

# **Business and Regulatory Impact Assessment**

**June 2023**

Final

## Business and Regulatory Impact Assessment

### The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 3) Regulations 2023

#### Purpose and intended effect

##### Background

- *Defended Family and Civil Partnership Actions*

The Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022, which will come into force on 25 September 2023, made changes to court rules in relation to procedure in certain family law case. Amendment is required to legal aid fees to allow for remuneration for the innovations introduced by the Act of Sederunt, including, but not limited to, the Initial Case Management Hearing, Pre-Hearing Meeting (and related joint minute) and witness summaries.

- *Counsel Fees*

The Scottish Government has committed to regularly review Counsel fees and as such current provision for Counsel fees for criminal legal aid work in the High Court and Sheriff and JP Court requires to be updated. These amendments will delete fees no longer required and create new fees to support changes to court procedure.

- *Disregard – Cost of Living Payments/Winter Fuel Payments*

The Social Security (Additional Payments) Act 2023 makes provision for additional payments to be made as part of the UK Government's response to increases in the cost of living. Relatedly, the Social Fund Winter Fuel Payment (Temporary Increase) Regulations 2023<sup>(1)</sup> will provide a payment to those who qualify to assist with the cost of gas and electricity. Provision is required for these payments to be disregarded when assessing financial eligibility for advice and assistance, civil legal aid and children's legal assistance. Similar disregards were previously effected by SSI 2023/11, but that instrument does not cover these new payments – further legislation is required to allow for the new payments to be disregarded.

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(1) S.I. 2023/549.

- *The 2007 Hague Convention*

As a signatory to the Convention on the International Recovery of Child Support and other forms of Family Maintenance done at The Hague on 23rd November 2007 (known as the 2007 Hague Convention), the UK is obliged to provide free legal assistance in respect of certain applications under that Convention concerning maintenance obligations arising from a parent-child relationship. Legislation in relation to legal aid provision in this area was affected by the UK's departure from the EU and existing provision is not considered sufficient to make clear that applicants under the 2007 Hague Convention are entitled to free Advice and Assistance for these purposes. Amendments are required to the Advice and Assistance (Scotland) Regulations 1996 to ensure the necessary provision is in place.

Against this background, the Scottish Government intends to introduce a Scottish Statutory Instrument to amend the following regulations.

- The Civil Legal Aid (Scotland) (Fees) Regulations 1989 ("the 1989 Civil Regulations")
- The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 ("the 1989 Criminal Regulations")
- The Advice and Assistance (Scotland) Regulations 1996 ("the 1996 Regulations")
- The Civil Legal Aid (Scotland) Regulations 2002 ("the 2002 Regulations")
- The Children's Legal Assistance (Scotland) Regulations 2013 ("the 2013 Regulations")

### **Objective**

- *Defended Family and Civil Partnership Actions*

The Scottish Government wishes make amendments to the 1989 Civil Regulations to support the changes made to court rules and procedure by the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022.

- *Counsel Fees*

The Scottish Government wishes to make amendments to certain Counsel fees as set out in the 1989 Criminal Regulations.

- *Disregard – Cost of Living Payments/Winter Fuel Payments*

The Scottish Government wishes to make amendments to the 1996 Regulations, the 2002 Regulations and the 2013 Regulations to ensure that these payments are disregarded for the purposes of financial assessment when a person is seeking the relevant forms of publicly funded legal aid ("PFLA")

- *The 2007 Hague Convention*

The Scottish Government wishes to make amendments to the 1996 Regulations clarify to make clear that applicants under the 2007 Hague Convention are entitled to free Advice and Assistance in respect of applications relating to child maintenance obligations under that Convention.

- **Rationale for Government intervention**

Amendments to the 1989 Civil Regulations will allow for legal providers to be appropriately remunerated for work carried out following the changes to court rules and procedure made by the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022.

Amendments to the 1989 Criminal Regulations will provide for appropriate fees for criminal legal aid work carried out by counsel in the High Court, Sheriff Court and JP Court.

Amendment to the 1996, 2002 and 2013 regulations will ensure that payments made under the Social Security (Additional Payments) Act 2023 and the Social Fund Winter Fuel Payment (Temporary Increase) Regulations 2023 are disregarded for the purposes of financial assessment for individuals seeking the relevant forms of PFLA.

The amendments to the 1996 Regulations in relation to 2007 Hague Convention applications will also ensure that applicants are able to access the appropriate assistance when pursuing matters in relation to maintenance obligations in Scottish courts.

## **Consultation**

- **Within Government**

The Scottish Legal Aid Board (SLAB) is a non-departmental public body which administers legal aid in Scotland and is accountable to the Scottish Government. SLAB have been consulted in the development of these draft Regulations.

- **Public Consultation**

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

- **Business**

There has been consultation with the representative bodies for the legal profession Scotland - the Law Society of Scotland and the Faculty of Advocates.

## Options

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

Legal aid fees would not reflect changes made as part of Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022, meaning legal aid providers would not be remunerated appropriately following the coming into force of the Act of Sederunt.

Legal aid providers would not be remunerated for work carried out around the initial case management hearing.

Counsel fees in relation to criminal legal aid work would not be updated, going against Scottish Government commitment for these to be reviewed.

Payments made from or in connection with The Social Security (Additional Payments) Act 2023 and Social Fund Winter Fuel Payment (Temporary Increase) Regulations 2023 would be taken into account in terms of financial eligibility of individuals seeking PFLA, potentially preventing them from accessing PFLA.

Advice and assistance may not be available to applicants pursuing matters in relation to maintenance obligations in Scottish courts.

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

Legislate for amended provisions, as noted above.

## Benefits

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

The current arrangements for legal aid will remain in place. There are no benefits to this option.

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

The measures will support the changes made by the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022 and for Counsel fees for criminal legal aid work to be updated as per Scottish Government commitment.

The amending regulations will ensure that payments made in response to the cost of living/fuel crisis to be disregarded in the assessment of financial eligibility for PFLA.

## **Costs**

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

No costs are associated with this option.

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

#### *Defended Family and Civil Partnership Actions*

The costs range from £500k - £1.5million depending on the profile of cases, how the new procedures are managed by the courts and importantly how solicitors claim for the work involved. SLAB believe that the costs are likely to be towards the upper end of the range.

#### *Counsel Fees for non-appeal Criminal Legal Aid work in the High Court, Sheriff and JP Courts*

SLAB have estimated the costs to be around £50-75k inclusive of VAT.

#### *Disregards – Cost of Living Payments/Winter Fuel Payments*

In terms of the two forms of Cost of Living Payments, these are to be made to individuals who are in the main in receipt of benefits that are already disregarded, for the purpose of means assessment for legal aid eligibility. Due to the current eligibility thresholds, SLAB have confirmed that it is unlikely that disregarding these payments will have much, if any, impact on the Fund.

#### *The 2007 Hague Convention*

There is no anticipated cost as advice and assistance should already be available for these matters – the provisions will ensure that the availability of this assistance is clear to applicants and solicitors.

## **Scottish Firms Impact Test**

It has been assessed that there is likely to be minimal impact on firms or sole practitioners as a result of these amendments.

### **Competition Assessment**

Having applied the Competition and Markets Authority competition filter, these proposals will not impact on competition within the legal aid market. These Regulations do not directly or indirectly limit the number or range of suppliers. They do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

### **Consumer Assessment**

These regulations will not have an impact on consumers.

### **Test run of business forms**

All legal aid applications are currently submitted online through SLAB's Legal Aid Online. Guidance and application updates will be incorporated ahead of commencement.

### **Digital Impact Test**

These regulations will not have a digital impact.

### **Legal Aid Impact Test**

Additional cost to the Scottish Legal Aid Fund:

#### *Defended Family and Civil Partnership Actions*

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

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

### **Implementation and delivery plan**

The Regulations will come into force on 21 September 2023, with provisions relating to the 1989 Civil Regulation and 1989 Criminal Regulations applying from 25 September 2023

### **Post-implementation review**

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

### **Summary and recommendation**

It is recommended that the amendments to the current legal aid regulations in Scotland are implemented (**Option 2**).

### **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: SIOBHIAN BROWN**



**Date: 6 June 2023**

**Scottish Government contact point:**

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CLLS: Access to Justice Unit

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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)

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