

POLICY NOTE

THE CIVIL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2016

SSI 2016/290

The above instrument was made in exercise of the powers conferred on the Scottish Ministers by sections 33(2)(a) and (3) of the Legal Aid (Scotland) Act 1986 and all other powers enabling them to do so. The instrument is subject to negative procedure.

Policy Objectives

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’ (provided for at section 72(3) of the 2014 Act) 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.

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 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.

Regulation 2(2) and (3) amend the 1989 Regulations to provide for fees in simple procedure cases to be calculated in accordance with a new Schedule 2A. This will provide detailed fees (based on the structure at Schedule 5 of the 1989 Regulations) at a rate equivalent to those presently allowable to solicitors for assistance by way of representation (‘ABWOR’, in terms of schedule 3 of the Advice and Assistance (Scotland) Regulations 1996, ‘the 1996 Regulations’).

In short, this is essentially a hybrid structure which takes the detailed, ‘time and line’ fee table from the 1989 Regulations and applies the fee rate from the 1996 Regulations. Overall this creates a fee regime for simple procedure which we anticipate will provide a preferable fee provision over the current summary cause block fee regime.

We consider the use of a detailed fee structure is preferable to a block fee structure (as is currently available for summary cause cases) for the introduction of a new procedure. This is because it allows solicitors to be able to charge on a detailed basis to reflect the work actually done. We consider the rate for simple procedure work is appropriately set at a level below that available for ordinary procedure and work undertaken in higher courts. ABWOR rates are currently used for work before the Mental Health Tribunal and Immigration Tribunal and the level of work for simple procedure is considered likely to be equivalent.

Legal aid provision for summary cause cases is based on a block fee structure that we understand is poorly regarded by solicitors undertaking legal aid work of this nature. This results in few solicitors undertaking legal aid summary cause work and many people requiring publicly funded legal assistance access this via law centres and the Civil Legal Assistance Office (directly funded from the Legal Aid Fund). The summary cause block fee table does not reflect the changes being brought in by simple procedure and would not present a suitable model.

Regulation 2(4) amends Schedule 7 of the 1989 Regulations to allow a case to be certified as an “exceptional case” by the Scottish Legal Aid Board (‘SLAB’) if the Schedule 2A fees would not provide reasonable remuneration for the work due to the volume or complexity of the case. If SLAB certifies the case as exceptional, a solicitor’s fees are to be calculated in accordance with the Schedule 5 detailed fees (which cover the rate payable in ordinary procedure, the Sheriff Appeal Court and Court of Session).

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 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 Regulations 9 and 10(1) and schedule 4 of the 1989 Regulations. We provided this confirmation. The Auditor of the Court of Session made no comment on the draft regulations.

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 a simple procedure case, the availability of publicly-funded legal assistance to them is not affected by this policy.

Solicitors providing representation in a simple procedure case involving children and young people will be affected by the policy 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, in relation to fees for solicitors, will be available for the new simple procedure.

We have not been able to accurately assess the cost of the fee structure provided for in the regulations as there is no data on how simple procedure 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 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. This makes any assessment of costs to the Legal Aid Fund challenging but we have worked with the Scottish Legal Aid Board to model a suitable range. We would expect any increase in costs to be modest, in the region of £93,000. This would represent a 43% increase in current costs on summary cause – from £215,000 to £308,000 per year.

Scottish Government
Justice Directorate
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