

Equalities, Human Rights and Civil Justice Committee

16th Meeting, 2023 (Session 6), Tuesday 5 September 2023

Subordinate legislation

Note by the Clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
 - [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 3\) Regulations 2023 \(SSI 2023/178\)](#) – Policy Note and links to relevant impact assessments are at [Annexe A](#).

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 3) Regulations 2023 (SSI 2023/178)

2. This instrument amends existing regulations made under the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) and 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.
3. Regulation 2 makes provision as to when the amendments made by regulations 3 and 4 of these Regulations apply
4. Regulation 3 amends the [civil legal aid fee tables, and related notes on their operation, in Chapter 2 of schedule 6 of the Civil Legal Aid \(Scotland\) \(Fees\) Regulations 1989](#), to take account of changes made to court rules relating to procedure in defended family and civil partnership actions in the sheriff court by the Act of Sederunt (Ordinary Cause Rules 1993 Amendment) (Case Management of Defended Family and Civil Partnership Actions) 2022.
5. Regulation 4 makes provision to amend 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 fee tables, and related notes on their operation, set out in](#)

[schedule 2 of the Criminal Legal Aid \(Scotland\) \(Fees\) Regulations 1989](#). Minor changes are also made to regulation 3A of those Regulations.

6. Regulation 5 amends the [Advice and Assistance \(Scotland\) Regulations 1996](#) to provide that—
- additional payments made under the Social Security (Additional Payments) Act 2023 (“the 2023 Act”) and the Social Fund Winter Fuel Payment (Temporary Increase) Regulations 2023 (“the 2023 Regulations”) are to be disregarded by the Scottish Legal Aid Board in the assessment and computation of an applicant’s disposable capital and income,
 - such payments are excluded from bearing fees and outlays when forming part of any recovered or preserved property in proceedings,
 - the 1986 Act is modified so advice and assistance is available to an applicant who is entitled to free legal assistance under Article 15(1) of the Hague Convention or who has, in a State bound by the Hague Convention, benefited from legal aid or exemption from costs or expenses—
 - without regard to their income or capital, whether or not they are within Scotland,
 - without their requiring to pay any fees or outlays in respect of such advice and assistance, irrespective of their disposable income, and
 - with their fees or outlays to the solicitor met firstly out of any expenses payable to them by any other person (by virtue of a judgment, court order, agreement or otherwise) in respect of the matter in connection with which the advice and assistance is provided, and otherwise by SLAB out of the Scottish Legal Aid Fund.
7. Regulations 6 and 7 amend the [Civil Legal Aid \(Scotland\) Regulations 2002](#) and the [Children’s Legal Assistance \(Scotland\) Regulations 2013](#) respectively to make similar provision to regulation 5 in respect of disregarding additional payments made under the 2023 Act from the computation of disposable capital and income, and the exclusion of payments made under the 2023 Regulations from bearing fees and outlays.

Delegated Powers and Law Reform Committee Consideration

8. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on [27 June 2023](#) and initially agreed to draw it to the attention of the Parliament under the general reporting ground for cross-referencing errors.

9. The Committee noted that the Scottish Government has undertaken to correct errors by correction slip, or at the next suitable legislative opportunity. Correspondence between the Committee and the Scottish Government is at [Annexe B](#).
10. Following the correspondence, the Committee determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments – as detailed at the end of their report.

Equalities, Human Rights and Civil Justice Committee Consideration

11. SSI 2023/178 was laid on 8 June 2023 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to the negative procedure and due to come into force on 21 September 2023.
12. **The Committee is invited to consider any issues which it wishes to raise on this instrument and is required to report to the Parliament by 18 September 2023.**

Procedure for negative instruments

13. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
14. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
15. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
16. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
17. If the Parliament resolves to annul an SSI, then what has been done under authority of the instrument remains valid, but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

18. Each negative instrument appears on the Equalities, Human Rights and Civil Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

19. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Clerks to the Committee
August 2023

Annexe A

SSI 2023/178

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

Scottish Government Policy Note

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 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, 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.

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 and Social Fund Winter Fuel Payment (Temporary Increase) Regulations 2023 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, 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(6) 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

The following impact assessments have been completed alongside this instrument:

- An Equality Impact Assessment (EQIA):
https://www.legislation.gov.uk/ssi/2023/178/pdfs/ssieqia_20230178_en_001.pdf
- A Business and Regulatory Impact Assessment (BRIA):
https://www.legislation.gov.uk/ssi/2023/178/pdfs/ssifia_20230178_en_001.pdf

Financial Effects

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.

Annexe B

SSI 2023/178

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

Correspondence with the Scottish Government

On 15 June 2023, the Committee asked the Scottish Government:

Regulation 4 of the instrument makes amendments to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

Regulation 4(3)(b)(ii) of the instrument inserts a new sub-paragraph (cb) into paragraph 3 of schedule 2 of the 1989 Regulations.

The newly inserted sub-paragraph 3(cb)(i) refers to fees payable for managed meetings under either paragraph 1B(d) of Chapter 1 of Part 1 or paragraph 1AA(d) of Chapter 1 of Part 3 of the Table of Fees. The Table of Fees is also relevantly amended by regulation 4(6)(b) of this instrument by inserting paragraph 1AA into the Table of Fees. Should the reference to paragraph 1AA(d) in this regulation be to paragraph 1AA(e)?

The newly inserted sub-paragraph 3(cb)(iii) refers to fees payable relating to the conduct of a first diet under paragraph 1AA(e) of chapter 1 of part 3 of the Table of Fees, the Table of Fees which is also amended by regulation 4(6)(b) of this instrument by inserting paragraph 1AA into the Table of Fees. Should the reference to paragraph 1AA(e) in this regulation be to paragraph 1AA(f)? Regulation 4(3)(j) of the instrument makes amendments to paragraph 16A of schedule 2 of the 1989 Regulations relating to consultation fees payable.

Regulation 4(3)(j)(i)(dd) substitutes “accused” for “expert” in regulation 16A(1)(b) so it now refers to “the same counsel and expert”.

Regulation 16A(1)(d) of the 1989 regulations already refers to “the same counsel and expert” so the amendment results in heads (b) and (d) of this regulation being identical. Is this intentional?

On 20 June 2023, the Scottish Government responded:

We thank the Committee for bringing these points to our attention. The references inserted in paragraph 3 of the notes on the operation of schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 are incorrect:–

the reference in paragraph 3(cb)(i) to paragraph 1AA(d) of Chapter 1 of Part 3 of the Table of Fees should be to paragraph 1AA(e);

the reference in paragraph 3(cb)(iii) to paragraph 1AA(e) of Chapter 1 of Part 3 of the Table of Fees should be to paragraph 1AA(f).

The Scottish Government considers that in the context of the amended regulations, having regard to the wider wording of inserted sub-paragraph (cb) and the entries in paragraph 1AA of Chapter 1 of Part 3 of the Table of Fees, the provisions are capable of being operated effectively despite the incorrect references. The primary users of the legislation will be counsel, agents and the Scottish Legal Aid Board. However, in the interests of clarity the Government will amend the legislation by correction slip, as the intention is obvious from the context, or at the next suitable legislative opportunity.

The intention was to make the amendments included in the instrument, including the change at regulation 4(3)(j)(i)(dd) to regulation 16A(1)(b), but the drafting has inadvertently left a duplicate provision.

The Scottish Government considers that paragraph 16A can be operated effectively, however proposes to rectify the duplication at the next suitable legislative opportunity.