

Final Business and Regulatory Impact Assessment

Title of Proposal

The Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Amendment Regulations 2016

Purpose and intended effect

- **Background**

Following the decision in *Cadder v HMA* in 2010, section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) was introduced to allow Scottish Ministers to make regulations for criminal advice and assistance to be available without reference to the financial eligibility test that normally applies to advice and assistance (A&A) in Section 8 of that Act, and the circumstances in which it is available.

A&A is therefore currently available under regulation 8 of the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011 to anyone to whom section 15A of the Criminal Procedure (Scotland) Act 1995 applies (those detained, arrested without charge or attending voluntarily for questioning on suspicion of having committed an offence) before questioning or at any point during questioning without a financial eligibility test. Section 15A of the 1995 Act will be repealed if Parliament passes the Criminal Justice Bill, however the policy intention will remain the same and will apply in relation to the new provisions of the Bill.

At present, a suspect may be due to pay a contribution toward their A&A under section 11 of the 1986 Act. This means that while anyone in those circumstances outlined above will qualify for A&A, they may be required to pay a contribution and a financial means assessment is still necessary. If they have a disposable income of over £245 in a week, the maximum contribution of £142 must apply.

Section 8A of the 1986 Act has been amended since 2010 to allow Ministers to waive the contribution due under section 11 in regulations. The policy aim is therefore to remove any requirement for suspects who are questioned by the police to pay a contribution toward the cost of their A&A.

- **Objective**

The objective for no contribution toward A&A to be due from anyone to whom section 15A of the Criminal Procedure (Scotland) Act 1995 applies (those detained, arrested without charge or attending voluntarily for questioning on suspicion of having committed an offence) before questioning or at any point during questioning. This would be instead of requiring them to pay a contribution where they have sufficient means to do so.

- **Rationale for Government intervention**

Lord Bonyon's Report on Post-corroboration Safeguards states that requiring a person present as a suspect to pay a contribution towards A&A (the possibility is specifically stated in the Letter of Rights given to suspects) is likely to dissuade some suspects from taking up their right to legal advice. Further, assessing the level of contribution due, if any, can be difficult as those being questioned are unlikely to have the necessary financial documents with them.¹

The legal aid system contributes to the Safer and Stronger objective. Particularly, it contributes to the National Outcome of "strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others" by ensuring that individuals can be held to account for their actions and can enforce their own legal rights through the effective functioning of the courts. As well as supporting this outcome, the proposal also contributes to "our public services are high quality, continually improving, efficient and responsive to local people's needs" in making the availability of A&A in police stations more straightforward.

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 Scottish Ministers. SLAB has been consulted in the development of these Regulations.

- **Public Consultation**

The Regulations affect applicants for A&A at police stations and solicitors providing this advice for applicants. Consultation was therefore carried out with legal aid solicitors, which is covered in the "Business" consultation section.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland ("the Society"). The Society's engagement on legal aid issues is led by the criminal and civil legal aid negotiating teams, each being panels of solicitors who work in these field, either as a sole practitioner or a member of a firm.

The criminal legal aid negotiating team has been consulted in the development of these regulations.

¹ The Post Corroboration Safeguards Review, Final Report April 2015 – <http://www.gov.scot/Resource/0047/00475400.pdf>

Options

Option 1: Do Nothing

Suspects being interviewed at a police station would continue to pay a contribution, where they have sufficient disposable income or disposable capital.

Option 2: Introduce the Amended Regulations

The requirement for a contribution to be paid for A&A in a police station would be removed for those who currently have sufficient means to be due a contribution. The amended regulations would bring no change for those being questioned that already receive A&A with no contribution due.

Sectors and groups affected

These measures will largely impact upon suspects being questioned at a police station (particularly those who would currently pay a contribution toward the cost of their A&A), solicitors offering A&A at police stations, SLAB, and Police Scotland.

Delivery of legal advice in police stations is currently managed through a Solicitor Contact Line and local police station duty plans. A solicitor can give advice via telephone or personally attend the police station. SLAB deals with in excess of 60 requests a day for this type of advice. Between July 2014 and June 2015, there were 23,001 calls for advice assistance at a Police Station.²

Benefits

Option 1: Do Nothing

Legal Aid Fund expenditure may be expected to remain at current levels, there would be no increase in the total number of accounts to be administered by SLAB for A&A at a police station. There will be no increase to opportunity costs relating to police staff time facilitating access to legal advice.

Option 2: Amend Regulations

Those detained, arrested without charge or attending voluntarily for questioning on suspicion of having committed an offence would be able to access publically funded legal advice without taking into account the possibility of having to pay a contribution. The total value of those contributions is currently around £18,000 per year. If behaviours change significantly as a result of the policy, solicitors might expect an increase in fee income in the range £200,000 to £650,000 in aggregate. Solicitors and SLAB would not need to check that contributions have been correctly calculated.

² Police Station duty scheme update – Solicitor Contact Line figures:
[http://slab.kraya.net/common/documents/news/2015/Police Station Duty Update 9th October 2015.pdf](http://slab.kraya.net/common/documents/news/2015/Police%20Station%20Duty%20Update%209th%20October%202015.pdf)

Costs

Option 1: Do Nothing

Some suspects being questioned at the police station would continue to pay a contribution toward their A&A. Solicitors would continue with the administrative tasks of checking financial eligibility and collecting contributions from those clients who have sufficient means to be due a contribution. SLAB would continue to check whether eligibility to pay a contribution had been correctly calculated when a solicitor submits an account.

Option 2: Amend the Regulations

There would be a cost to the Legal Aid Fund in terms of the value of the contributions that would no longer be deducted from solicitors' accounts. This is currently around £18,000 per year.

There would be a further cost to the Legal Aid Fund if the removal of contributions increased the use of A&A for telephone advice or police station attendances. By removing contributions, solicitors may change their behaviour and use A&A in either telephone advice or personal attendance more often than they do at the moment. There would be additional police time spent in facilitating access to legal advice but as it is not a direct financial cost and is encompassed in general workloads, it will be an opportunity cost to the Police.³

This would mean an increase in the total amount of fees paid to solicitors. Should this happen, SLAB estimates an increase in costs within a range of £200,000 to £650,000 (including the cost of contributions no longer due). The range takes account of an anticipated increase in requests for advice and increased delivery by solicitors.

An increase in the number of Advice & Assistance grant and accounts will not result in any appreciable operational cost to SLAB for administering those accounts. The online system will facilitate an increase in volume without any additional cost. The only additional cost is in decision-making on requests for increases which can be accommodated within current budgets.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the Society, which negotiates with the Government on behalf of the profession.

The profession includes solicitors employed in firms, partners and sole practitioners. If there is any impact as a result of these proposals, the majority of providers affected is likely to be small providers (both small and micro sized businesses) due to the dominance of small legal service providers in the legal aid market. In SLAB's 2010 survey of legal aid solicitors, partners were asked how many solicitors their firm

³ Criminal Justice (Scotland) Bill – Explanatory Notes (and other accompanying documents): [http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-intro-en.pdf](http://www.scottish.parliament.uk/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-intro-en.pdf)

employed across Scotland. Almost half of the firms (48%) employed 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

Competition Assessment

Having applied the Competition and Markets Authority competition filter, the proposal will not impact on competition within the criminal 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.

As more than two questions have been answered in the negative, there was no requirement to complete a full Competition Assessment.

Test run of business forms

There should be no requirement for new forms. All legal aid applications are currently submitted online through SLAB's Legal Aid Online.

Legal Aid Impact Test

The Scottish Legal Aid Board estimates that the additional cost to the Fund, assuming no change in behaviours, is £18,000 per year. If there are significant shifts in behaviour, it estimates an additional cost in the range of £200,000-£650,000 per year. The exact figure will depend on any changes in the behaviour of either or both solicitors and suspects.

Enforcement, sanctions and monitoring

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

Implementation and delivery plan

These Regulations will come into force on 1 April 2016.

Post-implementation review

The Scottish Government and SLAB will review the impact of this legislation within 10 years through consideration of analysis of data which is collected routinely by SLAB.

Summary and recommendation

It is recommended that the amendments are implemented (Option 2), giving effect to the recommendation made by Lord Bonyon in his Post Corroboration Report to remove contributions. It will remove any financial disincentive to suspects being questioned at a police station accessing legal advice that may exist as a result of the possibility of a contribution being due.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p><u>Solicitors</u></p> <p>None.</p> <p><u>Police</u></p> <p>No opportunity cost of additional police staff time facilitating as a result of increase in suspects accessing their right to legal advice.</p> <p><u>SLAB</u></p> <p>Total number of accounts to be administered for police station A&A does not increase.</p> <p><u>Clients</u></p> <p>None.</p> <p><u>Scottish Government</u></p> <p>No expected increase in expenditure.</p>	<p><u>Solicitors</u></p> <p>Administrative costs for calculating contributions expected to remain at current levels.</p> <p><u>Police</u></p> <p>None.</p> <p><u>SLAB</u></p> <p>Administrative costs for checking correct calculation of contribution due.</p> <p><u>Clients</u></p> <p>Some of those accessing A&A will be due to pay a contribution. These currently total £18,000 per year.</p> <p><u>Scottish Government</u></p> <p>None.</p>

<p>2</p>	<p><u>Solicitors</u></p> <p>If removing any possibility that a contribution would be due increased the number of suspects accessing A&A, this would increase the total fees being paid to solicitors by £200,000 to £650,000. No administrative cost for calculating whether a contribution was due or the value of that contribution.</p> <p><u>Police</u></p> <p>None.</p> <p><u>SLAB</u></p> <p>Reduced administrative costs for checking correct calculation of contribution due.</p> <p><u>Clients</u></p> <p>Those currently due to pay a contribution would no longer do so, currently totalling £18,000 per year. Financial disincentive to accessing legal advice would be removed.</p> <p><u>Scottish Government</u></p> <p>None.</p>	<p><u>Solicitors</u></p> <p>None.</p> <p><u>Police</u></p> <p>Opportunity cost of additional police staff time facilitating.</p> <p><u>SLAB</u></p> <p>Increase in the total number of accounts to be administered for police station A&A.</p> <p><u>Clients</u></p> <p>None.</p> <p><u>Scottish Government</u></p> <p>Increased cost to the Legal Aid Fund of the total value of contributions – currently £18,000 per year. If there are significant shifts in the behaviour of clients and solicitors, this could rise to between £200,000 and £650,000 per year.</p>
----------	---	--

Declaration and publication

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:

Date:

Paul Wheelhouse
Minister for Community Safety and Legal Affairs

Scottish Government Contact point:

Rhona Brown
Access to Justice Team
Civil Law and Legal System Division
Scottish Government
GW, St Andrew's House
Edinburgh
EH1 3DG

E-mail: rhona.brown@scot.gov