

# Equalities, Human Rights and Civil Justice Committee

8th Meeting, 2023 (Session 6), Tuesday 28 March 2023

## Subordinate legislation

### Note by the Clerk

#### Purpose of the paper

1. This paper invites the Committee to consider the following draft affirmative instrument:
  - [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 2\) Regulations 2023](#) - Policy Note and any associated documents are at [Annexe A](#).

#### 2023/Draft: The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2023

2. This instrument makes provision to (i) implement an increase of 10.2% to non-reformed legal aid and advice and assistance fees, and (ii) reform and simplify the criminal legal aid fee structure in solemn cases, with the aim of targeting fee rates more appropriately, reducing administrative costs to both legal provider and the Scottish Legal Aid Board, encouraging early preparation and resolution of criminal cases.
3. The instrument seeks improvements in service delivery, improved outcomes for service users, and deliver longer term efficiencies. Therefore, reform of summary and solemn fees alongside support for other aid types are both essential elements of the instrument, further details of which are provided in the annexed Policy Note.
4. Full details of all fee amendments and costs are also noted on the [draft Scottish Statutory Instrument](#).

## Delegated Powers and Law Reform Committee Consideration

5. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on [7 March 2023](#) and agreed that it did not need to draw the Parliament's attention to the instrument on any grounds within its remit.

## Equalities, Human Rights and Civil Justice Committee Consideration

### Procedure for Affirmative instruments

6. The draft instrument was laid on 27 February 2023 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to affirmative procedure (Rule 10.6) and due to come into force on 29 April 2023. It is for the Equalities, Human Rights and Civil Justice Committee to recommend to the Parliament whether the instrument should be approved.
7. The Minister for Community Safety has, by motion [S6M-08058](#), proposed that the Committee recommends the approval of the instrument.
8. The Minister for Community Safety is due to attend the Committee meeting on 28 March to answer any questions on the instrument and to move the motion for approval.
9. The Committee received a letter from the Law Society of Scotland's Legal Aid Committee on 17 March ahead of consideration of this instrument. This was circulated to Members on 22 March and is also included as [Annexe B](#) to this paper for reference.
10. **It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 23 April 2023. Thereafter, the Parliament will be invited to approve the instrument.**
11. **The Committee is asked to delegate to the Convener authority to approve a short, factual report on the instrument for publication.**

Clerks to the Committee  
March 2023

# Annexe A

## Scottish Government Policy Note

### The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2023

The above instrument was made in exercise of the powers conferred by sections 9(1) and (2)(e), 33(2), (3)(a), (b), (c), (d) and (f) and (3A) and 36(1), (2)(a) and (b) of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

#### Purpose of the instrument

This instrument seeks to deliver a long-standing commitment by Scottish Government to significantly simplify the fee system and to ensure that the system appropriately compensates solicitors for the work involved in the early preparation and resolution of cases where this is both possible and in the best interests of clients. As well as delivering an increase in payment for cases that resolve prior to trial, the reforms reduce administrative costs for solicitors associated with the preparation of bespoke and often complex accounts.

The instrument seeks improvements in service delivery, improved outcomes for service users, and deliver longer term efficiencies. Therefore, reform of summary and solemn fees alongside support for other aid types are both essential elements of the instrument.

#### Policy objectives

The instrument provides for a 10.25% overall uplift in fees, distributed via a combination of targeted fee reforms and uplifts and overall increases. In summary:

- The solemn and summary fee reforms have been revised to ensure that the reforms themselves, augmented by increases in specific fees, delivers an overall increase in fees payable for these cases of 10.3%
- All other criminal fees not affected by fee reforms will be uplifted by 10.2%
- All civil and children's fees will be uplifted by 10.2%

This model of distribution ensures that there is an equitable uplift across all legal aid types while also making targeted increases requested by representatives of the legal profession and delivering reforms.

The solemn reforms combine several existing fees into new case disposal fees, payable in every case. The disposal fees are then set at a level to deliver an overall increase in funding which is focused on cases that resolve prior to trial. Overall the changes proposed are calculated to increase the average fee payable in a solemn case from £2110 to £2326.

The summary reforms simplify the summary criminal fixed payment arrangements so that full payment can be achieved in the majority of cases via a single all-encompassing fee. It also reverses many of the fee changes and complexities introduced by regulations in 2011. The package removes reduced fees so that a full core fee is now payable in most situations i.e. the core fee in these cases is at least doubled. Overall, the changes proposed are calculated to increase the average fee payable in a summary case from £628 to £693.

## Consultation

No formal consultation has been conducted on these regulations but the content is the result of extensive engagement by Ministers (both the Cabinet Secretary for Justice and Veterans and Minister for Community Safety) and Scottish Government officials with representatives of the Law Society of Scotland, the Scottish Solicitors Bar Association and the Scottish Legal Aid Board. Draft regulations have been shared with the main representative bodies of the legal profession: the Law Society of Scotland and the Faculty of Advocates.

## Impact assessments

The following impact assessments were considered:

- Child Rights & Wellbeing Impact Assessment – no CRWIA required.
- Equality Impact Assessment (EQIA) – no negative impacts on groups with protected characteristics:
- Business & Regulatory Impact Assessment (BRIA) – additional spend to the legal aid fund identified and BRIA completed: [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 2\) Regulations 2023 \(legislation.gov.uk\)](#)
- 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 and is linked above.

For financial impact:

Although some of the new fees can apply to existing cases in the system, it will take time for the full impact of the revised fees to feed through. Taking account of the impact of the revised fees, Scottish Legal Aid Board has estimated total costs for the Legal Aid Fund in 2023-24 will be £141m. The total Fund expenditure in 2021-2022 was £118.2m.

The restructure of fees for solemn criminal legal assistance will have a positive impact in reducing bureaucracy for legal professionals delivering legal aid services and for the Scottish Legal Aid Board in administering the Legal Aid Fund.

## Annexe B

### Letter from the Legal Aid Committee, Law Society of Scotland - 17 March 2023

#### The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2023

Dear Convener

We thank you, on behalf of the Legal Aid Committee of the Law Society of Scotland, for this opportunity to submit our thoughts on the above named regulations, having noted with interest that your committee has invited the Minister to speak to the instrument at your meeting on Tuesday 28 March.

Firstly, it's important to acknowledge that the passing of these regulations, providing an increase in spend across both civil and criminal legal aid fees, is a step towards much needed, and long awaited, progress. It is, however, clear that this remains a sector in crisis.

There are deep-rooted problems in legal aid after decades of underfunding, and solicitors are leaving this area in droves, with access to justice eroding at an alarming rate whilst demand increases. We must reverse this trend to ensure there are solicitors able to offer civil, children's and criminal legal aid across the country and across all types of work, another concern being that the criminal fee reforms may not deliver the increases equivalent to those proposed for civil and children's legal aid. We would call for a review to take place twelve months following implementation to fully assess if the reforms have effectively addressed the crisis in legal aid provision, and identify additional action that may be required.

The system is in need of full-scale reform. Until this happens, it is vital that fee increases are implemented, the priority then turning to ensuring a robust fee review mechanism. This will be essential to ensuring the long-term sustainability of the legal aid sector and access to justice. The Scottish Government have committed to implementing this mechanism, but not before a benchmarking process is carried out. Whilst we can see the need for this benchmarking process, our view would be that consideration should be given to the fee review mechanism being dealt with independently of the benchmarking process to provide some confidence to the profession, and to avoid the perception that the benchmarking review is adding further delay to much needed change.

In terms of timescales, there has been suggestion that the output of the benchmarking research might not feed into the budgeting process until as late as

2025-26. It is simply not palatable to wait this length of time for a mechanism to review fees, and thought must be given to how the government will review fees in the interim as it is not sustainable for fees to be frozen in any intervening period. Much evidence is already available to the Scottish Government from previous work, and from SLAB, and there is widespread acknowledgement of the scale of the problem that exists. Legal aid is a fundamental part of Scotland's justice system. We can't afford any further delay in taking the necessary steps to safeguard it.

We also want to take this opportunity to highlight that a lack of legal aid funding is not solely an issue for Solicitors, it's a problem for all of society. Legal aid is there to help those who need, but cannot afford, a Solicitor. If there is not enough legal aid provision to help all of these people, their access to justice is denied. This is the case now for thousands of Scotland's most deprived families, further exacerbated by the fact that legal aid fees agreed in 1999 have only increased by 10%, compared to an inflation increase of 55%, alongside the impact of the pandemic and the cost of living crisis. It's also the case that fewer people are financially eligible for legal aid as inflation rises.

Analysis carried out for a campaign the Society ran last year showed that the 139 most deprived communities in Scotland, resident to around 100,000 people, shared just 29 civil legal aid firms between them. There were no civil legal aid firms at all in 122 of the 139 areas. Of the legal firms in these areas, 87,064 people were left without any local access at all. The most common civil court cases include dealing with divorce and child contact or custody; adoption; adults with incapacity; immigration and asylum cases; and deportation. They might also involve cases such as securing compensation for medical negligence or securing social welfare payments. This demonstrates the breadth of situations where any one of us could require a Solicitor and might face the prospect of acting for ourselves against an experienced practitioner. This highlights inequalities and the need to ensure those vulnerable in society are protected. We must secure longer term, lasting investment in legal aid services.

Retention should also be mentioned as a contributing factor to these issues. We welcomed the Scottish Government's £1 million fund to support legal aid traineeships in Scotland, launched in 2021, which provided support for up to 40 new legal aid trainees and paid for up to half of their salaries. In addition, trainees' regulatory costs, National Insurance, Practising Certificate costs and Trainee CPD were all half-funded by the grants for the full term of the traineeships. We would welcome further schemes such as this one, however would highlight the wider problem of retention into this field of work. Young solicitors are interested in this work, start their careers doing this but don't stay. There are many factors to this, including work/ life balance, one's constant availability to clients, pressures from court backlogs and pay; in-house, some private firms and the Crown will offer better pay, hours and benefits. We have to work together with those involved in this sector to think of long term solutions to this issue, however investment will always be needed and will always be a key factor in improving retention.

We hope the above demonstrates that, while the fee increases in the regulations are a start, much more is still to be done, and to be done urgently, to stop ever diminishing numbers, decreasing confidence and curtailment of access to justice. We'd be happy to provide further evidence to the Committee, either in writing or in person, if helpful.

Thank you and the committee for your consideration.

Yours sincerely

Ian Moir and Pat Thom  
Co-Conveners of the Legal Aid Committee  
Law Society of Scotland