

## POLICY NOTE

### THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) (NO. 3) REGULATIONS 2023

SSI 2023/178

The Scottish Ministers made the above Regulations in exercise of the powers conferred by sections 12(3), 17(2B), 33(2)(a), and (3)(a), (b), (d) and (f), 36(1) and (2)(a) and 42 of the Legal Aid (Scotland) Act 1986(1) and all other powers enabling them to do so. The instrument is subject to negative procedure.

#### Summary

This instrument:

- amends Civil Legal Aid fees to provide suitable remuneration for work carried out in relation to defended family and civil partnership actions in the sheriff court;
- amends fees for non-appeal criminal legal aid work carried out by Counsel in the High Court, Sheriff Court and JP Court;
- disregards new Social Security payments and new Winter Fuel Payments from financial assessment in relation to eligibility for Advice and Assistance, Civil Legal Aid and Children's Legal Assistance;
- makes specific provision in relation to entitlement to Advice and Assistance in relation to applications under the 2007 Hague Convention on International Recovery of Child Support and Other Forms of Family Maintenance.

#### Policy Objectives

This instrument makes provision to ensure appropriate civil legal aid fee arrangements are in place to support the changes to court rules made by the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022(2), which come into force on 25 September 2023. The instrument will amend the legal aid fees to allow for remuneration for the innovations introduced by the Act of Sederunt, including Initial Case Management Hearings, Pre-Hearing Meetings (and related joint minutes) and witness summaries.

The instrument also makes amendments to fees for criminal legal aid work carried out by counsel in the High Court, Sheriff Court and JP Court, by providing for changes to the regulations and fee tables, set out in the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. This supports a commitment by the Scottish Government to review Counsel fees regularly and support changes in court procedure. This instrument will remove fees no longer applied and provide new fees where required.

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(1) 1986 c. 47 ("the Act"). Section 17(2B) was inserted by paragraph 36(6) of schedule 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40). The functions of the Secretary of State under the Act were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46).

(2) <https://www.legislation.gov.uk/ssi/2022/289/contents/made>.

The instrument also makes provision for payments by the State made to assist during the cost of living crisis via the Social Security (Additional Payments) Act 2023<sup>(3)</sup> and Social Fund Winter Fuel Payment (Temporary Increase) Regulations 2023<sup>(4)</sup> to be disregarded by the Scottish Legal Aid Board when assessing financial eligibility for advice and assistance, civil legal aid and children’s legal assistance, and from recovery in the course of any related proceedings. Similar provision was made in an earlier instrument, SSI 2023/11<sup>(5)</sup>, to disregard earlier such payments; these Regulations ensure that payments made under the 2023 legislation are also disregarded.

Finally, this instrument amends the Advice and Assistance (Scotland) Regulations 1996 to ensure that Advice and Assistance is available to applicants entitled to free legal assistance under the 2007 Hague Convention<sup>(6)</sup> without an assessment of their income or capital or the need to pay any fees or outlays, and with their legal fees met either from any expenses payable to them (following a judgment or court order for example), or otherwise out of the Scottish Legal Aid Fund. Equivalent entitlement is already in place in respect of Civil Legal Aid; this instrument ensures that the necessary provision is also set down in legislation to ensure access to Advice and Assistance.;

### **Consultation**

The Law Society of Scotland has been consulted on the changes relating to the Act of Sederunt.

The Faculty of Advocates has been consulted on Counsel Fee amendments.

Consultation regarding the application of the disregard has taken place with the Scottish Legal Aid Board. It is not expected that there would be any objections raised by others to this approach.

### **Impact Assessments**

A BRIA and CRWIA have been completed alongside this instrument.

### **Financial Effects**

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is financially beneficial as it introduces remuneration for new procedures. The impact on the Legal Aid Fund is expected to be less than £2m per annum.

Scottish Government  
Justice Directorate

*June 2023*

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(3) <https://www.legislation.gov.uk/ukpga/2023/7/contents>.

(4) <https://www.legislation.gov.uk/uksi/2023/549/made>.

(5) <https://www.legislation.gov.uk/ssi/2023/11/contents/made>.

(6) <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>.