

POLICY NOTE

THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) REGULATIONS 2021

SSI 2021/56

The above instrument was made in exercise of the powers conferred by sections 33(2), (3)(a), (b), (c) and (f), and (3A), and 36(1), (2)(a), (d) and (e) of the Legal Aid (Scotland) Act 1986 and all other powers enabling Scottish Ministers to do so. The instrument is subject to negative procedure.

Purpose of the instrument

To 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) and make provision for additional or increased payments be available to counsel in prescribed circumstances.

Policy Objective

These Regulations have been brought forward in order to increase all legal aid and advice and assistance fees and outlays payable to solicitors and counsel by 5%. Amendments are made to the following Scottish Statutory Instruments by regulations 3 – 7 and schedules 1 – 17 of these Regulations in order to effect this increase –

- the Civil Legal Aid (Scotland) (Fees) Regulations 1989
- the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (“the Criminal 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

These Regulations also makes amendments to provide for exceptional payments to counsel in certain circumstances. The Government is of the view that the Criminal Regulations 1989 do not contain sufficient provision to allow the Scottish Legal Aid Board (SLAB) to make additional payments to counsel where, in exceptionally lengthy or complex cases, they require to undertake additional work in order to prepare a note of appeal or an opinion on the merits of an appeal. Regulation 4(4) of these Regulations inserts a new regulation into the Criminal Regulations 1989 giving SLAB discretionary powers to authorise an additional payment where certain conditions are met.

The Regulations also make amendments to the Criminal Regulations 1989 to support continuity of counsel. Regulation 4(9) amends the relevant Notes in the fee regulations to provide that where junior counsel has been leading on a case, with other junior counsel being

led by them, they will continue to be entitled to the fee at that rate even where the counsel being led by them becomes unavailable and they continue alone (with the court's approval).

Consultation

No formal consultation has been conducted on these regulations but the Cabinet Secretary for Justice has discussed the 5% increase with representatives of the Law Society of Scotland, the Aberdeen Bar Association, the Edinburgh Bar Association, the Glasgow Bar Association and the Scottish Legal Aid Board.

Impact Assessments

We anticipate that these regulations will have no significant impact on child rights and wellbeing, data protection, the environment, island communities or socio-economic disadvantage and accordingly we have not prepared the following impact assessments:

- Data Protection Impact Assessment
- Strategic Environmental Impact Assessment
- Island Communities Impact Assessment
- Fairer Scotland Duty Assessment

- Consideration was given to completing an Equality Impact Assessment and a Child Rights and Wellbeing Impact Assessment, and it was determined no negative impacts on groups with protected characteristics identified

We have undertaken the following impact assessments:

- Business & Regulatory Impact Assessment – additional spend to the legal aid fund identified and a BRIA has been completed.
- Equality Impact Assessment. Stage 1 completed; no negative impacts on groups with protected characteristics identified.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed.

For financial impact in respect of the uplift to all fees, and based on current levels of business, we can anticipate the following additional spend to the Legal Aid Fund in Scotland over the next three years: an additional £2.8m in 2021/22, £4.7m in 2022/23 and £4.8 thereafter. The delay in full spend is due to the length of time it takes some civil cases to conclude.

Minimal costs can be expected in respect of the discretionary powers to provide additional payment for 'preparation of the note of appeal and counsel's opinion on the merits of the appeal in exceptional circumstances' as this is likely to be utilised rarely, whereas savings from 'junior counsel acting alone' are expected to cancel out the cost of the aforementioned,

as this measure is likely to realise savings to the legal aid fund. On balance there is likely to be a minimal saving to the fund, the value of which is non-quantifiable as it is difficult to predict the number of cases that 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. The impact of this policy on business is minimal, but is likely to be positive to the relevant stakeholders.

Scottish Government
Justice Directorate

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