



T: 0300 244 4000
E: scottish.ministers@gov.scot

Margaret Mitchell MSP
Convener
Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

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Dear Margaret,

Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016 (SSI 2016/290)

At the Committee's session on Tuesday 1 November, the Convenor sought further clarification on the financial impact of the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2016, which make provision for solicitors legal aid fees in simple procedure cases.

While simple procedure is intended to enable people to represent themselves, some cases will require legal representation and so legal aid provision is being made available. The current provision for legal aid for summary cause cases (which will be replaced by simple procedure) is poorly regarded by the legal profession causing few solicitors in private practice who deliver legal aid to undertake this work.

The new fee arrangement is an improvement on the summary cause fees for legal aid work and this may therefore increase the number of cases being taken under legal aid. However, the level of increase cannot be assessed accurately as there is no data on how simple procedure cases will progress and we do not know what numbers may involve publicly funded legal assistance.

The figure outlined in the policy note accompanying the regulations (of a potential increase in expenditure of £93,000) is an estimate based on potential increases in the number of cases presenting for legal aid and a potential increase in the amount of fees per case. The following information sets out how the figure was arrived at.

The average cost of solicitors' fees in summary cause cases (where payment is made from the Legal Aid Fund) is approximately £350. In the year to 31 March 2015, there were approximately 615 cases in which payment was claimed from the Legal Aid Fund. This is a small fraction out of a total number of cases which currently fall under summary cause (approximately 20,000). Total current cost in terms of payment from the Fund is approximately £215,000.

The figure of £93,000 is based on an estimate that fees paid may increase by up to 30% and that the volume increase will be more limited – at a 10% increase. This will be partly managed by communications about the ease of self-representation in simple procedure cases.

We have estimated therefore that case numbers may rise from 615 to 676 cases per year and that the costs per case may rise from £350 to £455 as a result of the new provision. Overall, this could increase the spending on this case type from approximately £215,000 per year to approximately £308,000 per year. This is an estimate based on variables we cannot control - how the new procedure operates in practice and how legal aid solicitors respond to the new fees provision. The Scottish Legal Aid Board will however monitor expenditure as a result of these provisions.

The increase creates a potential additional cost to the Legal Aid Fund as a result of the Regulations of approximately £93,000 on current expenditure on summary cause cases. We would consider this potential increase as modest (against the current 2016/17 budget allocation for the Legal Aid Fund of £126.1million). The increase represents a 43% increase on the current costs to the Fund for **summary cause cases only** (not a 43% in the legal aid bill). The eligibility criteria for civil legal aid remain fair and transparent. They consider the means of the applicant as well as the merits of the case. The eligibility criteria act to manage expenditure from the Fund and target spending only on those people and those cases that require it.

Without these Regulations, expenditure from the Legal Aid Fund will be more difficult to control as the payment of solicitors fees will rely on a “fall back” provision which is in place to cover procedures in court for which no specific provision is made. This applies a table of block fees - intended for ordinary cause - to simple procedure cases. The Board estimate that use of the ordinary cause block fees could increase costs up to £431,000, driven by an increase in the fees available in each case (up to 100%) and an increase in the volume of cases (up to 50%). The use of this table would not be a good fit for simple procedure cases and thus would make ambiguous and inconsistent fees provision. This would likely lead to an increase in disputes over accounts between solicitors and the Scottish Legal Aid Board – creating an additional administrative burden for both.

On the rationale for the use of detailed fees over block fees, in general, block fees are used in the case of well-established processes where the work pattern is predictable and relatively stable. With the introduction of an entirely new procedure, we considered it fairer for solicitors to be able to charge on a detailed basis to reflect the work actually done. The use of detailed fees also allows information to be gathered on the structure of a ‘typical’ case which is required for the creation of a block fee. We anticipate that over time, once practice is settled, we may be able to move to a block fee structure, if appropriate.

*Yours sincerely,
Annabelle*

ANNABELLE EWING