

Final Business and Regulatory Impact Assessment

Title of Proposal

The Legal Aid (Scotland) Act 1986 Amendment Regulations 2016 and
The Civil Legal Aid (Scotland) (Miscellaneous Amendments) Regulations 2016

Purpose and intended effect

- **Background**

The Tribunals (Scotland) Act 2014 (the 2014 Act) created the First-tier Tribunal for Scotland (First-tier Tribunal) which will hear cases at first instance and the Upper Tribunal for Scotland (Upper Tribunal) which will mainly hear appeals – known collectively as the Scottish Tribunals. Tribunals will transfer into the Scottish Tribunals on a phased basis.

The private rented housing panel (prhp) and homeowner housing panel (hohp) and their relevant committees (prhc/hohc) are due to be the first tribunals to transfer into the Scottish Tribunals on 1 December 2016. These First tier Tribunals are not currently within scope for 'legal aid' and will continue to be outwith scope when they transfer to the Scottish Tribunals.

Other tribunals will transfer in over the next 6 years up to April 2022. In total, at present, 14 tribunals are due to transfer to the Scottish Tribunals.

The majority of tribunals that will transfer into the Scottish Tribunals currently have a mixture of appeal rights to either the Sheriff Court or the Court of Session.

Legal aid provision

Current legal aid provision makes civil legal aid available for appeals from a tribunal (with an appeal mechanism) to the Sheriff Court or the Court of Session, as both courts are included in Schedule 2 of the Legal Aid (Scotland) Act 1986 (the 1986 Act).

Provisions in the Civil Legal Aid (Scotland) Regulations 2002 ('the 2002 Regulations) set out how civil legal aid operates for courts mentioned in Schedule 2 of the 1986 Act, including when a separate grant of legal aid is required for proceedings and when it is appropriate to instruct counsel.

The fees that can be charged for civil legal aid work and how the fee system

operates (e.g. how to submit accounts and resolve disputes about chargeable fees) are set out in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ('the 1989 Regulations).

- **Objective**

- **The Legal Aid (Scotland) Act 1986 Amendment Regulations 2016**

- *(Affirmative Regulations making Legal Aid available in the Upper Tribunal)*

The policy objective of this instrument is to recognise the Upper Tribunal for Scotland for the purposes of legal aid by amending Schedule 2 of the 1986 Act. The amendments will include appeals to the Upper Tribunal, including an application for permission to appeal, to the list of proceedings for which civil legal aid is available.

These changes will retain access to civil legal aid for cases that are currently heard in the Sheriff Court and the Court of Session in time for the transfer-in of functions from the prhp/prhc and hohp/hohc on 1 December 2016

- **The Civil Legal Aid (Scotland) (Miscellaneous Amendments) Regulations 2016**

- *(Negative Regulations clarifying administrative arrangements and payment of fees to solicitors and counsel for legal aid work at the Upper Tribunal)*

This instrument will amend the 2002 and 1989 regulations to:

- Provide for the fees payable to solicitors and counsel in the Upper Tribunal;
- Provide for proceedings on appeal to the Upper Tribunal to be treated as distinct proceedings for the purposes of legal aid (requiring a separate grant of legal aid) and for proceedings initiated in the Court of Session and remitted to the Upper Tribunal not to be treated as distinct proceedings;
- Require the prior approval of the Scottish Legal Aid Board for the employment of counsel in proceedings before the Upper Tribunal; and
- Specify the auditor of the Court of Session as the relevant auditor in relation to legal aid accounts for work in the Upper Tribunal.

The regulations will also amend the 1989 regulations to specify the auditor of the Sheriff Appeal Court as the relevant auditor in relation to legal aid accounts relating to work in the Sheriff Appeal Court.

- **Rationale for Government intervention**

Without Government intervention, appellants will have no access to legal aid for appeals to the Upper Tribunal when the Scottish Tribunals become operational.

The policy aims of both sets of regulations are to ensure that legal aid is available for cases brought in the Upper Tribunal for Scotland and that

appropriate fees are available.

The legal aid system contributes to the 'Safer and Stronger' Strategic Objective. In particular, 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 enforce their own legal rights through the effective function of the courts.

Consultation

- **Within Government**

Policy colleagues within the Scottish Government with overall responsibility for the implementation of the 2014 Act have been closely involved in the preparation of these regulations. Additionally, as the first to be affected by the changes brought in by the 2014 Act, policy colleagues in Housing and the Minister for Housing and Welfare have signed off the approach and the regulations.

The Scottish Legal Aid Board (SLAB) is a non-departmental public body which administers legal aid in Scotland and is accountable to the Scottish Ministers. SLAB has been consulted in the development of these regulations.

- **Public Consultation**

These regulations directly affect solicitors and counsel providing legal aid services. Consultation was therefore carried out with legal aid solicitors and counsel.

Representing the Scottish Tribunals, the President of the Scottish Tribunals and the Lord President were also consulted.

As the first sector to see tribunal functions transfer to the Scottish Tribunals, housing stakeholders were consulted.

The Auditor of the Court of Session was also consulted.

More details of these groups are 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 civil legal aid issues is led by the civil legal aid team - a panel of solicitors who work in this field, either as a sole practitioner or a member of a firm. This team has been consulted in the development of these regulations.

The Faculty of Advocates ("the Faculty") is the proposed body of advocates in Scotland. The Faculty was consulted in the development of these regulations.

The following housing stakeholders were consulted: The Scottish Landlords Association (representing landlords), Chartered Institute of Housing

(representing housing professionals), Letting Agents and Scottish Lands and Estates (representing land owners).

Options

Option 1: Do Nothing

Without the affirmative regulations, the Upper Tribunal would not be named in the 1986 Act and there would therefore be no legal aid provision for appellants in the new tribunal structure. As appeals are on a point of law only, this would reduce access to justice for those wishing to appeal a decision of the First-tier Tribunal.

Without the negative regulations there would be no satisfactory and appropriate structure within which legal aid is available and administered for work at the Upper Tribunal by solicitors and counsel. There would be no provision for the prior approval of SLAB for the use of counsel in the Upper Tribunal.

Changes to the role of the Auditor would also not be made.

Option 2: Amend Legal Aid Regulations

Affirmative Regulations

Civil legal aid provision for appeals to the Upper Tribunal would be clearly specified. This would enable people to access legal aid for representation at the Upper Tribunal in the same way as they can currently do for an appeal to the relevant court.

Negative Regulations

By amending the 2002 and 1989 fees regulations, fees payable to solicitors and counsel and administrative arrangements for civil legal aid will be clearly specified for Upper Tribunal cases.

Sectors and groups affected

These regulations will largely impact on solicitors and counsel and on tribunal users.

Benefits

Option 1: Do Nothing

The main benefits of making no changes to the provision of legal aid (in the affirmative instrument) would be in costs from the Legal Aid Fund. Current costs for tribunal appeals are estimated at around £74,000 per year. With no provision made for legal aid in the Upper Tribunal, these costs would not be incurred.

Option 2: Amend Legal Aid Legislation with Regulations

Affirmative regulations

Laying the affirmative regulations to amend the 1986 Act will provide civil legal aid provision for appeals in the Upper Tribunal on a similar basis to the current

structure.

Making the changes to the 1986 Act will also ensure that ECHR obligations are met so that individuals can uphold their rights through access to legal representation should they require it.

Negative regulations

The fees regulations clearly specify civil legal aid provision for work in the Upper Tribunal. Fees available in the Upper Tribunal will be detailed fees that are currently chargeable by solicitors in a range of courts and tribunals including those listed at regulation 5(3) of Schedule 5 of the 1989 Civil Fee Regulations, the Court of Session, and Sheriff Court proceedings listed at Schedule 7. Detailed fees allow all work reasonably and actually done to be charged and paid for.

Clear and specific civil legal aid provision ease the administration of fee claims, both from the perspective of solicitors and counsel, and from that of SLAB, and reduce opportunities for extended dispute between solicitors or counsel and SLAB as to the fees chargeable.

The opportunity to seek SLAB's approval to employ counsel means that counsel is involved where the case merits it.

Estimates on financial costs and savings as a result of changes to the Tribunal structure are covered in more detail in the legal aid impact section. These are based on structural changes to the tribunal system rather than attributed to the legal aid provision. The range of potential costs or savings are entirely dependent on how the new Tribunal functions in practice and cannot be accurately predicted e.g. the extent of 'filtering' of appeals through the new review provisions available at the First-tier (covered in sections 43-45 of the 2014 Act). SLAB estimate that there may be a modest saving to the Legal Aid Fund of around £20,000 to £40,000 per year on the current costs of £74,000 per year for appeals to the court, once all jurisdictions are transferred into the Scottish Tribunals. This is as a result of the new review provisions that are available in the Scottish Tribunals structure (covered in sections 43-45 of the 2014 Act). However, as covered in the 'costs' section below, there may be a cost of up to £60,000 to the Legal Aid Fund if the appeals that are heard in the Upper Tribunal are generally more complex and time-consuming

Costs

Option 1: Do Nothing

The lack of legal aid provision would be a diminution in access to justice in the Scottish Tribunals. Tribunal users may choose to pursue an appeal without legal representation or may make the decision not to pursue an appeal at all.

If legal aid provision is made in the affirmative instrument but the fees provision in the negative instrument is not laid, there would be ambiguity about civil legal aid provision for the Upper Tribunal and no requirement for SLAB's prior approval

before employing counsel. This could result in an increase in the use of counsel and potential disputes with SLAB on the fees to be paid to solicitors and counsel in individual cases.

Option 2: Amend Legal Assistance Regulations

The costs associated with making civil legal aid available in the Upper Tribunal will depend on a variety of factors including the number of cases heard and their complexity. All projections on the impact of the changes to structure are based on knowledge of the current system and how it functions. As with the introduction of any new structure, it is unclear if cases will flow in the same way. This could impact on total numbers of cases as well as on the total cost of cases.

SLAB estimates on expenditure are based on an estimated case load once all tribunal functions are transferred over to the Scottish Tribunals. As these functions are being phased in gradually, the first years will not see the full level of savings or costs.

The number of appeals may be lower in the new structure than under the current structure with the introduction of the review function in the First-tier Tribunal (section 43). This provision will give the First-tier Tribunal the option, at its own instance or on the request of a party, to review certain decisions it has made, and thereby potentially obviate an appeal, for example to correct an administrative error or where it is in the interests of justice.

However, if appeals to the Upper Tribunal are generally more complex, and case costs exceed the average range, there could be an increase in expenditure from the Fund of around £60,000 per year.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the Law Society of Scotland, whose Legal Aid Teams engage with government on proposed changes to legislation on behalf of the legal profession. These teams comprise practising solicitors who are authorised to provide publicly-funded civil legal assistance.

The profession includes solicitors employed in firms, partners and sole practitioners. The majority of providers affected by these proposals are likely to be small providers (both small and micro sized businesses) due to the dominance of small legal services providers in the civil legal aid market. In SLAB's 2010 survey of legal aid solicitors, partners were asked how many solicitors their firm 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.

The Lord President and the President of the Scottish Tribunals and the then President of the Scottish Tax Tribunals were content with the proposals in the affirmative regulations. The prhp/hohp President made a drafting point on the negative fees regulations.

The Law Society commented on the proposed draft affirmative regulations which were shared with them stating that they welcomed the fact legal aid would be available in the Upper Tribunal. They did not comment on the negative regulations providing for the fees available for solicitors and counsel.

The Faculty of Advocates welcomed the extension of civil legal aid to appeals to the Upper Tribunal. The Faculty did not provide comments on the negative fees regulations.

Shelter Scotland welcomed the extension of civil legal aid to appeals to the Upper Tribunal.

There was no comment from the Auditor of the Court of Session.

Competition Assessment

In our view, having applied the Competition and Markets Authority competition filter, the proposal will not impact on competition within the civil legal aid market. These Regulations do not directly or indirectly limit the number or range of suppliers, limit the ability of supplies to compete, or reduce suppliers' incentives to compete vigorously.

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 System.

Legal Aid Impact Test

The impact on the Legal Aid Fund will depend on the type and number of cases heard in the new Upper Tribunal and the way in which business flows through the new system. This could result in a modest saving of around £20,000 to £40,000 per year. However, these benefits may not be realised if appeals proceed to the Upper Tribunal, rather than being filtered out via review provisions in the 2014 Act (at sections 43-45).

If cases are generally more complex, there would instead be an additional cost to the Legal Aid Fund of perhaps around £60,000 per year.

These estimates on expenditure are based on an estimated case load once all tribunal functions are transferred over to the Scottish Tribunals. As these functions are being phased in gradually, the first years will not see the full level of savings or costs.

Enforcement, sanctions and monitoring

The amendments made to the provision of publicly-funded civil legal assistance do not 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

Both sets of Regulations will come into force on 1 December 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 regulations be made as set out in Option 2. This will allow legal aid provision to be in place for the implementation of the 2014 Act.

- **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>Scottish Ministers Potential saving to Legal Aid Fund of around £74,000 per year.</p> <p>Scottish Legal Aid Board None.</p> <p>Solicitors and counsel There is a possibility that without legal aid funding being available, solicitors may access more private work. (Although it is thought to be more likely that appellants will appear unrepresented or will not pursue an appeal).</p> <p>Tribunal users None</p>	<p>Scottish Ministers Reputational risk at diminution of access to justice. Cost (financial and reputational) of any challenge to deny access to justice.</p> <p>Scottish Legal Aid Board None.</p> <p>Solicitors and counsel It is assumed solicitors are less likely to be instructed for appeals if there is no legal aid provision in the new structure.</p> <p>Tribunal users There would be a diminution in access to justice for tribunal users wishing to pursue an appeal. They may have to pay for representation privately or appear unrepresented. This may breach their rights under ECHR.</p>

	<p>Tribunal system None</p>	<p>Tribunal system If the lack of legal aid led to more unrepresented cases, the new system may find appeal proceedings more challenging if the appellant has difficulty engaging with the process.</p>
2	<p>Scottish Ministers Potential modest savings of around £20,000 to £40,000.</p> <p>Scottish Legal Aid Board None.</p> <p>Solicitors and counsel There may be a wider range of users eligible to apply for legal aid under the new structure as a result of these regulations (although total numbers may be reduced by the review function in the First-tier Tribunal). This may bring in different legal practitioners with expertise in areas not previously eligible for civil legal aid.</p> <p>Tribunal users There may be a wider range of users eligible to apply for legal aid for an appeal under the new structure as a result of these regulations.</p> <p>Tribunal system The new system will have clear legal aid provision in place in time for the first transfer of functions for appeals.</p>	<p>Scottish Government Risk of additional spend of approximately £60,000 from the Legal Aid Fund if cases are more complex.</p> <p>Scottish Legal Aid Board None.</p> <p>Solicitors and counsel There will be no additional costs to solicitors and counsel as a result of these regulations (although the pattern of work under the new structure may change as a result of the changes brought in by the 2014 Act).</p> <p>Tribunal users There will be no additional costs to users as a result of these regulations.</p> <p>Tribunal system There will be no additional costs to as a result of these regulations.</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:**

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