

Final Business and Regulatory Impact Assessment

The Criminal Legal Assistance (Miscellaneous Amendments)(Scotland) Regulations 2017

Purpose and intended effect

- **Policy**

The policy objective of The Criminal Legal Assistance (Miscellaneous Amendments)(Scotland) Regulations 2017 is to ensure criminal legal assistance is available for persons in police custody when Part 1 of the Criminal Justice (Scotland) Act 2016 (CJ(S)A) commences on 25 January 2018.

Amendment will be made to Advice and Assistance (A&A), Advice By Way of Representation (ABWOR) and Criminal Legal Aid. Changes are also being made to simplify the payment process for police station advice.

The purpose of this Business and Regulatory Impact Assessment (BRIA) is to assess the impact these regulations will have on solicitors in Scotland who provide police station advice.

- **Background**

Currently public funding of legal advice, for advice in a police station, is available in the form of A&A through the Police Station Duty Scheme.

A&A is suited to police station advice in that it was designed to allow relatively modest levels of legal advice to be provided quickly without the full scrutiny of applications necessary in legal aid for court proceedings.

When the Police Duty Scheme was introduced in 2011, it was on an interim basis with a commitment to review the fee arrangements when the various reviews on the criminal justice system had been completed. The implementation of the CJ(S)A marks the end of that process.

Scottish Government (SG) has removed any means testing and contributions for police station advice and everyone who exercises their statutory right to police station advice is entitled to get that free. The full potential cost of this to the legal aid fund has never fully materialised. It is thought that at least 60% of telephone advice given by solicitors in private practice is given without engaging with the advice and assistance formalities. Solicitors are dissuaded from claiming because the A&A process is considered cumbersome.

- **Proposals**

The implementation of CJ(S)A has presented an opportunity for SG to review and simplify the fee structure in relation to police station work. Making it simpler for solicitors to submit accounts and receive payment. It is anticipated this will significantly reduce the police station advice fees going unclaimed.

The proposal is to make changes to the regime in which criminal legal assistance is made available to applicants in custody in police stations and related matters post-implementation of the CJ(S)A. The changes consist of measures to introduce a block fee structure for police station advice, introduce new arrangements and procedures relating to investigative liberation and post-charge questioning and introduce simplifications to solicitor applications for police station fees.

- **Rationale for Government intervention**

With the implementation of Part 1 of the CJ(S)A there is a need to change legal aid regulations to ensure appropriate criminal legal assistance is in place.

There is a requirement to cover the provision of criminal legal assistance to cover consultation with a solicitor at any time under section 44 of CJ(S)A.

There is a requirement to cover the provision of ABWOR for variation of investigative liberation conditions, and post charge questioning.

Introduction of these regulations provided an opportunity to review and simplify the fee structure for criminal legal assistance in these circumstances.

Consultation

- **Within Government**

SLAB is a non-departmental public body which administers publicly funded legal assistance in Scotland and is accountable to Scottish Ministers. SLAB has been consulted in the development of these Regulations.

- **Public Consultation**

No public consultation was undertaken as these changes relate solely to legal aid for CJ(S)A. Full public consultation was held as part of the Bill stages of CJ(S)A.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (LSS). The LSS 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 SG consulted the LSS criminal legal aid negotiating team (LANT) in the development of these regulations.

The LANT sought amendment to the original proposals made by SG. The proposal by the LANT would be approx. £4.3m per annum if adopted in full.

SG reviewed the LANT proposals and agreed the following:

- Increase block fees from the original proposal.
- Amend the times around the payment of an unsocial hour premium.
- Apply the payment of an unsocial hour premium to travel time within these hours.
- Apply the payment of an unsocial hour premium to telephone calls within these hours.

A targeted consultation with solicitors was carried out across 50 faculties and businesses. There were 3 responses. Responses were received from LSS, Edinburgh Bar Association and Dunfermline District Society of Solicitors.

SLAB carried out stakeholder engagement events in eight locations across the county to discuss the changes and invite proposals for implementation. SG officials attended the events.

Options

Option 1: Do Nothing

There would be no change to the legal aid regulations.

As this would not meet the requirements of the Criminal Justice (Scotland) Act 2016 this option was not explored.

Option 2: Bring forward regulations with no amendment to the fee structure

Do the minimum – introduce new regulations for new requirements but keep the existing fee structure.

CJ(S)A provided the opportunity to improve the processes and introduce block fees which is something the LSS have been pushing for, for some time.

Costs

There would be additional costs for police station advice simply by virtue of the changes introduced by CJ(S)A. As this option would further complicate the fee structure it was not taken forward.

Benefits

There were no benefits identified with this option.

The 60% of unclaimed fees for police station advice would likely remain and this was identified as a dis-benefit for solicitors.

Option 3: Bring forward regulations with amendment to the fee structure

The regulations would be amended to support part 1 of CJ(S)A which will involve solicitors providing criminal legal assistance, the fee structure changed to block fees which will simplify the process for claiming publicly funded legal aid in relation to police station advice.

Costs

The cost to SG is an additional £3.1m per annum to be paid from the legal aid fund for police station advice.

Benefits

A simplified and amended system of fees for police station advice ensuring the profession are remunerated fairly for the work they carry out in relation to police station advice.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the LSS, which negotiates with SG on behalf of the legal profession and with 50 solicitor businesses.

Returns from the consultation exercise indicate that 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 market².

Small Businesses

In their consultation response the LSS highlighted that criminal legal aid providers may not be able to provide both police station and court advice. Given the statistics

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

² A 2010 survey of legal aid solicitors showed 48% employed 2 to 4 solicitors; and 19% were sole practitioners.

around small and micro sized businesses it can be assumed the LSS refer to these businesses.

The police station advice scheme is not mandatory and criminal legal aid practitioners are not mandated to enrol to undertake other legal aided work. There are many parts of the country where solicitors only undertake court work.

Simplification of the process for claiming police station advice fees should have a positive impact on these small and micro businesses.

Competition Assessment

These proposals will not have an impact on the competitiveness of Scottish companies within the UK, or elsewhere in Europe or the rest of the world.

The measures will not award exclusive rights to any supplier or create closed procurement.

The requirements of CJ(S)A as a whole may affect the ability of small businesses to provide police station advice in addition to court advice however this is a result of the rights of people in police custody and the Criminal Legal Assistance (Miscellaneous Amendments)(Scotland) Regulations 2017 are a result of this policy.

Options on how to provide cover to lessen the load on solicitors is being explored in consultation with stakeholders . There have recently been changes around the timescales before trainees can appear in criminal court which will assist some businesses.

Test run of business forms

There is no requirement for new forms. All legal aid applications are currently submitted online through SLAB Legal Aid Online.

The National Custody System number, issued by Police Scotland, will be used for a solicitor to claim payment online.

Legal Aid Impact Test

The Scottish Legal Aid Board estimates that the additional cost to the Legal Aid Fund will be £3.1 million per year

Enforcement, sanctions and monitoring

The proposals do not create any new enforcement or monitoring mechanisms.

Implementation and delivery plan

These Regulations will come into force 25 January 2018.

Post-implementation review

SLAB monitor changes and report to SG any negative impacts.

Regular stakeholder engagement between LSS and SG will highlight negative impacts that can then be investigated.

Recommendation

Regulations are being laid supporting option 3.

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 relevant stakeholder groups were consulted as part of the regulatory changes.

Signed:

Annabel Ewing (by email)

Date: 8 November 2017

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