

# **Business and Regulatory Impact Assessment**

**January 2021**

# Final Business and Regulatory Impact Assessment

## **Title of Proposal**

The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2021

## **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 and 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.

It has been important to keep the justice system functioning throughout the Covid-19 pandemic so that disputes, which may be felt more keenly and cause more distress at an already anxious time, continue to be resolved.

The legal profession has played its part in keeping the system functioning and continuing to deliver services to people in need. As we emerge from the pandemic, and additionally contemplate the full consequences of Brexit, maintaining a legal aid sector will be crucial to our recovery and the resolution of problems associated with this economic shock. We know that emerging evidence suggests that Covid-19 has exacerbated many of these pre-existing inequalities in society and exposed the vulnerability of some population groups. The Scottish Government is developing a range of policy responses to ameliorate that impact and access to legal advice and representation is a vital part of that.

During the course of the Covid-19 pandemic the Scottish Government has worked collaboratively with the Scottish Legal Aid Board and the Law Society of Scotland to identify and provide appropriate support for those in the solicitor profession providing legal aid services.

At the outset of the pandemic, Coronavirus legislation was used to expand the ability to make interim payments to solicitors (and advocates) from the Legal Aid Fund, to assist with cash-flow. Thereafter provisions were introduced to allow for named solicitors to be paid the full court fee when the duty solicitor covered the court, rather than a half fee, facilitating criminal solicitors to comply with travel restrictions and assist with social distancing.

In December the Scottish Government announced a further package of support to include: a 10% uplift in fees, over the next two financial years; the development of a

Covid resilience fund of up to £9m through which grants can be paid; and funding to help support approximately 40 legal traineeships.

In furtherance of this announcement, this instrument will, from 22 March 2021:

amend a number of regulations to apply a 5% increase to all legal aid fees and associated outlays payable to solicitors and counsel;

amend the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to make available additional payments to counsel for reasonably required additional work for preparation of a note of appeal or counsel's opinion on the merits of an appeal in exceptional circumstances; and

amend the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to make provision for continuity in relation to fees available to junior counsel when appearing as junior as leader

### **Objective**

The instrument will apply a 5% increase to fees and outlays paid to solicitors and counsel for providing work under publicly funded legal assistance (legal aid and legal advice and assistance) by amending the following regulations made under the Legal Aid (Scotland) Act 1986:

- The Civil Legal Aid (Scotland) (Fees) Regulations 1989
- The Criminal Legal Aid (Scotland) (Fees) Regulations 1989
- The Legal Aid in Contempt of Court Proceedings (Scotland) (Fees) Regulations 1992
- The Advice and Assistance (Scotland) Regulations 1996
- The Criminal Legal Aid Fixed Payments (Scotland) Regulations 1999

We wish to amend the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to allow SLAB discretionary powers to provide additional payment to counsel for preparation of criminal appeals in exceptional circumstances prior to a hearing being fixed.

We wish to amend the notes on the operation of Schedule 2 of the Criminal Legal Aid (Fees) (Scotland) Regulations 1989 to provide that a leading junior who, upon the unavailability of junior being led, is sanctioned by the court to proceed alone, may continue to be paid at the higher rate as leading junior counsel.

- **Rationale for Government intervention**

*5% uplift in legal aid fees*

As detailed previously the Scottish Government is primarily concerned with people being able to access legal advice and assistance to protect their rights, particularly against the anticipated economic shock of Covid-19 and Brexit.

The Scottish Government has recognised the financial difficulties and changing work practices faced by providers of legal aid services as a consequence of the Coronavirus pandemic, and has sought to develop measures to support resilience in the legal aid sector in direct response to the pandemic and, where possible, to support reform of the legal aid system into one of a sustainable, user-centred public service.

The Law Society of Scotland and Bar Associations have made representations to the Scottish Government. In responding to the challenges that were described by the legal profession, as exacerbated by the Covid-19 pandemic, the Scottish Government announced that legal aid and advice and assistance fees and outlays for solicitors and counsel will increase by 5% over the next two financial years, with the first 5% uplift in effect from March 2021.

*Exceptional circumstances for additional payment to counsel for preparation work pending leave to appeal*

We want to allow for additional payment to be made to counsel in exceptional circumstances, where fixed fee's available under Schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 are not adequate to cover preparatory work in relation to preparing the note of appeal and counsel's opinion on the merits of the appeal in a criminal case. This will ensure an assisted person's right to a fair trial and improve access to justice.

Where leave to appeal is sought in a criminal case under section 107 of the Criminal Procedure (Scotland) Act 1995, special urgency legal aid may be granted under Regulation 15 of the Criminal Legal Aid (Scotland) Regulations 1996 (Regulation 15 certificate). An application for full criminal legal aid cannot be made until such time as the court sets the date for an appeal hearing.

Fees for preparation of the Note of Appeal and for a Counsel's opinion on the merits of the appeal are listed in Schedule 2 of the Criminal Legal Aid (Scotland) (Fee) Amendment Regulation 1989 and are stated to include all preparation.

There is currently no provision within the regulations to allow the Scottish Legal Aid Board (SLAB) to make additional payments to counsel for additional work that might reasonably be required for preparation of the note of appeal or counsel's opinion on the merits of an appeal in exceptional circumstances.

### *Junior counsel as leader*

In September 2016, the Lord Justice General issued a Practice Note in relation to certain issues which had been identified in how representation of an accused was being provided in High Court trials. The specific issue of relevance related to the position in cases which ran over multiple days, over which it was recognised that there could be competing demands on counsel appearing in a case. This was brought to the attention of the Dean of the Faculty of Advocates who prepared a Memorandum which indicated where a junior being led was unavailable and the leading junior felt capable, with the leave of the court the remaining counsel could continue alone, dispensing with any need for an unnecessary 'stand-in' junior counsel.

We seek to remove financial disincentive for the leading junior to appear alone if sanctioned by the court to do so; and for them to continue to be paid at a higher rate as a leading junior as part of routine maintenance of the regulations relating to the provision of publicly funded legal assistance.

In criminal proceedings where the crimes alleged are particularly serious, the accused may be represented by senior counsel. Senior counsel may act alone, or where the circumstances make it appropriate, assisted by junior counsel. The use of senior counsel requires sanction (except for prosecution for murder where senior counsel is permitted automatically) which is granted where appropriate by SLAB. Similarly sanction of senior and junior counsel will be granted where appropriate.

Junior counsel may appear alone, but representation by two junior counsel can occur generally in two situations. The most common is where the leading junior counsel is instructed as a direct alternative to senior counsel, due to the unavailability of senior counsel, or the capabilities of the leading junior counsel. The other is where the case involves a large volume of material which would otherwise be conducted by junior counsel alone, and the volume of material justifies the use of two junior counsel. When instructing two junior counsel, one is "leading junior" and the other is "junior being led".

There is provision in the criminal legal aid table of fees for counsel for a higher rate to be paid to the leading junior than is paid to the junior being led. This represents the greater responsibility borne by the leading junior. The rate paid to the junior being led is lower than the standard rate for junior counsel. For example, in High Court category A trial cases a leading junior is paid a daily fee of £750.00, junior alone £650.00 and junior being led £450.00 (all plus VAT).

However, there is a financial disincentive in that a leading junior appearing with a junior being led is paid at a higher rate than a junior appearing alone in the example above where there are two juniors, the leading junior receives £750.00 per day, and the junior being led, £450.00. If the junior being led has another commitment, the choice for the leading junior is to seek permission to continue alone, with the daily fee dropping from £750.00 to £650.00.

In practice, to preserve the higher rate for the leading junior counsel, a "stand-in" junior being led is found on the day, resulting in unnecessary additional spend of £450.

## Consultation

- **Within Government**

The Scottish Legal Aid Board 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**

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's engagement on legal aid issues is led by the Criminal and Civil Legal Aid Negotiating Teams, each being panels of solicitors and solicitor advocates who work in these fields, either as a sole practitioner or a member of a firm. The Society have also been consulted in the development of these regulations.

Edinburgh Bar Association, Glasgow Bar Association and Aberdeen Bar Association were 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. The Faculty's representatives have been consulted in the development of these regulations insofar as these relate to changes to fees for counsel.



## **Options**

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

#### *5% uplift in fees*

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

#### *Exceptional circumstances for additional payment to counsel*

There will be no provision in statute for SLAB to provide additional payment to counsel for additional work that might reasonably be required for preparation of an appeal in exceptional circumstances and for preparation of the Note of Appeal until such time as a hearing fixed.

#### *Junior counsel as leader*

There will remain a disincentive for junior leading counsel to appear alone when sanctioned by the court as opposed to with junior being led as their fee will drop to £650. It constitutes a decrease of £100 from £750 they would be entitled to if appearing with a junior being led.

### **Option 2: Bring forward Regulations**

#### *5% uplift in fees*

The uplift in fees will assist legal aid providers with some of the challenges resulting from the pandemic.

#### *Exceptional circumstances for additional payment to counsel*

Criminal Legal Aid (Scotland) (Fees) Regulations 1989 will be amended to allow SLAB discretionary powers to provide additional payment in exceptional circumstances that could arise in the preparation of the note of appeal and counsel's opinion on the merits of an appeal

#### *Junior counsel as leader*

Schedule 2 of the Criminal Legal Aid (Fees) (Scotland) Regulations 1989 will be amended to provide that a leading junior who, upon the unavailability of junior being led, is sanctioned by the court to proceed alone, may continue to be paid at the higher rate of £750 as leading junior counsel.

## **Benefits**

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

*5% uplift in fees*

This uplift was developed in collaboration with key stakeholders. There is no benefit to doing nothing.

*Exceptional circumstances for additional payment to counsel AND Junior counsel as leader*

There may be a marginal saving to the Scottish Legal Aid fund if these change are not implemented, however, the saving can potentially be balanced out by the continued need to pay for the stand in junior council being led.

### **Option 2: Bring forward Regulations**

*5% uplift in fees*

The Scottish Government committed to increase in fees as part of a package of support to the providers of legally aided services, and requires to do this by way of regulations.

*Exceptional circumstances for additional payment to counsel AND Junior counsel as leader*

Fair remuneration for counsel for work carried out in exceptional circumstances in relation to preparation of criminal appeals and increased fees available to junior leading counsel appearing alone where appropriate.

*Junior counsel as leader*

The change would support the Lord Justice General's Practice Note 3 of 2016 and the Dean's Memorandum of 27 September 2016 and dispense with any need for an unnecessary 'stand-in' junior being led to be found as is currently the practice.

The need for "stand-in" junior council being led will be removed.

The change would contribute to a collaborative approach to justice system improvement.

## **Costs**

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

There may be resource cost implications to the Scottish Government and SLAB in relation to not implementing proposed regulations should there arise a need for

allowing SLAB to make additional payments to counsel in exceptional circumstances in preparation of criminal appeals, by means other than secondary legislation.

## **Option 2: Bring forward Regulations**

### *5% uplift in fees*

Costs will fall to the Scottish Government budget as a result an increase in spend across all fees for all legal aid provision. These are detailed under the legal aid impact test below.

### *Exceptional circumstances for additional payment to counsel AND Junior counsel as leader*

There will be some cost to SLAB and the Scottish Government resulting from additional and increased payments from the Scottish Legal Aid Fund. These costs will be balanced out if not exceeded by the savings made by removing the cost of the fees for the “stand-in” junior being led which will no longer be incurred resulting in savings of £450 (plus VAT) per day.

These cost and savings are currently non quantifiable as it is difficult to predict the number of cases where these changes will be applicable. It is not foreseen, however, that there will be any negative effect on the Scottish Legal Aid Fund as a result of these regulations.

## **Scottish Firms Impact Test**

As stated elsewhere in this Impact Assessment, the Scottish Government has worked collaboratively with the Law Society of Scotland and the Scottish Legal Aid Board in bringing forward a proposal to uplift legal aid fees. The Law Society of Scotland negotiates with the Government on behalf of the solicitor profession, and the Faculty of Advocates does so for counsel.

Advocates are self-employed lawyers and since proposed regulations seek to provide additional fees to counsel in relation to preparation of the note of appeal and counsel’s opinion on the merits of an appeal in exceptional circumstances and increase existing fees for junior leading counsel appearing alone the impact on the profession will likely be positive.

### **Competition Assessment**

Explain here whether your proposals will have an impact on competition ensuring you provide evidence to back up any statements you make.

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**

No negative consumer impact

[CompetitionPolicy@gov.scot](mailto:CompetitionPolicy@gov.scot). You should allow **10 working** days for a response. Record the results of any discussion with CCPU or relevant consumer groups in this section.

### **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 will not have a digital impact.

### **Legal Aid Impact Test**

A percentage uplift costs the Legal Aid Fund broadly £1m per one percent. 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. This could be shorter if the substantial changes to interim fees which were introduced at the start of the pandemic remain in place. This would leave it open to solicitors to draw down fees at the increased rate at various points during the life time of case.

A 10% uplift across all fees, payable in two 5% increases over 2 financial years, 2021/22 and 2022/23, would mean costs would be spread over 3-4 financial years:

For this SSI a 5% uplift on fees only from 22 March means an increase over the next three years of £2.8m in 21/22, £4.7m 22/23 and £4.8m in 23/24. These figures will be subject to further change as the Scottish Government has committed to introduce a further 5% uplift of fees in the following financial year

There will also be some cost in connection with the counsel additional and increased payments being made available from the Scottish Legal Aid Fund.

These costs will be balanced out if not exceeded by the savings made by removing the cost of the fees for the “stand-in” junior being led which will no longer be incurred resulting in savings of £450 (plus VAT) per day.

These cost and savings are currently non quantifiable as it is difficult to predict the number of cases where these aspects of the regulations will be applicable. It is not foreseen, however, that there will be any negative impact on the Scottish Legal Aid Fund as a result of these regulations.

### **Enforcement, sanctions and monitoring**

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

### **Implementation and delivery plan**

The proposal will be implemented in March 2021.

#### **□ Post-implementation review**

The Scottish Legal Aid Board monitor changes and report 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 the amendments to the regulations are implemented (Option 2).**

□

**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: Humza Yousaf**

**Date: 28th January 2021**

**Minister's name Humza Yousaf**

**Minister's title Cabinet Secretary for Justice**

**Scottish Government Contact point: Kieran Burke, Head of Legal Aid Policy & Reform**



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