

Business and Regulatory Impact Assessment

January 2022

Final Business and Regulatory Impact Assessment

Title of Proposal

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022

Purpose and intended effect

- **Background**

Legally aided services perform a valued public function in our society. Services paid for by the Scottish Legal Aid Fund 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 as we move into the recovery phase of the pandemic so that disputes, which may be felt more keenly and cause more distress at an already anxious time, continue to be resolved.

Particularly as Scotland emerges from the Covid-19 pandemic, maintaining a legal aid sector will be crucial to our recovery and the resolution of problems associated with the economic and societal shocks. We know that evidence suggests that Covid-19 has exacerbated many of the 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.

In December 2020 the Scottish Government announced a package of support to include: a 10.25% 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 1 April 2022:

- apply a 5% increase to all legal aid fees payable to solicitors and counsel.

- apply a supplementary fee of £80 per case to be paid to solicitors representing an accused person appearing from custody on a day which has been designated a court holiday, and
- clarify when payment for counsel is to be made from prescribed fees as opposed to assessed fees.

Objective

The instrument will apply a 5% increase to fees paid to solicitors and counsel for providing work under publicly funded legal assistance (legal aid and legal advice and assistance); it will make available additional payments to be paid to solicitors representing an accused person appearing from custody when doing so on a day which has been designated a court holiday; and clarify when certain work undertaken by counsel is to be assessed on a prescribed fee basis, and in so doing will reduce potential for fee disputes and associated costs of administration.

The instrument will give effect to the 5% increase 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

- **Rationale for Government intervention**

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 and societal shocks of Covid-19.

The Scottish Government is committed to 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 identified by the legal profession, as exacerbated by the Covid-19 pandemic, the Scottish Government announced a 10.25% increase in legal aid and advice and assistance fees for solicitors

and counsel over two financial years, with the first 5% uplift in effect from March 2021. These regulations will implement the second such uplift.

Supplementary fee – Designated Court Holidays

In order to comply with statutory requirements on time allowed to detain an arrested person until appearance from custody, it is sometimes necessary for courts to sit on what would otherwise be a court holiday. There are 11 such holidays in each Sheriffdom a year. Staff from the Scottish Courts and Tribunal Service and from Crown Office and Procurator Fiscal Service involved in these courts receive an enhanced rate of pay when supporting the operation of these courts. Solicitors appearing for the accused on these dates do not. The provision here seeks to recognise that a legal aid solicitor appearing at court on a designated holiday should also receive an enhanced payment on these days. An £80 fixed fee, per case, will now be payable when appearing on a designated court holiday.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

The case of Amir Beroghani v Scottish Legal Aid Board centred on the proper interpretation of schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. In particular, the case considered the fees of senior counsel for preparation and attendance at a hearing in the Inner House of the Court of Session, on an application for permission to appeal from the Upper Tribunal (Immigration and Asylum Chamber) in terms of section 13(4) of the Tribunals, Courts and Enforcement Act 2007. In light of the decision in Beroghani, the Scottish Government considers that there may be an ambiguity in the regulations, and that amendment is required to ensure the long standing policy objective is implemented and the established approach to the fee table continues.

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 Scottish Government has undertaken substantial engagement on legal aid and fee related issues with

representatives of the Law Society of Scotland and also with representation from a number of Bar Associations.

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

Uplift in fees

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

Holiday Courts

The absence of a supplementary payment to solicitors appearing in custody courts during a court holiday is a source of frustration and perceived unfairness to many providers of criminal legal assistance. Failure to address this could lead to a continuation of disruptive action impacting the operation of these courts, and which may lead to unrepresented accused persons. Lack of legal representation could lead to loss of liberty for an accused person.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

There will be an increased likelihood of fee disputes, and a consequential increased costs of administration.

Option 2: Bring forward Regulations

Uplift in fees

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

Holiday Courts

Supplementary payments for appearance at custody courts sitting on designated holidays is designed to improve fairness of remuneration and support legal aid providers to undertake work during the sitting of these courts.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

The amendments are intended to clarify the basis on which cases are to be assessed on a prescribed fee basis, and in so doing reduce potential for fee disputes and associated costs of administration.

Benefits

Option 1: Do Nothing

Uplift in fees

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

Holiday Courts

There is no benefit to doing nothing.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

There is no benefit to doing nothing. Uncertainty will remain and costs are likely to increase unnecessarily.

Option 2: Bring forward Regulations

Uplift in fees

The increase in fees is a crucial aspect of a package to support the providers of legally aided services.

Holiday Courts

Supplementary payments for appearance at custody court sitting on designated holidays is designed to produce improve fairness of remuneration and support legal aid providers to undertake work during the sitting of these courts.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

The amendments are intended to clarify the basis on which cases are to be assessed on a prescribed fee basis, and in so doing reduce potential for fee disputes and associated costs of administration.

Costs

Option 1: Do Nothing

Uplift in fees

There would be no cost implications if the uplift were not applied.

Holiday Courts

Some potential costs to the Justice system as a whole relating to accused persons being remanded in custody rather than receiving bail due to lack of legal representation.

Option 2: Bring forward Regulations

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.

Holiday Courts

Costs will fall to the Scottish Government budget as a result of supplementary payments being made available.

Schedule 4 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

Without clarification on the basis on which cases are to be assessed, costs are likely to increase and it is likely there will also be an increase in fee disputes with the associated costs of administration that will ultimately fall to the Scottish Government budget.

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.

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. 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 £1.25m 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.

The current forecast is that introducing this 5% increase will cost the Legal Aid Fund £4.5m in 2022/23 rising to £5.8m in 2023/24 then a full yearly impact figure of £6.0m.

It is estimated that the additional cost to the Legal Aid Fund, each year, for a supplementary fee payment being available in cases that require representation at holiday custody courts, will be in the region of £214k.

Clarity on when payment is to be made to counsel from prescribed fees as opposed to assessed fees will help alleviate the potential for related disputes and lead to more certainty around payment from the Fund.

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 April 2022.

□ 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).

Summary costs and benefits table

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1		
2		

Declaration and publication

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication. Use appropriate text from choices below:

Sign-off for Partial BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

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: Ash Regan

Date: 26/1/2022

**Ash Regan
Minister for Community Safety**

**Scottish Government Contact point:
Kieran Burke
Justice Directorate**



Scottish Government
Riaghaltas na h-Alba
gov.scot

© Crown copyright 2018

OGL

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/opengovernment-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk.

Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at
The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-78781-353-3 (web only)

Published by The Scottish Government, November 2018

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA PPDAS489486 (11/18)

w w w . g o v . s c o t