

Business and Regulatory Impact Assessment

Title of Proposal

**The Legal Aid (Scotland) Act 1986 Amendment Regulations 2017
First - Tier Tribunal for Scotland Housing and Property Chamber**

Purpose and intended effect

Background

The Tribunals (Scotland) Act 2014 (the Tribunals Act) created a new, two-tier structure for devolved tribunals in Scotland – to be known as the Scottish Tribunals.

The establishment of a devolved First-Tier Tribunal for Scotland Housing and Property Chamber (the First-tier Tribunal) is intended to provide a less formal and more user focussed forum to enable greater accessibility in handling housing disputes. The aim is for users to be able to engage effectively with the First-tier Tribunal and understand the decision making process, ideally without requiring any representation.

The former functions and members of the Private Rented Housing Panel and Homeowner Housing Panel and associated committees transferred to the First-Tier Tribunal on 1 December 2016. First decisions in relation to these jurisdictions are now heard in the First-Tier Tribunal with a general onward appeal to the Upper Tribunal for Scotland. There is currently no publicly funded legal assistance available in the First-Tier Tribunal.

Part 3, section 16, of the Housing (Scotland) Act 2014 (Housing Act) transfers sheriffs' jurisdiction in civil matters in relation to regulated and assured tenancies in the private rented housing sector to the First-Tier Tribunal. These actions include repossession cases and various non-repossession cases. The grounds which allow someone to raise an action and the issues to be taken into account in deciding a case would remain the same, but the decision-maker changes from the Sheriff Courts to the First-Tier Tribunal. The transfer of jurisdiction is expected to commence on 1 December 2017. Legal aid is currently available for these Sheriff Court proceedings, subject to eligibility criteria.

Part 4 of the Housing Act makes provision to further regulate the letting agent industry in Scotland. The First-Tier Tribunal will start to hear cases relating to the new letting agent regime when all aspects of its regulation come into force in January 2018.

The Private Housing (Tenancies) (Scotland) Act 2016 creates a new type of Scottish Private Residential Tenancy which is expected to come into force on 1 December 2017. Civil disputes relating to the new tenancy including repossessions will be heard in the First-Tier Tribunal.

The Business and Regulatory Impact Assessment in relation to the Proposal for a Private Rented Sector Tribunal can be found [here](#).

Civil legal aid is available for disputes in relation to the private rented housing sector in the Sheriff Court (as schedule 2 of the 1986 Act makes legal aid available in civil proceedings in the Sheriff Court). Civil legal aid will cease to be available for these cases as they are transferred out of the Sheriff Courts and into the First-Tier Tribunal as the First-tier Tribunal is not named in Schedule 2 or Schedule 4 of the Legal Aid (Scotland) Act 1986.

We therefore require a change to schedule 2 of the Legal Aid (Scotland) Act 1986 to allow legal aid provision in the First-Tier Tribunal in time for the transfer of this jurisdiction from the Sheriff Courts and to allow legal aid provision for the additional provisions coming into force in January 2018.

Objective

The objective of this instrument is to name the First-Tier Tribunal in schedule 2 of the Legal Aid (Scotland) Act 1986. This will make civil legal aid available for cases calling in the First-Tier Tribunal.

We wish to ensure that no-one is disadvantaged when housing disputes are transferred from the Sheriff Courts to the First-Tier Tribunal simply because of a change of forum. We propose to maintain the status quo by ensuring that civil legal aid continues to be made available, to those eligible, in those civil private rented sector cases due to transfer from the Sheriff Courts on 1 December 2017. Those cases include a wide range of tenancy related disputes including rent arrears and evictions under the following enactments

- The Housing (Scotland) Act 1984,
- Housing (Scotland) Act 1988,
- Housing (Scotland) Act 2006

in so far as they relate to the transfer of jurisdiction under section 16 and schedule 1 of the Housing Act.

New tenancies due to come into force under the Private Housing (Tenancies) (Scotland) Act 2016 include tenancy related disputes similar to those currently heard in the Sheriff Courts. We propose to make civil legal aid available to achieve parity of treatment between old and new tenancy related disputes.

At the same time, we also wish to maintain the status quo in the First-Tier Tribunal where procedures for existing jurisdictions currently operate well without legal aid. We, therefore, propose that homeowner applications (relating to property factors) and the private rented sector applications continue to proceed without legal aid.

Procedures relating to the new letting agents regime will follow similar procedures to the homeowner applications and landlord registration in the First-Tier Tribunal. We, therefore, propose that legal aid should not be made available for

procedures relating to letting agents.

Cases relating to landlord registration matters will transfer from the Sheriff Courts to the First-Tier Tribunal only in relation to applications from landlords who wish to appeal a decision of a local authority under the Antisocial Behaviour (Scotland) Act 2004. At the same time, new proposals for landlord registration are due to come into force under section 21 of the Housing Act. It is Scottish Government policy to develop landlord registration and letting agent registration in parallel, following existing procedures for homeowner applications and property factors in the First-Tier Tribunal as far as practicable. To transfer legal aid in relation to registration matters from the Sheriff Courts in relation to the Antisocial Behaviour (Scotland) Act 2004 would cut across housing policy objectives to give parity to the treatment of parties in similar proceedings in the First-Tier Tribunal.

There may be no real impact on the exception of the Antisocial Behaviour (Scotland) Act 2004 as above since legal aid eligibility criteria is likely to place landlords outwith the scope of legal aid.

- **Rationale for Government intervention**

The First-tier Tribunal enables a less adversarial approach in comparison to the Sheriff Courts. The aim is for a system that will allow most people to engage directly with the First-Tier Tribunal, and where legal representation is not the norm. However, the cases due to be transferred from the Sheriff Courts include tenancy related disputes that could lead to eviction and homelessness so it is important that legal aid continues to be available where it is appropriate and subject to eligibility criteria.

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. The Board agree that landlords would be ineligible for legal aid given the criteria.

- **Public Consultation**

A Consultation on procedure of the First-Tier Tribunal including proposals for the provision of the publicly funded legal assistance, opened on 6 January and closed on 31 March 2017 with 21 responses received. The publication of the [consultation analysis report](#) is now published together with the [individual responses](#).

- **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 field, either as a sole practitioner or a member of a firm. The Society were consulted as part of the public consultation however did not participate.

Options

Option 1: Do Nothing

The Housing Act transfers jurisdiction for civil cases relating to the private rented sector from the Sheriff Courts to the First-Tier Tribunal, this change will happen independently of any legal aid regulation amendment. Doing nothing would mean individuals appearing in the First-tier Tribunal would be unable to access publicly funded legal assistance in relation to cases calling in the First-tier Tribunal.

Option 2: Transfer the availability of legal aid from the Sheriff Courts to the First-Tier Tribunal. Those cases include a wide range of tenancy related disputes including rent arrears and evictions under the following enactments

- **The Housing (Scotland) Act 1984,**
- **Housing (Scotland) Act 1988,**
- **Housing (Scotland) Act 2006**

in so far as they relate to the transfer of jurisdiction under section 16 and Schedule 1 of the Housing Act.

The status quo would be maintained as civil legal aid would continue to be available to those civil private rented sector cases.

Legal aid will not continue in relation to appeals of local authority decisions in relation to registration matters from the Sheriff Courts in relation to the Antisocial Behaviour (Scotland) Act 2004 because this would cut across housing policy objectives to give parity to the treatment of parties in similar proceedings in the First-Tier Tribunal.

There may be no real impact on the exception of the Antisocial Behaviour (Scotland) Act 2004 as above since legal aid eligibility criteria is likely to place landlords and appeals in relation to local authority decisions under the Antisocial Behaviour (Scotland) Act 2004 outwith the scope of legal aid.

Sectors and groups affected

Current provision

Schedule 2 of the Legal Aid (Scotland) Act 1986 makes civil legal aid available in civil proceedings in the Sheriff Courts. Housing disputes are generally heard under summary cause procedure (heritable property) in the Sheriff Courts. The majority of cases involving heritable property (mostly tenant/landlord evictions) are currently undertaken either by law centres or the Civil Legal Assistance Office which is directly funded by the Scottish Legal Aid Board).

Previous housing tribunals

There was no general provision for publicly funded legal assistance in respect of the previous housing tribunals (the private rented housing panel (prhp) and homeowner housing panel (hohp)) which transferred to the First-Tier Tribunal in December 2016. This reflects the continued approach that, at first instance, cases are handled inquisitorially and informally. This worked well for prhp since it was established in 2006 in handling cases dealing with property repairs, housing conditions and landlord registration. Similarly, there was no need for legal assistance for the hohp in handling cases relating to property factoring and maintenance, registration matters and enforcement of a code of practice.

As the measures maintain the status quo we expect no sector or group will be affected negatively, landlords will not be eligible for civil legal aid however due to the financial merits test they were unlikely to be eligible under the original system due to the eligibility around capital.

Landlords would likely be ineligible for legal aid due to the financial merits test which puts those with disposable income over £26,239 and / or Capital over £13,017 outwith the scope, due to owning property other than their place of residence.

Benefits

Option 1: Do Nothing

Doing nothing would mean individuals appearing in the First-tier Tribunal would be unable to access publicly funded legal assistance in relation to cases calling in the First-tier Tribunal which would have called in the Sheriff Courts. As a result expenditure to the legal aid fund could be expected to reduce, as effectively this would reduce the scope of civil legal aid.

Option 2: Transfer the availability of legal aid from the Sheriff Courts to the First-Tier Tribunal – as above.

Due to the merits test only those most vulnerable are eligible for civil legal aid in these types of cases therefore maintaining the status quo will ensure those who require assistance most will receive it.

Costs

Option 1: Do Nothing

Individuals who are most in need of publicly funded legal assistance would be unable to obtain it in the First-tier Tribunal.

Option 2: Bring forward Regulations

Estimates for publicly funded legal assistance are set out on page 22 of the [consultation paper](#) and states the following:

“When the Government introduced the Bill for the Housing Act, it estimated that the cost of legal assistance for the 700 private rented housing cases each year that would transfer from the Courts to the Tribunals would be about £25,000 – comprising £14,000 for Advice and Assistance, and £11,000 for Civil Legal Aid, based on continuing the same form of legal assistance in the First-Tier Tribunal as is currently available for these cases in the Courts.” This echoes figures provided by the Board for this instrument.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the Society, which negotiates with the Government on behalf of the profession.

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 businesses¹) due to the dominance of small legal service providers in the legal aid market. In the Board’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.

If this instrument is not put in place there is potential for a reduction in the scope of legal aid which could reduce income to civil legal aid practitioners, however as the majority of cases likely to call in the First-tier Tribunal are currently undertaken either by law centres or the Civil Legal Assistance Office which are directly funded by the Scottish Legal Aid Board, therefore any impact on civil legal aid practitioners is likely to be minimal regardless of this instrument.

Competition Assessment

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. They do not limit the ability of suppliers to compete or reduce suppliers’ incentives to compete vigorously.

As more than two questions have been answered in the negative, there was no requirement to complete a full Competition Assessment.

Test run of business forms

There should be no requirement for new forms. All legal aid applications are currently submitted online through the Board’s Legal Aid Online and the majority of cases involving heritable property (mostly tenant/landlord evictions) are currently undertaken either by law centres or the Civil Legal Assistance

¹ Small business have less than 50 employees, micro business have less than 10 employees

Office, which is directly funded by the Scottish Legal Aid Board.

Legal Aid Impact Test / Financial Implications

When the Government introduced the Bill for the Housing Act, it estimated that the cost of legal assistance for the 700 private rented housing cases each year that would transfer from the Sheriff Courts to the First-tier Tribunal would be about £25,000 – comprising £14,000 for Advice and Assistance, and £11,000 for civil legal aid, based on continuing the same form of legal assistance in the First-Tier Tribunal as is currently available for these cases in the Sheriff Courts.

Enforcement, sanctions and monitoring

The proposals will be enforced through secondary legislation. The proposals do not, otherwise, create any new enforcement or monitoring mechanisms. The Board 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 December 2017.

Post-implementation review

The Scottish Legal Aid Board monitor changes and report to the Scottish Government any negative impacts.

The Law Society of Scotland will also report any negative impacts on the legal profession to both the Board and Scottish Government.

Summary and recommendation

It is recommended that the amendments to the regulations are implemented (**Option 2**).

- **Summary costs and benefits**

Option 1: Do Nothing

Solicitors

- **Costs** - Potential for solicitors to lose income in respect of Advice and Assistance and Civil legal Aid, however the majority of cases likely to call in the First-tier Tribunal are currently undertaken either by law centres or the Civil Legal Assistance Office which is directly funded by the Scottish Legal Aid Board).
- **Benefits** - None

The Scottish Legal Aid Board

- **Costs** - None
- **Benefits** - Doing nothing would mean individuals appearing in the First-tier Tribunal would be unable to access publicly funded legal assistance in relation to cases calling in the First-tier Tribunal where in the Sheriff Courts they may be eligible for legal aid. As a result expenditure to the legal aid fund could be expected to reduce, as effectively this would reduce the scope of civil legal aid.

Civil Legal Aid Clients

- **Costs** - Individuals who would be eligible for legal assistance in the Sheriff Courts would no longer be in the First-Tier Tribunal, they may be required to pay for any legal assistance themselves.
- **Benefits** - None

The Scottish Government

- **Costs** – None.
- **Benefits** - As the Scottish Government fund the Scottish Legal Aid Board's Legal Aid Fund, similar savings may be expected.

Option 2: Bring forward Regulations

Solicitors

- **Costs** - None.
- **Benefits** - The status quo would remain. Cases which attract legal aid in the Sheriff Courts would continue to do so in the First-Tier Tribunal, with the addition of the disputes relating to new tenancies, due to come into force through the implementation of the 2016 Act.

The Scottish Legal Aid Board

- **Costs** - 700 private rented housing cases each year that would transfer from the Sheriff Courts to the First-tier Tribunal would be about £25,000 – comprising £14,000 for Advice and Assistance, and £11,000 for civil legal aid.
- **Benefits** - None.

Civil Legal Aid Clients

- **Costs** - None.
- **Benefits** - The status quo would remain meaning those eligible for the appropriate publicly funded legal assistance would receive it.

The Scottish Government

- **Costs** -. As the Scottish Government fund the Scottish Legal Aid Board's Legal Aid Fund, similar costs are expected.
- **Benefits** - None.

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:

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