

## **POLICY NOTE**

### **THE CIVIL LEGAL AID (SCOTLAND) (MISCELLANEOUS AMENDMENTS) REGULATIONS 2015**

#### **SSI 2015/380**

The above instrument was made in exercise of the powers conferred by sections 33(2)(a) and (3) and 36(1) and (2)(a) and (c) of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

#### **Policy Objectives**

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, for which legal aid is available. In addition, some cases currently heard in the Court of Session will be heard in the new court (the change in exclusive competence of the sheriff court now means that all cases with a value up to £100,000 have to be raised in the sheriff court, where previously cases with a value of over £5,000 could have been raised in the Court of Session). 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.

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.

#### *Availability of civil legal aid*

The 2014 Act made civil legal aid available in the Sheriff Appeal Court by amending Schedule 2 of the Legal Aid (Scotland) Act 1986.

Regulation 3(3)(a) makes proceedings before the Sheriff Appeal Court on appeal from the sheriff distinct proceedings for the purpose of civil legal aid. This means that these appeals will require a separate application for and grant of legal aid.

Regulation 3(3)(b) makes sure that where proceedings begin in one court and are then remitted to another, the proceedings in the new court are not considered to be distinct proceedings and therefore do not require a separate grant of legal aid. Specifically, this applies to proceedings which start in the sheriff court and are remitted to the Scottish Land Court or the Court of Session, start in the Court of Session and are remitted to the sheriff court, or start in the Sheriff Appeal Court and are remitted to the Court of Session.

### *Fees for solicitors*

Regulation 2(4), (10) and (11) make provision for the fees available for civil appeals in the Sheriff Appeal Court. Regulation 2(4)(a) allows solicitors to choose whether to charge the block fees set out in Schedule 6 to the Civil Legal Aid (Scotland) (Fees) Regulations 1989 (“the 1989 Regulations”), which currently apply to appeals to the sheriff principal, or the detailed fees set out in Schedule 5 to those Regulations (which are currently available in the Court of Session).

Where a solicitor elects to charge under Schedule 6 to the 1989 Regulations, regulation 5(2C) and (2D) of those regulations permit the Scottish Legal Aid Board, at its discretion, to allow an additional fee where it is satisfied that any of the circumstances specified in chapter III of Schedule 6 exist, and have had a significant effect on the conduct of the case.

Regulation 2(4)(b) of the instrument ensures that, where charging fees from Schedule 5, the Sheriff Appeal Court may choose to determine that a percentage increase on those fees (an “additional fee”) should be paid and the Scottish Legal Aid Board can determine the level of those additional fees. The decisions of the court and the Scottish Legal Aid Board are subject to certain criteria listed in regulation 5(4) of the 1989 Regulations, for example where the case is particularly complex.

Fees for appeals before the sheriff principal will still be payable where these started before this type of appeal is abolished, as set out in regulation 2(12).

### *Fees for counsel*

Regulation 3(4) only allows the employment of counsel in the Sheriff Appeal Court with prior approval of the Scottish Legal Aid Board. Regulations 2(2)(b) and 3(2) allow a solicitor advocate to be employed and paid as counsel in the Sheriff Appeal Court where this prior approval is given.

Where approval is granted by the Scottish Legal Aid Board, regulation 2(6) and (9) allows counsel or a solicitor advocate to be paid at the same rates as if the proceedings were taking place as an appeal before the sheriff principal in the sheriff court. These are set out in Schedule 4 to the 1989 Regulations.

Fees for appeals before the sheriff principal will still be payable where these started before this type of appeal is abolished, as set out in regulation 2(12).

### *Legal aid accounts*

Regulation 2(3) and (5) allows only one legal aid account to be submitted in a case. Solicitors will still be able to submit multiple accounts in relation to proceedings before the Sheriff Appeal Court, the Court of Session or the UK Supreme Court. Particularly for cases in the Court of Session or the UK Supreme Court, this recognises that the solicitor being instructed in these cases often has skills and resources that could not be supplied by the nominated solicitor.

The single account should be submitted by the principal solicitor acting for the client, referred to as “the nominated solicitor” in the regulations. This will take account of the work

carried out by any other solicitor acting for the client in connection with the case, for example where a solicitor local to the place of the court is being instructed by the nominated solicitor. How the fees are divided among all the solicitors will be for those solicitors to agree.

Regulation 2(2)(a) specifies that where there is a dispute between the Scottish Legal Aid Board and a solicitor or counsel as to the amount of fees or outlays allowable for civil proceedings in the Sheriff Appeal Court, the matter will be referred for taxation to the auditor of the sheriff court in which the proceedings took place. This is similar to the current arrangement for taxation of accounts relating to appeals to the sheriff principal. Regulation 2(7) allows objections to the auditor's report to be made to the Sheriff Appeal Court where the report relates to proceedings in the Sheriff Appeal Court.

## **Consultation**

Draft provisions were shared with the Scottish Legal Aid Board, the Law Society of Scotland, the Faculty of Advocates and the Auditor of the Court of Session.

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 the Scottish Legal Aid Board.
- 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 the Scottish Legal Aid Board 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, an adjustment was made to allow solicitor advocates to be paid as counsel when conducting a case in the Sheriff Appeal Court where approval to employ counsel has been granted by the Scottish Legal Aid Board.

No comments were received from the Faculty of Advocates or the Auditor of the Court of Session on the draft regulations that were shared.

### **Impact Assessments**

An equality impact assessment has been completed on the draft SSI and is attached. There are no equality impact issues.

Following screening, a child rights and wellbeing impact assessment was not completed. Although children and young people may be involved in civil proceedings before the Sheriff Appeal Court, the availability of publicly-funded legal assistance to them is not affected by this policy. Solicitors and counsel providing representation in the Sheriff Appeal Court will be affected by the policy, principally in terms of the fees they will be able to charge.

### **Financial Effects**

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that civil legal aid arrangements, particularly in relation to fees for solicitors and counsel, will be clearly set out for the 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. Solicitor advocates very rarely conduct these appeals in legal aid cases at present. In the last three years, counsel was involved in 30% of cases funded by civil legal aid going to the sheriff principal.

Solicitors will have the flexibility to choose whether to be paid under a detailed fee structure (charging for each individual item of work) or a block fee structure as they currently do for appeals to the sheriff principal. Solicitors conducting summary cause cases in the Sheriff Appeal Court will be able to charge higher fee rates than at present. Where approval to employ counsel in the Sheriff Appeal Court has been given by the Scottish Legal Aid Board, solicitor advocates will be able to charge counsel rates for conducting the case. The Scottish Legal Aid Board estimates that this will increase expenditure from the Legal Aid Fund by up to £125,000.

Scottish Government  
Justice Directorate

November 2015