

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

The Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016

## **Purpose and intended effect**

- **Background**

Legal aid is currently available for a wide range of proceedings in Scottish courts. The Courts Reform (Scotland) Act 2014 (“the 2014 Act”) introduced reforms to modernise and enhance the efficiency of the Scottish civil justice system. Provisions are being commenced on 28 November 2016 to bring into force the new ‘simple procedure’ to replace current summary cause and small claims procedures.

Simple procedure applies to cases worth £5000 or less. Over time, these will be dealt with mainly by the new summary sheriffs that were introduced by the 2014 Act.

While simple procedure is intended to be a quick, cheap and informal process - so as to be convenient for party litigants - publicly funded legal assistance will be made available for those that require legal representation.

- **Objective**

The 2014 Act contains a provision (at paragraph 23 of Schedule 5) to make civil legal aid available in simple procedure cases, excluding those that are broadly equivalent to small claims (which are not currently eligible for civil legal aid).

The policy objective of this instrument is to adapt the framework and arrangements for the payment of fees to solicitors in the Civil Legal Aid (Scotland) (Fees) Regulations 1989, (‘the 1989 Regulations’) to accommodate simple procedure.

Under these provisions, solicitors will be able to charge on a detailed basis to reflect the work actually done at a rate equivalent to civil Advice by Way of Representation (“ABWOR”). The rationale for choosing a rate equivalent to ABWOR is the equivalence in the level of work anticipated under simple procedure. The rate for simple procedure cases is appropriately pitched at a rate below that which is available for ordinary actions in the sheriff court and work in the Sheriff Appeal Court and Court of Session. ABWOR rates are currently available for work before tribunals such as the Mental Health Tribunal and Immigration Tribunal.

Fees for Counsel continue to be governed by regulations 9 and 10(1) and schedule 4 of the 1989 Regulations and will not change.

The policy aims to ensure that legal aid continues to be available where appropriate

for cases proceeding under the new simple procedure

- **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.

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 and defend their own legal rights through the effective function of the courts.

This policy aims to ensure that legal aid continues to be available as appropriate for cases brought under the new simple procedure.

## **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 providing legal aid services. Consultation was therefore carried out with legal aid solicitors and advocates , which is covered in the “Business” consultation section.

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.

The Society’s Civil Legal Aid Team was consulted on draft regulations.

The Faculty of Advocates is the professional body to which all Advocates belong. The Faculty was consulted on draft regulations.

## **Options**

### **Option 1: Do Nothing**

With no change to existing provision for legal aid, simple procedure cases would fall under a “sweep-up” provision (regulation 5(2)(a)) of the 1989 regulations which applies a block fee table intended for ordinary cause matters.

### **Option 2: Amend Legal Aid Regulations**

By amending the 1989 regulations, specific tailored provision can be made for fees payable to solicitors under civil legal aid provision for simple procedure cases.

Under the amendments in the draft regulations, solicitors will be able to charge on a detailed basis to reflect the work actually done at a rate equivalent to civil ABWOR. The rationale for choosing a rate equivalent to ABWOR is outlined above.

The regulations also incorporate an exceptional case provision which allows for detailed fees where the payment under the ABWOR equivalent fees, would not provide reasonable remuneration for the work actually, necessarily and reasonably done. The exceptional fee rate for simple procedure would be the rate payable in ordinary procedure, the Sheriff Appeal Court and Court of Session.

## **Sectors and groups affected**

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

## **Benefits**

### **Option 1: Do Nothing**

The “sweep up” fee table does not present an appropriate fit with simple procedure. It provides block fees for work types under ordinary procedure that are unlikely to fit the flow of work under simple procedure. This would likely lead to an increase in disputes over accounts between solicitors and SLAB – creating an administrative burden for both.

This may – nonetheless - represent some benefit to solicitors as the work would attract a fee rate that is associated with ordinary cause in a process designed to be simple.

### **Option 2: Amend Legal Aid Regulations**

Clear and specific civil legal aid provision would ease the administration of fee claims and reduce opportunities for extended dispute between solicitors and SLAB as to the fees chargeable.

Solicitors would benefit from the flexibility of being able to charge detailed fees for the work actually done. They would be able to charge for each element of work and could receive a higher fee rate for 'exceptional' cases.

## **Costs**

### General remarks on case volumes and costs

We have not been able to cost different fees scenarios accurately as simple procedure is new so there is no data on how cases will progress and what numbers may involve publicly funded legal assistance. It is not expected that total case volumes will change significantly with the introduction of simple procedure. However, the profile of cases and the numbers involving legal representation may change. While clearly some people will still require or prefer legal representation in these cases, simple procedure is intended to be a quick, cheap and informal process so as to be convenient for party litigants.

It might be thought that a prediction on volumes and costs might be based on data for summary cause cases. However there are issues around the data provided in legal aid applications and there is very limited participation in the delivery of legal aid in summary cause procedures by solicitors in private practice.

Apart from general summary cause cases, summary cause procedure also currently includes landlord and tenant repossession cases ("heritable cases"), and reparation actions for sums less than £5,000. Both of these types of cases are subject to further particular features that impact on the ability to provide data which would otherwise be useful to the current context. With heritable cases, the majority of these summary causes are undertaken either by law centres or Civil Legal Assistance Office ('CLAO', directly funded by SLAB so no fee claims on the Legal Aid Fund). With reparation actions, although these are undertaken by solicitors in private practice, successful claims will usually settle with an award of expenses, and solicitors, normally, elect to claim the expenses rather than claim on the Fund.

These factors contribute to the difficulty in measuring or predicting volumes or costs of cases under simple procedure and therefore any assessment of costs or savings is uncertain.

With the above caveats, SLAB reviewed possible summary cause applications submitted and accounts paid in the two financial years April 2013 to March 2015, and assuming that similar trends are maintained following the introduction of simple procedure, the rough data that has been extracted would suggest:

- Current volumes across all summary cause categories for which legal aid is available and for which cases representation is provided by solicitors who potentially render accounts for payment from the Fund (i.e. excluding CLAO) appear to be between 650 and 1000 cases per annum.
- For the reasons given above, not all of these cases will result in a claim against the Fund. The average cost of solicitors' fees in summary cause cases generally (where payment is made from the Fund) is approximately

£350.00 inclusive of VAT in relation to the work carried out under the legal aid certificate. In the year to 31 March 2015, there were approximately 615 cases in which payment was claimed.

- Accordingly total current cost in terms of payment from the Fund is approximately £215,000.
- Our assessment is that there will likely be an increase in the volume of cases which are legally aided as the fees regime covered in these regulations will likely improve the total fees chargeable in a simple procedure case (in comparison to the fees chargeable under summary cause fees). In order to show the potential range of any financial costs to the Legal Aid Fund, a 20% increase in the number of cases and a 20% increase in fees cost per case would yield an annual cost of £310,000 on the Fund (an increase of £95,000 or 44%). A 100% increase in fees and a 50% increase in volume would result in a total cost of £646,000 (an increase of £431,000 or 200% on current costs).

### **Option 1: Do Nothing**

Application of a table of block fees - intended for ordinary procedure - to simple procedure cases, would result in ambiguous and inconsistent fees provision for the new procedure. The “sweep up” block fees table does not match the expected work to be done under simple procedure.

This will create a disproportionate administrative burden for both solicitors and SLAB and would likely raise the number of cases going to taxation.

As outlined above, estimates on impact to the Legal Aid Fund are challenging. However, based on working assumptions, the Board estimate that use of the ordinary cause block fees could increase costs to the higher end of the range - up to £431,000. This would be driven by an increase in the fees available in each case and an increase in volume of cases.

### **Option 2: Amend Legal Assistance Regulations**

SLAB have modelled various scenarios as a result of the fees provision in the draft regulations. We expect any additional costs to the Legal Aid Fund as a result of the draft regulations to be at the lower end of the (heavily caveated) range above – at an increase of approximately £93,000 on current expenditure on summary cause cases. The assumptions on which this calculation is based are that fees paid may increase by up to 30% but that the volume increase will be more limited, managed – in part – by communications about the ease of self-representation in simple procedure cases. We consider that it is reasonable to limit a probable volume increase to 10% (i.e. an increase in legally aided cases from 615 per year to 676). This is a small fraction out of a total number of cases which currently fall under summary cause (20,000).

As stated in the consultation section, consultation took place with the Law Society of Scotland Civil Legal Aid Team. This team comprises 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 questioned the rationale behind the choice of fee structure and the move away from the summary cause block fee table. They highlighted differences and perceived gaps in the new fee table. We provided reassurance and clarification that the differences and perceived gaps in the new fee regime were due to the difference in approach to fee structure – a move from block/inclusive fees to detailed fees. We explained solicitors would be able to use the detailed structure to charge on each element of work that make up the blocks (where these are relevant to a simple procedure case). We also amended the draft regulations in relation to a charge per sheet in the new Schedule 2A at Paragraph 4(a), highlighted by the Law Society, to make clear this charge was per sheet with no restriction on the number of sheets

Block fees are used in the case of well-established processes where the work pattern is predictable and relatively stable. With the introduction of an entirely new procedure, we considered it fairer for solicitors to be able to charge on a detailed basis to reflect the work actually done. The use of detailed fees also allows information to be gathered on the structure of a 'typical' case which is required for the creation of a block fee. We anticipate that over time, once practice is settled, we may be able to move to a block fee structure, if appropriate.

The Faculty of Advocates requested confirmation that their fees remained unchanged under the relevant regulations. We provided this confirmation. 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**

As outlined above, SLAB estimate the range of additional costs to the Legal Aid Fund resulting from the fees provision in these regulations is between £93,000 and £431,000, although more likely to be nearer the lower end of the range.

**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 28 November 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 make clear civil legal aid provision for solicitors to be paid for the work they do in simple procedure cases.

- **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> None.</p> <p><b>Scottish Legal Aid Board</b> None.</p> <p><b>Solicitors</b> Will increase the level of fees a solicitor could charge in a simple procedure case. Will increase the number of cases in which legal aid is applied for as a result of the significantly higher fees, increasing the benefit to solicitors.</p>	<p><b>Scottish Ministers</b> Potential additional spend from the Legal Aid Fund of up to £431,000.</p> <p><b>Scottish Legal Aid Board</b> Ambiguity in regulations could lead to a higher number of disputes over accounts submitted by solicitors.</p> <p><b>Solicitors</b> Ambiguity in regulations could lead to a higher number of disputes over accounts submitted to SLAB.</p>
2	<p><b>Scottish Ministers</b> A clear fee structure.</p> <p><b>Scottish Legal Aid Board</b> Clarity in how the legal aid framework applies to simple procedure cases minimising the number of disputes over accounts submitted by solicitors.</p> <p><b>Solicitors</b> Clarity in how the legal aid framework applies to simple procedure cases minimising the number of disputes over accounts submitted by solicitors.</p> <p>Solicitors would have the flexibility associated with charging detailed fees for the work actually done. They would be able to charge for each element of work and would receive a higher total</p>	<p><b>Scottish Government</b> Additional spend from the Legal Aid Fund of approximately £93,000.</p> <p><b>Scottish Legal Aid Board</b> None.</p> <p><b>Solicitors</b> None.</p>

	fee where the work was more complex and/or time-consuming.	
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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:**

**Annabelle Ewing**  
**Minister for Community Safety and Legal Affairs**

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