

POLICY NOTE

THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) REGULATIONS 2022

SSI 2022/30

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) of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

Purpose of the instrument.

This instrument makes provision for a 5% increase to fees and outlays paid to solicitors and counsel for providing publicly funded legal assistance, makes provision for a ‘holiday court payment’ – a supplementary fee payment where legal representation is provided to persons appearing from custody on days designated as court holidays (or where the court sits on a weekend day as a result of a holiday), amends related Regulations to ensure that such holiday court payments are not subsumed within consolidated payments where these apply, and makes an amendment to clarify the applicable payment regime for certain civil legal aid work provided by counsel.

Policy Objective

These Regulations increase all legal aid and advice and assistance fees 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 Civil 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 1996 Regulations”)
- the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (“the 1999 Regulations”)

These Regulations also remove ambiguity as to the applicable payments due to counsel for certain civil legal aid work, (in Schedule 4 of the Civil Regulations 1989, which is amended by the insertion of a new table by regulation 3(8) of these Regulations).

As the Government is of the view that additional payment should be made for criminal legal representation when provided on a day that is designated as a court holiday, amendments are made to the Criminal Regulations 1989, the 1996 Regulations and the 1999 Regulations (by regulations 4(2), 4(6), 62(b) and 7(2)) to make provision for holiday court payments. Further provision is made in schedules 8, 12 and 17.

Finally, minor amendments are made to the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 to ensure that when holiday court payments are payable

these are paid in addition to the applicable fee, and are not subsumed within a single consolidated payment, where this would otherwise apply.

Consultation

No formal consultation has been conducted on these regulations, the purpose of which is primarily to introduce a second 5% fee increase to legal aid rates (following the previous increase effected by S.S.I. 2021/56), further to a commitment made by the Scottish Government in 2020. However, throughout 2021 the Scottish Government has been involved in substantial engagement with representatives of the Law Society of Scotland, Bar Associations and the Scottish Legal Aid Board regarding support to legal aid providers and legal aid fee reform. The Faculty of Advocates has been consulted in the development of these regulations insofar as these relate to changes to fees for counsel.

Impact Assessments

The following impact assessments were considered:

Business & Regulatory Impact Assessment – additional spend to the legal aid fund has been identified and a BRIA has been completed.

Child Rights & Wellbeing Impact Assessment – these Regulations are not considered to have a significant impact on children and young people.

Equality Impact Assessment – no negative impacts on groups with protected characteristics are anticipated. Stage 1 completed.

Fairer Scotland Duty – not required

Strategic Environmental Assessment – not required

Data Protection Impact assessment – not required

Financial Effects

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

For financial impact in respect of the uplift to fees, and based on current levels of business, we anticipate the following additional spend to the Legal Aid Fund in Scotland – £4.5m in 2022/23 rising to £5.8m in 2023/24, then a full yearly impact figure of £6.0m.

The delay in full spend is due to the length of time it takes some civil cases to conclude.

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.

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

January 2022