

Business and Regulatory Impact Assessment

February 2024

Final

Business and Regulatory Impact Assessment

Title of Proposal

The Legal Aid (Miscellaneous Amendment) (Scotland) Regulations 2024

Purpose and intended effect

Background and Objectives

Counsel Travel/Subsistence Fees

Following discussion with the Scottish Legal Aid Board (SLAB) and the Faculty of Advocates, existing regulations provide that counsel who must travel beyond the Central belt to appear in cases may claim an accommodation allowance of £113.56. It has become apparent that in some instances, such as peak holiday times, this is insufficient for covering the costs of the hotel room.

The SSI will amend existing provision to ensure that counsel can be reimbursed for duly incurred expenses of this kind.

Counsel Written Submission Fees

There is currently no separate fee provided to counsel for the preparation of written submissions where requested by the court. It is simply subsumed into the Preliminary Hearing fee and does not adequately cover the amount of time and work that goes into preparing these. This SSI will amend the relevant fee tables in existing fees regulations to allow for a fee of £350 for Junior Counsel and £500 for Senior Counsel (80% at Sheriff Court level) to be payable for criminal cases only where a written submission has been requested by the court *ex proprio motu*.

Children (Care and Justice) (Scotland) Bill

The Children (Care and Justice) (Scotland) Bill includes provisions that are intended to ensure that 16 and 17 year olds will not be sent to Young Offender's Institutions in the future. Current planning is that this will take effect from 2024.

In order to achieve this, it is likely that there will be an increased use of a type of measure which can be required following a children's hearing known as a Movement Restriction Condition (MRC).

Legal aid is currently automatically available for children where a pre-hearing panel or children's hearing consider that it might be necessary to impose other types of measures – a Compulsory Supervision Order (CSO) that will also include a Secure Accommodation Authorization (SAA) – but is not automatically available where a CSO is considered alongside an MRC (in the absence of a SAA).

This SSI will amend existing legislation to ensure that automatic legal aid is available where a pre-hearing panel or children's hearing consider the imposition of a CSO with an MRC.

Legislative amendments

- The Civil Legal Aid (Scotland) (Fees) Regulations 1989
- Criminal Legal Aid (Scotland) (Fees) Regulations 1989

Minor corrections are needed to the above instruments in relation to counsel written submission fees and counsel travel and subsistence fees.

- Legal Aid (Scotland) Act 1986

Additional provision is required in the 1986 Act to make children's legal aid automatically available for children where a pre-hearing panel or children's hearing consider that it might be necessary to impose a Compulsory Supervision Order alongside an Movement Restriction Condition (in the absence of a Secure Accommodation Authorization).

Rationale for Government intervention

Existing regulations provide that counsel who must travel beyond the Central belt to appear in cases may claim an accommodation allowance of £113.56. It has become apparent that in some instances, such as peak holiday times, this is insufficient for covering the costs of the hotel room.

There is currently no separate fee provided to counsel for the preparation of written submissions where requested by the court. It is simply subsumed into the Preliminary Hearing fee and does not adequately cover the amount of time and work that goes into preparing these. This SSI will amend the relevant fee tables in existing fees regulations to allow for a fee of £350 for Junior Counsel and £500 for Senior Counsel (80% at Sheriff Court level) to be payable for criminal cases only where a written submission has been requested by the court *ex proprio motu*.

Without the additional provision in relation to children's legal aid to be included in this SSI, legal aid will not be automatically provided to children at pre-hearing panels or children's hearings while they consider whether to make a CSO with MRC in relation to a child, leading to a potential lack of access to justice through proper legal representation for affected individuals.

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 the Scottish Government. SLAB have been consulted in the development of these draft Regulations.

Public Consultation

In respect of the provisions regarding counsel travel and subsistence fee and written submission fees, no public consultation was carried out due to the technical nature of the proposed regulations.

As noted, the provisions in relation children's legal aid relate to the changes to the children's hearings system implemented by the Children (Care and Justice) (Scotland) Bill. Full consultation was carried out as part of the development of that Bill, and as making legal aid automatically available for children where a pre-hearing panel or children's hearing consider that it might be necessary to impose a CSO alongside an MRC is not considered to be controversial it was not considered necessary to consult further.

Business

There has been consultation with the Faculty of Advocates (the FoA) and the Scottish Legal Aid Board (SLAB) in developing these regulations.

Options

Option 1: Do Nothing

Without additional provision to ensure proper reimbursement of counsel accommodation and subsistence expenses there is a risk that High Court trials held beyond the central belt could be effected. This would impact on access to justice for victims and witnesses as well as court time.

Written submissions requested by the court are rare and tend to be in cases which are particularly complex or technical. Doing nothing would mean that current levels of remuneration would not reflect the work involved.

Without the additional provision in relation to children's legal aid to be included in this SSI, legal aid will not be automatically provided to children at pre-hearing panels or children's hearings while they consider whether to make a CSO with MRC in relation to a child, leading to a potential lack of access to justice through proper legal representation for affected individuals.

Option 2: Bring forward Regulations

Legislate for amended provisions, as noted above.

Benefits

Option 1: Do Nothing

The current arrangements for legal aid will remain in place. There are no benefits to this option.

Option 2: Bring forward Regulations

Without additional provision to ensure proper reimbursement of counsel accommodation and subsistence expenses there is a risk that High Court trials held beyond the central belt could be effected. This would impact on access to justice for victims and witnesses as well as court time.

Counsel will be adequately remunerated for providing written submissions in complex or technical cases where requested by the court .

With the additional provision to make children's legal aid automatically provided to children at pre-hearing panels or children's hearings while they consider whether to make a CSO with MRC in relation to a child, there will be an increase in access to justice through proper legal representation for children in these circumstances.

Costs

Option 1: Do Nothing

No costs are associated with this option.

Option 2: Bring forward Regulations

There will be an impact on the Legal Aid Fund as a result of these regulations (see 'Legal Aid Impact Test' below).

Scottish Firms Impact Test

It has been assessed that there is likely to be minimal impact on firms or sole practitioners as a result of these amendments.

Competition Assessment

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

Consumer Assessment

These regulations will not have an impact on consumers.

Test run of business forms

All legal aid applications are currently submitted online through SLAB's Legal Aid Online. Guidance and application updates will be incorporated ahead of commencement.

Digital Impact Test

These regulations will not have a digital impact.

Legal Aid Impact Test

Additional costs to the Scottish Legal Aid Fund:

SLAB has estimated that increasing the accommodation allowance will increase costs to the legal aid fund by not more than £25,000 per annum. It is expected however that current limits are such that the additional allowance will be rarely needed.

In terms of written submission fees, SLAB have estimated that this will cost will not exceed £10,000 per annum.

Finally, in respect of legal aid being made automatically available for pre-hearing panels or children's hearings where the imposition of a CSO with a MRC is considered, it is estimated that the number of these cases will be very low so the impact to the legal aid fund is likely to be negligible.

Enforcement, sanctions and monitoring

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

Implementation and delivery plan

The SSI is due to come into force on 30 April 2024.

Post-implementation review

The Scottish Legal Aid Board will monitor changes and reports impacts to the Scottish Government.

Summary and recommendation

It is recommended that the amendments to the current legal aid regulations in Scotland are implemented (**Option 2**).

Declaration and publication

Sign-off for Final BRIAs:

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: Siobhian Brown

Minister for Victims and Community Safety

Date: 14/02/2024

Scottish Government contact point:

Katie Case

Legal Aid Policy Officer

CLLS: Access to Justice Unit



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The Scottish Government

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