for Government intervention**

The current and future financial climate remains challenging. In order for the Fund to function sustainably, savings must continue to be made. This policy has therefore been developed to deliver substantial savings and, in addition, the opportunity has been taken to tidy up the 1999 Regulations to make them easier to understand and to use.

## **Consultation**

- **Within Government**

The Scottish Legal Aid Board ("The Board") is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. The Board has been consulted in the development of these regulations.

- **Public Consultation**

These Regulations directly affect solicitors providing legal aid services. As those affected by this policy is limited, our consultation was carried out with legal aid solicitors, which is

covered in the 'Business' consultation section.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland ("the Society"). The Society's work on legal aid issues is led by the criminal and civil legal aid negotiating teams, each being panels of solicitors who work in these fields, either as a sole operator or a member of a Firm. These panels are responsible to the Council of the Society. The criminal legal aid negotiating team has been consulted in the development of these Regulations.

## **Options**

### **Option 1 - Do nothing**

Should we choose to do nothing, the status quo will remain. In effect, neither solicitors or clients will benefit from the widening of exceptional case status to include work done under Schedule 1A of the Regulations, and solicitors will not benefit from the continued without plea fee (CWP) revision. There will continue to be unintended pressure on the Fund through lack of clarity in relation to claiming fees in the 1999 Regulations.

- **Sectors and groups affected**

Those affected are the Board and those solicitors' firms carrying out publicly funded legal assistance. There may be some impact on a small number of clients through the restriction to the exceptional case status provision.

### **Option 2 - Carry out the proposed changes to the 1999 and 2003 Regulations**

The proposed amendments to the 1999 and 2003 Regulations will improve them by clarifying what fees are available to solicitors. This is aimed at reducing pressure on the Fund, and therefore achieving savings. Redundant text will be removed, thus tidying up the 1999 Regulations. Clarification of certain issues will reduce the scope for confusion and assist the administrative process.

In addition, the amendments will widen the exceptional case status provision allowing solicitors to claim detailed fees in certain circumstances.

- **Sectors and groups affected**

These measures will largely impact on the Board and those solicitors' firms carrying out publicly funded legal assistance. There will be some positive impact on a small number of criminal legal aid applicants; clients whose case was granted exceptional case status would be able to continue to be represented by the same agent rather than find the agent withdrawing from acting due to the prospect of not receiving fees for some of the work undertaken in the case.

- **Benefits**

### **Option 1**

The benefits associated with this option are that there would be not be a requirement to amend the current legislation. There would however, continue to be an administrative

burden to the Board through continuing disputes over fees and therefore pressure on the Fund. Some disputes may result in taxation. Solicitors would benefit from being paid more fees in some circumstances.

## **Option 2**

The benefits of this option would be some savings to the Fund, of approximately **£500,000** per annum, less of an administrative burden to both the Board and to solicitors and accounts submitted and approved more quickly. The widening to exceptional case status will be of benefit to solicitors and to clients and will allow claims for work done under Schedule 1A of the 1999 Regulations in certain circumstances. Solicitors will also benefit from revised CWP provision for continued without plea hearings (“CWP”), which will allow for a claim to be made for necessary work to resolve a case, even where the Hearing does not take place. Clarification of the 1999 Regulations will provide a clear steer about which fees can be charged and for what type of work.

- **Costs**

## **Option 1**

There would continue to be a lack of clarity around the feeing arrangements for some types of cases. Solicitors would not benefit from the revised CWP provision to ensure payment of the fee. The Board would continue to face administrative pressure with the potential for lengthy and protracted disputes over payments and with some cases going to taxation. Solicitors would not be able to claim detailed fees from the widening of the exceptional case status provisions under Schedule 1A of the 1999 Regulations, but would be restricted to fixed fees. Neither would clients benefit from exceptional case status, allowing representation by the same agent throughout the case.

The cost to the Fund would be approximately **£586,000 per annum**.

## **Option 2**

There will be a minimal cost to the Board from the widening of the exceptional fee status and CWP fee revision. For solicitors, there will be a reduction in fees for some aspects of legal aid work.

## **Scottish Firms Impact Test**

As stated in the consultation section, consultation took place with the Law Society of Scotland, whose Legal Aid Negotiating Teams, discuss proposed changes to legislation with Government and on behalf of the profession. These teams comprise practicing solicitors who are authorised to provide legal assistance. Team members share their own experiences with one another and at meetings with the Scottish Government and the Board.

The profession includes solicitors employed in firms, partners and sole practitioners. If there is any impact as a result of these proposals, the majority of providers affected are likely to be small providers (both small and micro sized businesses) due to the dominance of small legal services providers in the legal aid market. In the Board’s 2010 and more recent solicitor surveys, partners were asked how many solicitors their firm employed across Scotland. Almost half of the firms (48%) employed 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

An Equality Impact Assessment has been carried out on these proposals. The Scottish Government does not believe the regulations will give rise to any adverse impacts on groups with protected characteristics as defined in the Equality Act 2010.

- **Competition Assessment**

In our view, having applied the Office of Fair Trading competition filter, the proposal will not impact on competition within the legal aid market.

These Regulations do not directly or indirectly limit the number or range of suppliers, or limit the ability of suppliers to compete; or reduce suppliers' incentives to compete vigorously.

- **Test run of business forms**

There should be no requirement for new forms. All legal aid applications are currently submitted on line through the Board's Legal Aid Online system.

- **Legal Aid Impact Test**

Widening of the exceptional case status provisions will be at minimal cost per annum. The remaining amendments are likely to achieve overall savings to the Fund of **£586,000** per annum.

### **Enforcement, sanctions and monitoring**

The amendments made to the 1999 and 2003 Regulations do not create any new enforcement or monitoring mechanisms. The Board will, however, operate an appeals mechanism for solicitors who have been refused exceptional case status and other amendments, once implemented, will be subject to reconsideration or, where relating to fees, taxation before the Auditor as it already does for other types of legal assistance where exceptional case status may be granted. The Board will monitor the implications of these measures and has responsibility for administering the Fund.

- **Implementation and delivery plan**

These Regulations will come into force on 23 September 2014.

- **Post-implementation review**

The Scottish Government and the Board will review the impact of this legislation within 10 years through consideration of analysis of data which is collected routinely by the Board.

- **Summary and recommendation**

Our recommendation is that option **two** is taken forward. Although there will be a reduction in fees in some areas of the 1999 Regulations, solicitors will have the benefit of claiming detailed fees for work done through the widening of the exceptional case status provision. Solicitors will also benefit from the revised CWP fees. Option two is likely to deliver an operational benefit to the Board in that there will be less of an administration burden. There will also be an operational benefit to solicitors, who will have a clearer vision of the fees to which they are entitled and time saved when preparing accounts.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p><b>Scottish Ministers</b></p> <p>None.</p> <p><b>Scottish Legal Aid Board</b></p> <p>Administrative burden on the Board should lessen.</p> <p><b>Solicitors</b></p> <p>More fees in certain circumstances.</p> <p><b>Clients</b></p> <p>None. There will not be a benefit from exceptional case status</p>	<p><b>Scottish Ministers</b></p> <p>Savings would not be delivered at a cost of £586,000 per annum.</p> <p><b>Scottish Legal Aid Board</b></p> <p>The Board would continue to be involved in lengthy and costly fee disputes, to the detriment of the administration of the Fund.</p> <p><b>Solicitors</b></p> <p>Solicitors would not benefit from the widening of the exceptional fee provisions and the CWP fee revision</p> <p><b>Clients</b></p> <p>Lack of exceptional case status for certain cases.</p>
2	<p><b>Scottish Ministers</b></p> <p>Saving to the Fund of <b>£586,000</b>.</p> <p><b>Scottish Legal Aid Board</b></p> <p>Administrative benefit; accounts processed more quickly and effectively.</p> <p><b>Solicitors</b></p> <p>Clarification of the regulations. Certainty of which fees can be claimed and when.</p> <p>Widening of exceptional case status to ensure that solicitors can claim for additional work undertaken in certain circumstances.</p> <p>Revision of CWP fees.</p> <p><b>Clients</b></p>	<p><b>Scottish Ministers</b></p> <p>None.</p> <p><b>Scottish Legal Aid Board</b></p> <p>None</p> <p><b>Solicitors</b></p> <p>Some reduction in fees in certain circumstances</p> <p><b>Clients</b></p> <p>None</p>

	Exceptional case status, allowing continuity of representation in a wider range of cases.	
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### **Declaration and publication**

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**

**Date:**

**Kenny MacAskill**  
**Cabinet Secretary for Justice**

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