

Business and Regulatory Impact Assessment

February 2023

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Final

Business and Regulatory Impact Assessment

Title of Proposal

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2023

Purpose and intended effect

- **Background**

Legally aided services perform a valued public function in our society. Services paid for by legal aid enable people to enforce or protect their rights, resolve disputes, defend themselves when the state or others take action against them and use the remedies, processes and facilities the law provides to manage their personal affairs and relationships. At the collective level, the ability to use the law to challenge the wrongful use of power supports the rule of law and provides a firm foundation for a society based on civil, political, social and human rights.

As we emerge from the pandemic into a cost of living crisis, and the full consequences of Brexit, maintaining a legal aid sector is crucial to renewal programme and the resolution of problems associated with this combined economic shock. We know that COVID-19 has exacerbated many pre-existing inequalities in society, coupled with the increase in the cost of living, this has exposed the vulnerability of some population groups. The Scottish Government is developing a range of policy responses to ameliorate that impact and access to advice and representation is a vital part of that.

In December the Scottish Government announced a further package of support, worth up to £11m a year and including an overall 10.2% uplift in all legal aid fees and reforms to fees for solemn criminal legal assistance and summary criminal legal assistance.

Some fee increases would likely exceed the existing limits of authorised expenditure, meaning solicitors would be required to seek approval from the Scottish Legal Aid Board (“SLAB”) to ensure payment for the work undertaken, merely because the fees had increased. Accordingly, amendments to these authorisation limits are required in tandem with the fee increases.

This instrument will, from 29 April 2023:

- apply a 10.2% increase to all non-reform legal aid fees and associated outlays payable to solicitors;
- reform the fee structures for solemn criminal legal assistance and summary criminal legal assistance;

- increase reformed solemn fees by 3.3% where no entirely new fee is implemented; and
- make provision to uprate the current limits of authorised expenditure to prevent unnecessary bureaucracy to both SLAB and the legal profession.

Objective

This package will secure improvements in the legal aid regime to further the Scottish Government's wider strategic reform objectives.

Rationale for Government intervention

The Scottish Government's primary rationale in bringing forward these Regulations is to ensure that people are able to access legal advice and assistance to protect their rights, particularly against the anticipated economic shock of Covid-19, the cost of living crisis, and Brexit.

The Scottish Government is committed to reform of the legal aid system into one of a sustainable, user-centred service. That commitment will be more difficult to achieve without suitable legal aid provision to support it. It is therefore vital that there is sufficient capacity in the provision of legal aid advice and assistance going forward.

The Law Society of Scotland and the Scottish Bar Associations have made representations to the Scottish Government regarding the financial position of some of their members, and the capacity of the profession to support the increased court programming. The Scottish Government has taken into account those concerns in formulating this package and targeting funding where it would be most beneficial.

This instrument implements a long standing commitment to reform both solemn and summary fees to deliver simplification and to better recognise preparatory work undertaken before a trial. The amendments to legal aid fees will also support the Recover, Renew, Transform Programme ("RRT") through enhancing remuneration where it is appropriate for there to be early resolution in cases. It will reduce the potential for disagreements connected to abatements.

Consultation

- **Within Government**

SLAB is an executive 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**

No public consultation was carried out due to the technical nature of the proposed regulations.

- **Business**

The representative body for solicitors and solicitor advocates in Scotland is the Law Society of Scotland (the Society). The Society has also been heavily consulted in the development of these regulations.

The Scottish Solicitors Bar Association was also consulted in the development of these regulations.

The Faculty of Advocates (the Faculty) is an independent body of lawyers who have been admitted to practise as advocates before the courts of Scotland.

Options

Sectors and groups affected

Option 1: Do Nothing

Fee Uplift

Fees will remain payable at the current rates prescribed in regulations.

Fee Reform

Enhanced fees for early resolution of cases will not be available.

Option 2: Bring forward Regulations

Legal aid providers will benefit from increased fees and from the early resolution of cases.

Benefits

Option 1: Do Nothing

Inefficiencies in the administration of legal aid will remain for both SLAB and the legal profession if no action is taken. There is no benefit to doing nothing.

Option 2: Bring forward Regulations

The Scottish Government has undertaken significant engagement with both the Law Society of Scotland and the Scottish Solicitors Bar Association in the development of the targeted use of funds effected by this instrument. In addition the instrument delivers a long-standing objective of the Scottish Government to reform fees, increasing the value of early resolution of criminal cases and supporting the court programme to clear the backlog of cases which developed during the pandemic.

Costs

Option 1: Do Nothing

There are no immediate costs to doing nothing, however early resolution of cases is less likely than if action is taken, which has a cost to the justice system as a whole.

Option 2: Bring forward Regulations

The total value of the package is £11m. However, the financial impact on budgets of the fee reform and uplifts is likely to be spread over at least three financial years as cases reach a resolution.

Scottish Firms Impact Test

As noted, the Scottish Government has worked collaboratively with the Law Society of Scotland and SLAB in bringing forward this instrument to reform and uplift legal aid fees. The Law Society of Scotland engages with the Government on behalf of the solicitor profession, and the Faculty of Advocates does so for counsel. The Scottish Government has also engaged with the Scottish Solicitors Bar Association.

Competition Assessment

There are no competition concerns identified

- The regulations will not directly or indirectly limit the number or range of suppliers
- The regulations will not limit the ability of suppliers to compete
- The regulations will not limit suppliers incentives to compete
- The regulations will not limit the choices or information available to consumers

Consumer Assessment

These regulations are assessed as having no impact on consumers.

Test run of business forms

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

Digital Impact Test

These regulations are assessed as having no digital impact.

Legal Aid Impact Test

The total cost of the provisions, assuming application levels remain steady, is £11m per annum. However, there is normally a lead in time of around 18 months before the full impact of an increase is felt on legal aid expenditure, as fees are generally paid at the end of a case.

Any fee uplift will increase the pressure on the Scottish Legal Aid Fund (“the Fund”) budget for future financial years and the Scottish Government considers that affordability must be at the forefront of decision-making given the significant pressures within the Justice portfolio. There has been an additional pressure on the Fund as court business resumes and the backlog is cleared; the faster the backlog is cleared, the higher the cost to legal aid.

Prior to the pandemic there had been a year on year decrease in the number of legal aid applications, particularly in criminal legal aid. As the backlog clears there is no indication that applications will not return to pre-pandemic levels. It is unknown how long that will take.

Enforcement, sanctions and monitoring

The proposals will be enacted through secondary legislation. The proposals do not create any new enforcement or monitoring mechanisms. SLAB will monitor the implications of these measures and has responsibility for administering the Fund.

Implementation and delivery plan

The proposal will be implemented on 29 April 2023.

Post-implementation review

SLAB monitors changes and reports to the Scottish Government any negative impacts. The Law Society of Scotland and the Faculty of Advocates will also report any negative impacts on the legal profession to both SLAB and the Scottish Government.

Summary and recommendation

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

Summary costs

The total cost of the provisions, assuming application levels remain steady, is £11m per annum.

Declaration and publication

Sign-off for Final BRIAs:

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: Elena Whitham

Date: 22/02/2023

**Elena Whitham
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