

Criminal Justice Committee

8th Meeting, 2022 (Session 6), Wednesday, 2 March 2022

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following affirmative instrument:

- [The Legal Aid and Advice and Assistance \(Financial Limit\) \(Scotland\) Amendment Regulations 2022 \[draft\]](#)

Introduction

2. The above instrument was made in exercise of the powers conferred by sections 9(2)(e) and 33(2), (3)(b) and (f) of the Legal Aid (Scotland) Act 1986.

3. The Regulations make provision to increase the maximum total fees per court session allowable to duty solicitors representing accused persons in the sheriff or district courts, and to increase the financial limits for payments for advice and assistance under the Legal Aid (Scotland) Act 1986, beyond which solicitors are required to seek prior approval of the Scottish Legal Aid Board before undertaking further work.

4. They are considered necessary as a consequence of the increases to all legal aid and advice and assistance fees payable to solicitors and counsel by 5% introduced in 2021 and the further 5% increase which will be made in April 2022 (by the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2022 which are being brought forward concurrently with these Regulations). The existing limits of initial authorised expenditure for advice and assistance would be likely to be frequently exceeded as a result of increased fees, meaning that solicitors would require to seek the prior approval of the Scottish Legal Aid Board to ensure full payment for the work undertaken. To require such approval for payment that would otherwise be permitted would result in additional time, resource and bureaucracy for both legal aid providers and the Scottish Legal Aid Board.

5. Amendments are also being made to the “session limits” that apply to duty work under Criminal Legal Aid (Scotland) (Fees) Regulations 1989 – the maximum fees that may be accrued by a solicitor in a court session.
6. Further details on the purpose of the instrument can be found in the policy note attached in **Annex A**.

Correspondence received

7. The Committee has received a letter from the Law Society of Scotland regarding the instrument. A copy can be found in **Annexe B**.
8. The letter is also relevant to the Committee’s consideration of the [Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) Regulations 2022](#) (agenda item 3).

Delegated Powers and Law Reform Committee Consideration

9. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 8 February 2022.
10. The DPLR Committee agreed that it did not need to draw the Regulations to the attention of the Parliament on any grounds within its remit.

Criminal Justice Committee Consideration

11. The Committee is required to report to the Parliament by **17 March 2022**.
12. Motion S6M-03003 has been lodged proposing that the Committee recommends approval of the instrument. The Minister for Community Safety is due to attend the meeting on 2 March to answer any questions on the instrument and to move the motion for approval.
13. **It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament. Thereafter, the Parliament will be invited to approve the instrument.**
14. **The Committee is asked to delegate to the Convener authority to approve a short, factual report on the instrument for publication.**

Clerks to the Criminal Justice Committee
February 2022

Annex A

POLICY NOTE

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

SSI 2022/XXX

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

Purpose of the instrument. This instrument makes provision to increase the maximum total fees per court session allowable to duty solicitors representing accused persons in the sheriff or district courts, and to increase the financial limits for payments for advice and assistance under the Legal Aid (Scotland) Act 1986, beyond which solicitors are required to seek prior approval of the Scottish Legal Aid Board before undertaking further work.

Policy Objectives

These Regulations are considered necessary as a consequence of the increases to all legal aid and advice and assistance fees payable to solicitors and counsel by 5% introduced in 2021 and the further 5% increase which will be made in April 2022 (by the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2022 which are being brought forward concurrently with these Regulations). The existing limits of initial authorised expenditure for advice and assistance would be likely to be frequently exceeded as a result of increased fees, meaning that solicitors would require to seek the prior approval of the Scottish Legal Aid Board to ensure full payment for the work undertaken. To require such approval for payment that would otherwise be permitted would result in additional time, resource and bureaucracy for both legal aid providers and the Scottish Legal Aid Board.

Amendments are also being made to the “session limits” that apply to duty work under Criminal Legal Aid (Scotland) (Fees) Regulations 1989 – the maximum fees that may be accrued by a solicitor in a court session.

Consultation

No formal consultation has been conducted on these regulations, the purpose of which is support the introduction of additional fee increases 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.

Impact Assessments

The following impact assessments were considered:

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.

Business & Regulatory Impact Assessment – these regulations do not introduce additional spend to the Legal Aid Fund so a BRIA is not considered necessary.

Fairer Scotland Duty – not required

Strategic Environmental Assessment – not required

Data Protection Impact assessment – not required

Financial Effects

The Minister for Community Safety confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business. It is a technical instrument to facilitate payment of increased fees in full, to support the introduction of the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2022, for which a BRIA has been completed.

Scottish Government
Justice Directorate

January 2022

Annexe B: Letter from the Law Society of Scotland

23 February 2022

Dear Convener,

I write regarding the SSIs on Legal Aid and Advice Laid before the Parliament on 28 January 2022. I understand the Committee is to consider these regulations in due course. As you will no doubt be aware, the regulations enact a commitment to uplift legal aid fees by 5% made by the Cabinet Secretary in November 2020; amend duty fees; and provide a new rate for attendance at a sitting on a court holiday or weekend.

While any uplift in fees is a step in the right direction, these measures represent yet another real terms cut in legal aid rates and fall far below what is required. I thank you once again for inviting my colleague Ian Moir to attend evidence sessions during your recent inquiry on justice sector reforms, but the regulations before you clearly fail to address your Committee's recommendation in its subsequent report that there must be "immediate action on fee rates".

In our view, the 5% uplift was insufficient when first announced and is now significantly below even the rate of inflation. Legal aid rates have remained largely stagnant since 1999 and since then inflation has run at an average of 2.7% per year. Even taking into account the recent uplifts and those introduced by these regulations, legal aid rates will be around 60% lower in real terms than when the Scottish Parliament was first convened. This is in the context of a longstanding decline in overall legal aid expenditure, with the 2021-22 budget £138m in comparison to £160m in 2010-11.

Because of the complexity of the system and the challenges around funding, there has been a substantial reduction in the number of firms available to offer legal aid work. Between 2010 and 2020, the number of firms providing civil legal aid decreased by 16% and the number of criminal firms fell by 25%. More concerningly, 7.5% fewer firms were paid for legal aid work in 2020-21 than in 2019-20, clearly indicating that the pace of that decline has been increased by the pandemic.

As you heard in your evidence sessions, one of the key challenges facing the sector is the salary and conditions disparity between private legal aid firms and public sector organisations. Many new entrants to the legal profession and experienced practitioners are increasingly attracted by pay and conditions in the public sector which simply cannot be matched by firms who predominantly rely on legal aid fees. As a result, the criminal defence bar is losing both new entrants and experienced practitioners at an alarming rate.

As you will be aware from our previous correspondence, we have engaged proactively and in good faith with the Scottish Government on proposals to head off the acute issues we are now seeing in the provision of both criminal and civil legal aid. Following correspondence with the Minister in the buildup to COP-26 we proposed measures we believed would head off the proposed boycott of emergency and holiday courts and of the duty scheme and impressed upon her the urgency of

committing to substantial investment in the legal aid system. Our proposals included a 50% uplift of fees across the board to account for the historic failure to take account of inflation and fees for holiday courts and other antisocial business to be doubled.

This was not an aspirational figure but a necessity to secure the present and future of our legal aid system. Any uplift in criminal legal aid must also be matched in the civil sector where legal aid is simply not available to many citizens who would qualify because of a lack of remaining practitioners, particularly in rural areas.

At the Minister's invitation, we met with the Scottish Government's Director of Justice and other senior officials in December and again in January in a series of meetings we had understood would include discussion of proposals to address the present crisis. No such proposals were put to us at these meetings and despite assurances that proposals were being prepared, at the time of writing we still have no further information. This does not demonstrate the urgency which both your Committee and the Law Society have called for.

The Committee has recently considered the impact and measures to address the court backlog. While we recognise the need for investment in the prosecution, judiciary and courts service, defence agents must be prioritised if supply is to meet the demand of an increased caseload. Those agents remaining already report severe capacity difficulties and any further reduction in the number of solicitors working in criminal defence can only exacerbate this.

As you may be aware, many local bar associations have withdrawn from the duty system altogether and have indicated they will not take part in court sittings held on holidays or at weekends. The fees and holiday court payments presented in these regulations are extremely unlikely to have any bearing on this ongoing boycott. Already there are anecdotal reports of people being held on remand overnight because no duty solicitor could be provided by the PDSO and this situation will only worsen unless the Government immediately provides a commitment to a substantive uplift of legal aid rates. I also note that the new payments for attending holiday or weekend courts set out in the regulations have not been subject to any consultation.

The Minister regularly refers to the £20m package of relief and investment in legal aid firms over the past two years, but this must be considered in light of the £33m saved from the legal aid budget as a result of the downturn in business over the pandemic. Investment in public sector justice services, including the prosecution, judiciary and courts service, has outstripped any funds received by law firms who handle legal aid cases, further exacerbating issues around retaining and attracting solicitors to this line of work.

The Minister has also stated her desire for the legal sector to be as diverse as the citizens it represents, a goal we share. The reality is that despite the solicitor profession being majority female, very few new entrants to legal aid, particularly criminal legal aid, are female. Many new entrants and experienced practitioners leave defence for improved pay and conditions in the public sector, to the extent that there are now some sheriffdoms where no female agents remain. By failing to

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provide the legal aid system with sustainable funding, the sector simply cannot be as attractive to new entrants as it needs to be to meet the Minister's diversity objective.

Our legal aid system is at breaking point and the regulations before you do nothing to address this. I ask you to take the opportunity these regulations present to press Ministers on what further action they will take on fees, and on what timescale, to address the serious concerns that both your committee and the Law Society have made clear.

Yours sincerely,

Ken Dalling,
President
Law Society of Scotland