

Final Business and Regulatory Impact Assessment

Title of Proposal

The Civil Legal Aid (Scotland) (Miscellaneous Amendments) Regulations 2015

Purpose and intended effect

- **Background**

Legal aid is currently available for a wide range of proceedings in Scottish courts. Changes are being made to Scottish courts through the Courts Reform (Scotland) Act 2014 (“the 2014 Act”). Provisions in the 2014 Act are being implemented in January 2016 relating to civil proceedings in the new Sheriff Appeal Court.

Most of the appeals to be heard in the new court are cases currently heard by the sheriff principal and conducted by a solicitor. Legal aid in these cases currently accounts for around £285,000 from the Legal Aid Fund (which would represent around 0.2% of the budget for the Fund in 2015-16). This work is widely spread out. A total of 642 firms are registered to provide civil legal assistance. Over the past three years, the Scottish Legal Aid Board paid civil legal aid accounts to 117 firms for appeals to a sheriff principal. Of those firms, 71 received payment for only one civil appeal over that period. The new court may sit with up to three sheriffs and be held in a different sheriffdom from the one in which the decision being appealed was taken, depending on the circumstances. There is an opportunity to appeal the decision of the Sheriff Appeal Court, with permission, to the Court of Session.

- **Objective**

The policy objective of this instrument is to adapt the framework and arrangements in existing legal aid regulations to accommodate the changes coming into force in January by:

- recognising the new court and requiring a fresh application and grant of civil legal aid for an appeal to the Sheriff Appeal Court following any civil legal aid application that may have been granted for the proceedings in which a sheriff made a decision in the case, and for appeals and references from the Sheriff Appeal Court to the Court of Session;
- making specific provision for fees and taxation of accounts, including a percentage increase in fees where the case is particularly complex (“additional fees”), and allowing solicitors to choose whether to be paid the block fees currently available for appeals to the sheriff principal, or

to be paid the detailed fees available for Court of Session work;

- clarifying the circumstances in which solicitors require to submit a single account to the Scottish Legal Aid Board where a second solicitor has been instructed – for example, in order to provide representation in another location so that the first solicitor does not have to travel – as already happens for criminal legal aid, (and making an exception for proceedings in the Sheriff Appeal Court, the Court of Session and the UK Supreme Court); and
- requiring prior approval of the Scottish Legal Aid Board before employing counsel in the Sheriff Appeal Court and, where approval is given, allowing counsel or a solicitor advocate to be paid at the same counsel rates currently paid for appeals to the sheriff principal.

- **Rationale for Government intervention**

The reforms set out in the 2014 Act are part of the wider Making Justice Work Programme that the Scottish Government is working on in partnership with the Scottish Courts and Tribunals Service, the Scottish Legal Aid Board, the Crown Office and Procurator Fiscal Service, the Scottish Tribunals Service and others. This programme brings together a number of work streams to secure high quality, affordable and accessible justice for people in Scotland. This includes adapting legal aid arrangements to take account of civil appeals to the Sheriff Appeal Court. Reform of the civil courts forms part of Making Justice Work Programme 1: “effective court and tribunals”.

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 enforce their own legal rights through the effective function of the courts.

This proposal is aimed at making sure legal aid continues to be available in the new arrangements being brought in by the 2014 Act.

Consultation

- **Within Government**

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

- **Public Consultation**

These regulations directly affect solicitors and counsel providing legal aid services. Consultation was therefore carried out with legal aid solicitors and counsel, which is covered in the “Business” consultation section.

As regulations also have an effect on the taxation of accounts, the Auditor of the Court of Session was also consulted.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (“the Society”). The Society’s engagement 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 practitioner or a member of a firm.

Both negotiating teams have been consulted in the development of these regulations.

The Faculty of Advocates (the Faculty”) regulates advocates, subject to the oversight of the Court of Session. The Faculty was consulted in the development of these regulations.

Options

Option 1: Do Nothing

Provisions making civil legal assistance available and fees payable for civil legal assistance work would remain unchanged thereby providing no satisfactory and appropriate structure within which legal aid could be provided in the new court and for paying legal aid to solicitors and counsel. The Sheriff Appeal Court is listed at Schedule 2 to the Legal Aid (Scotland) Act 1986 as a court in which civil legal aid is available. However, civil legal aid regulations which provide the detail of the fees regime would make no specific reference to the Sheriff Appeal Court.

There would be no clear basis for the submission and taxation of accounts, or for establishing whether a single account would be required in the Sheriff Appeal Court, where a second solicitor is instructed, and arrangements, if any, for an additional fee. Counsel could be employed in the Sheriff Appeal Court without the prior approval of SLAB (contrary to current arrangements before the sheriff principal).

Option 2: Amend Legal Aid Regulations

Civil legal aid provision for appeals to the Sheriff Appeal Court would be clearly specified. In the Sheriff Appeal Court, solicitors would be able to choose whether to be paid the detailed fees currently available in the Court of Session or to be paid the block fees presently available for appeals to the sheriff principal, and be able to seek an additional fee where appropriate. Fees for solicitors conducting appeals in the Sheriff Appeal Court on summary cause cases would increase.

There would be clarity where a second solicitor is instructed for proceedings as to

the circumstances in which a single account did not have to be submitted, and that there was no need to do so in the Sheriff Appeal Court, the Court of Session and the UK Supreme Court. Prior approval of SLAB would be required before employing counsel in the Sheriff Appeal Court. Where approval was given, counsel or a solicitor advocate would be paid at the same counsel rates currently paid for appeals to the sheriff principal.

Sectors and groups affected

These measures will largely impact on SLAB and solicitors' firms and counsel carrying out civil legal aid work in terms of the fees chargeable.

Benefits

Option 1: Do Nothing

Counsel could gain economic advantage as prior approval from SLAB would not be required before being employed.

Option 2: Amend Legal Aid Regulations

Clear and specific civil legal aid provision would ease the administration of fee claims, both from the solicitors' and counsels' perspective, and from that of SLAB, and reduce opportunities for extended dispute between solicitors or counsel and SLAB as to the fees chargeable. Solicitors would benefit from the flexibility of being able to choose to be paid a block fee (reducing administration when submitting an account to SLAB) and detailed fees (meaning they would receive higher fees where the work was more time-consuming). Solicitors conducting appeals in the Sheriff Appeal Court on summary cause cases would benefit from an increase in fees.

The opportunity to seek SLAB's approval to employ counsel would make sure that this only happens where the case merits it. Solicitor advocates would be allowed to charge the counsel fee where approval to employ sanction for counsel was given. Allowing solicitors to submit only one account in civil legal aid cases involving more than one solicitor (except for the Sheriff Appeal Court, the Court of Session and the UK Supreme Court) would avoid duplication and administrative burden for SLAB.

Costs

Option 1: Do Nothing

There would be ambiguity about civil legal aid provision for the Sheriff Appeal Court, and no requirement for SLAB's approval before employing counsel. This would likely result in a significant number of disputes with SLAB on the fees to be paid to solicitors and counsel in individual cases. That lack of clarity could cost the Legal Aid Fund around £160,000 or more per year, plus administrative costs to SLAB, solicitors and counsel.

Option 2: Amend Legal Assistance Regulations

SLAB estimates that applying the existing legal aid frameworks to the Sheriff Appeal Court (Civil) could result in an increase to Legal Aid Fund expenditure of up to £125,000 per year (£35,000 less than Option 1). Clients could choose between counsel and a solicitor advocate in cases where SLAB gave approval to employ counsel. Fees available would be set out explicitly in regulations rather than being negotiated on a case by case basis. The actual impact from year to year would vary depending on the number and type of civil cases progressing through the courts, the frequency of appeal hearings assigned to a three bench court, the location of the court hearings, and the application of the additional fee procedure.

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 on behalf of the legal profession. These teams comprise practising solicitors who are authorised to provide publicly-funded civil legal assistance.

The profession includes solicitors employed in firms, partners and sole practitioners. The majority of providers affected by these proposals are likely to be small providers (both small and micro sized businesses) due to the dominance of small legal services providers in the civil legal aid market. In SLAB's 2010 survey of legal aid solicitors, 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.

The Law Society commented on the proposed draft regulations which were shared with them. It expressed concern about fee levels. Prior to the economic downturn, solicitor's civil legal aid fees have benefited from three waves of increase in 2003, 2007 and 2008. Both detailed and block fees were increased by 21% in 2003. Block fees in summary cause cases were increased by 21% in 2007. In 2008, there was an increase of almost 11% in detailed fees and an overhaul of block fees, including increases in value and more flexibility in applying for detailed fees and additional fees. Public funds have been constrained over at least the past five years and the draft regulations were revised to increase the benefits to solicitors in that context:

- The most generous of the detailed fee structures for solicitors in the Scottish legal aid system is being made available for work in the new court.
- In addition, in response to the Law Society's comments, the regulations were revised to allow solicitors to choose whether to charge detailed fees or the block fee currently used for appeals to the sheriff principal. The block fee is likely to be more profitable for solicitors in more straightforward cases because it requires less administrative work when submitting the account to SLAB.
- The Law Society also queried whether the "additional fee" available in the Court of Session would also be available for the Sheriff Appeal Court. The

regulations were revised to make clear that this additional fee will be available in the Sheriff Appeal Court. This is an increase of up to 50% on the detailed fees available, subject to certain criteria.

- There is also a means of applying to SLAB for an increase to the block fee, subject to certain criteria, which will continue to be available where that fee is charged.
- Further, the regulations were revised so that summary cause cases in the Sheriff Appeal Court will be eligible for these detailed fee and block fee arrangements. Both represent an increase in the fees available for solicitors conducting this type of case.
- Finally, provision was made so that where SLAB gave approval to employ counsel, solicitor advocates could conduct the case at counsel rates.

The Faculty of Advocates and the Auditor of the Court of Session made no comment on the draft regulations shared.

Competition Assessment

In our view, having applied the Competition and Markets Authority competition filter, the proposal will not impact on competition within the civil legal aid market. These Regulations do not directly or indirectly limit the number or range of suppliers, limit the ability of supplies 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 online through SLAB's Legal Aid Online System.

Legal Aid Impact Test

SLAB estimates that applying the existing legal aid framework in this way to the Sheriff Appeal Court (Civil) could cost the Legal Aid Fund around an additional £125,000 per year. If this kind of legal aid provision were not applied to the Sheriff Appeal Court (Civil), SLAB estimates that the cost to the Legal Aid Fund would be at least a further £35,000 per year (an additional £160,000 in total) and there would be a greater uncertainty over the fees to be paid in individual cases.

Enforcement, sanctions and monitoring

The amendments made to the provision of publicly-funded civil legal assistance do not create any new enforcement or monitoring mechanisms. SLAB will monitor the implications of these measures and has responsibility for administering the Legal Aid Fund.

Implementation and delivery plan

These Regulations will come into force on 1 January 2016.

- **Post-implementation review**

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

Summary and recommendation

It is recommended that regulations be made as set out in Option 2. This will allow provisions in the 2014 Act to be implemented as intended. It will also make clear civil legal aid provision for solicitors and counsel to be paid for the work they do.

- **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>Scottish Ministers None.</p> <p>Scottish Legal Aid Board None.</p> <p>Solicitors In all civil legal aid cases involving the instruction of a second solicitor, an account could be submitted to SLAB for each solicitor individually.</p> <p>Solicitor advocates None.</p> <p>Counsel Counsel could be employed for work in the Sheriff Appeal Court without prior sanction from SLAB.</p>	<p>Scottish Ministers Additional spend from the Legal Aid Fund of £160,000 or more per year.</p> <p>Scottish Legal Aid Board Ambiguity in regulations could lead to a higher number of disputes over accounts submitted by solicitors and counsel. In all cases, SLAB would have to administer separate civil legal aid accounts for each solicitor in cases where a second solicitor was instructed.</p> <p>Solicitors Ambiguity in regulations could lead to a higher number of disputes over accounts submitted to SLAB.</p> <p>Solicitor advocates Ambiguity in regulations could lead to a higher number of disputes over accounts submitted to SLAB.</p> <p>Counsel Ambiguity in regulations could lead to a higher number of disputes over accounts submitted to SLAB.</p>

<p>2</p>	<p>Scottish Ministers A clear fee structure and more predictable expenditure from the Legal Aid Fund.</p> <p>Scottish Legal Aid Board Clarity in how the legal aid framework applies to the Sheriff Appeal Court, minimising the number of disputes over accounts submitted by solicitors and counsel. With the exception of cases in the Sheriff Appeal Court, the Court of Session and the UK Supreme Court, SLAB would only have to administer a single account for solicitors' fees where a second solicitor was instructed in a civil legal aid case.</p> <p>Solicitors Clarity in how the legal aid framework applies to the Sheriff Appeal Court, minimising the number of disputes over accounts submitted to SLAB. Solicitors would have the flexibility to choose whether to charge detailed fees or a block fee in response to the circumstances of each case. Those solicitors conducting summary cause cases in the Sheriff Appeal Court would receive more fees than at present for those cases.</p> <p>Solicitor advocates Where SLAB give prior approval to employ counsel in the Sheriff Appeal Court, a solicitor advocate will be able to conduct the case at counsel rates.</p> <p>Counsel Clarity in how the legal aid framework applies to the Sheriff Appeal Court, minimising the number of disputes over accounts submitted to SLAB.</p>	<p>Scottish Government Additional spend from the Legal Aid Fund of up to £125,000 per year.</p> <p>Scottish Legal Aid Board None.</p> <p>Solicitors In civil legal aid cases other than those in the Sheriff Appeal Court, the Court of Session and the UK Supreme Court, solicitors would only be allowed to submit one combined account to SLAB where a second solicitor was instructed.</p> <p>Solicitor advocates None.</p> <p>Counsel Counsel could only be employed for work in the Sheriff Appeal Court with prior approval from SLAB. Where approval is given, counsel would be in competition with solicitor advocates.</p>
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Declaration and publication

I have read the Business and Regulatory 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:

Paul Wheelhouse
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