

## **Justice Committee**

### **Legal Aid and Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/78)**

#### **Written submission from the Law Society of Scotland**

##### **Introduction**

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Legal Aid Committee has considered The Legal Aid and Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2019 (the Regulations) which were laid before the Scottish Parliament on 1 March 2019 and are due to come into force on 26 April 2019. We welcome the opportunity to consider these Regulations which are due to be scrutinised by the Justice Committee on 19 March 2019.

##### **General**

The purpose of the Regulations is to increase the fees and outlays for legal aid and advice and assistance by 3%.<sup>1</sup> This implements the Scottish Government's commitment in November 2018 to bring in a 3% increase to all legal aid work with effect from April 2019.

##### **Background**

The Scottish Government set up an Independent Review into Legal Aid in December 2017 when the then Legal Affairs Minister Annabelle Ewing stated that:

"I am proud we have a legal aid system that enforces people's rights and upholds social justice. Our guiding principle is to focus legal aid on those who need it most and we have maintained access to publicly funded legal aid in both civil and criminal cases. With legislation that dates back to the 1980s, change is needed and the time

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<sup>1</sup> Explanatory Notes to the Regulations

is right to conduct a comprehensive review of legal aid. This is about ensuring we have a flexible and progressive system that is sustainable and cost effective”<sup>2</sup>

*Rethinking Legal Aid, An Independent Strategic Review* (the Review)<sup>3</sup> was published in February 2018. We supported a number of its recommendations to maintain the scope of legal aid, simplify the system and reinvest any savings to ensure access to justice for members of the public.

One of the further recommendations was for an independent evidence-based pay review with a commitment to regular reviews to be set up to address longstanding issues over the payment of fees to the legal profession.

It is essential that fair and sustainable fees to be in place for hard-working solicitors providing access to justice through legal aid work.

The announcement of the 3% fee increase was part of the Scottish Government’s response to the Review in November 2018.<sup>4</sup> The response also acknowledged a need to work together with the legal profession to agree an evidence-based process for setting fees for legal aid and what kinds of evidence could be used for that purpose.

The 3% fee increase represents a much-needed increase in fees for the legal profession. It recognises that our members provide support and representation for some of the most vulnerable in society by providing access to justice and meeting the challenges in the current legal aid system.

We would also urge the Scottish Government to consider providing for the fees payable to child welfare reporters and curators ad litem to increase in line with the legal aid fees. Both of these roles play a critical part in the efficient operation of the justice system, and often feature in legally aided cases.

### **Independent evidence-based fee review**

We acknowledge the good faith demonstrated by the 3% increase, but stress that it must be an interim measure. A 3% increase is not sufficient to address years of pressure on legal aid fees, which have failed to keep pace with inflation or with changes to practice. The legal profession has faced rising levels of unpaid

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<sup>2</sup> Scottish Government, *Independent review of legal aid*, (press release, 1 February 2017) available online at <https://news.gov.scot/news/independent-review-of-legal-aid>

<sup>3</sup> Martyn Evans, *Rethinking Legal Aid – An Independent Strategic Review*, (February 2018) available online at <https://www2.gov.scot/Resource/0053/00532544.pdf>

<sup>4</sup> Scottish Government, *Response to the Independent Review of Legal Aid in Scotland*, (November 2018) available online at <https://www.gov.scot/publications/scottish-government-response-independent-review-legal-aid-scotland/>

administration and bureaucracy and increasing complexity of cases and court procedure. The current legal aid system, including the fees, is no longer sustainable.

A new evidence-based system for review of fees must be established as soon as possible. Its first step needs to address the chronic underfunding of legal aid to establish the fees on a proper footing. Thereafter the review mechanisms should provide for an effective and efficient basis on which fee reviews can take place. A proper mechanism for review of fees will assist everyone as the process will then be transparent, fair, and measured.

We welcome the establishment of the Panel that has been recently set up to advise the Scottish Government on an evidence-based approach to reviewing legal aid fees. We look forward to working as part of that Panel on these important issues.

## **The Regulations**

Part of the longer-term plan for legal aid involves simplification of the legislation on which the fees and outlay structure is based. In the Regulations, the fact that a percentage increase can be implemented across all legal aid fees is a useful step forward; it should permit a starting point for future changes in fees and their structure given that the tables of fees, both civil and criminal, should now be located in one set of regulations. The Regulations amend the regulations set out in:

- the Civil Legal Aid (Scotland) (Fees) Regulations 1989
- the Criminal Legal Aid (Scotland) (Fees) Regulations 1989
- the Legal Aid in Contempt of Court Proceedings (Scotland) (Fees) Regulations 1992
- the Advice and Assistance (Scotland) Regulations 1996
- the Criminal Legal Aid Fixed Payments (Scotland) Regulations 1999

From our scrutiny of the regulations, we will raise a number of technical observations with Scottish Government officials. These are contained for reference in Appendix A. These relate, in the main, to minor typographical and transcription errors.

However, as part of ongoing legal aid simplification work, the Regulations offer an opportunity for increased transparency of the fee structure and the removal of some of the complexities in the process.

The Regulations are the place where reference can be made to the current fees for all interested parties that includes the public, the profession, the Scottish Legal Aid Board and the Scottish Government. Reference to the legal aid fee rates when required should be easy. We have queried if there are other opportunities to simply further. The set of regulations listed above have been heavily amended over time, and this has led to challenges in ensuring that all interested parties are able to easily identify the current rates. This is a particular issue as up to date, amended versions of regulations are often not available from free public sources. The Scottish Legal Aid Board does have a legislation handbook, but the handbook should not be relied upon as a fully up to date legislative resource.

The Regulations reflect efforts being made to take on board other changes that have taken place since the regulations were passed. An example of this is the removal of the reference to the stipendiary courts in Glasgow that no longer exist. These amendments are sensible. However, in the interests of transparency, it would be helpful for details of all changes being made to be provided.

### **Implementation of the 3% fee increase – timing**

The Regulations are due to come into force on 26 April 2019. There are transitional arrangements with regard to ongoing work as at that date that are set out in section 2 of the Regulations.

The 3% fee increase has been long awaited. In November 2018, the Scottish Government announcement indicated that the increase would take place from April. We expressed our disappointment that the increase would not be implemented immediately and are further disappointed to see that the increase will not be in place until the end of April. We understand that regulations should not normally be given retrospective effect. However, there is authority for legal aid fee increases to be backdated.

The Criminal legal Aid (Scotland) (Fees) Amendment Regulations 2006 gave effect to an increase in legal aid rates paid to solicitors for undertaking solemn work. Advocacy work was increased by 8% and a 12% increase was implemented for all other categories of work. These regulations came into force on 16 November 2006, and the increase was backdated to include all work done on or after 1 December 2005. These measures reflected the then Minister's wishes to ensure fair remuneration for work necessarily undertaken while ensuring value for tax payers' money.

### **Photocopying**

The 3% increase was to apply across all fees and outlays.

The Regulations provide for payment of photocopying in prescribed circumstances.

We note that these rates have not been increased. We assume that this is on account of the minimal effect given the small values such as 1, 5, and 8p allocated to photocopying. This would therefore not result in an increase of a whole pence and rounding up to a whole pence would create a more significant increase than intended.

We accept that, for the purposes of this specific fee increase, it may not be reasonable to include the photocopying rates. However, all fees and outlays, including photocopying, should be included in the scope of the wider review of fees. Court practice in Scotland remains a paper-heavy system, and photocopying can add up to a significant cumulative outlay. The position of the photocopying fees should be expressly stated in terms of the Scottish Government's specific policy intention.

## **The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (1989 Regulations) - limits on fees claimed**

Regulation 6 of the 1989 Regulations refers to the Duty Solicitor fees. The 3% fee increase has been made to the sessional and additional fee for the duty solicitors in the sheriff and JP courts. The sessional and additional fees are each subject to a maximum total fee of £140<sup>5</sup> £93<sup>6</sup> and £150<sup>7</sup> respectively. These limits have not themselves been increased. There seems no basis on which the maximum fees should not be increased by 3%, in line with the increases to the individual fees. We would request these prescribed limits are increased.

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<sup>5</sup> 1989 Regulations, Regulation 6 (1) (a)

<sup>6</sup> 1989 Regulations, Regulation 6(1) (b)

<sup>7</sup> 1989 Regulations, Regulation 6(2)

## Appendix: Technical observations

Number	Regulation	Comments
1.	Preamble Section 33(3) of the 1986 Act	Should reference be made to the specific section i.e. 33(3) (b)?
2.	Schedule 1	The second table has not been included in these regulations. As the second table only relates to cases commenced prior to 1994, it may be that it is no longer relevant. Clarification would be appreciated.
3.	Schedule 3	The heading – Part IV – Executry Business has been excluded. In paragraph 2, the word ‘petition’ is missing after the word ‘prepare’. Paragraph 3, “Fees for other work shall be chargeable according to Schedule 3” has been excluded. The second table has not been included in these regulations. As the second table only relates to cases commenced prior to 1994, it may be that it is no longer relevant. Clarification would be appreciated.
4.	Schedule 6 Table B Part 2 – Senior Counsel	Paragraph 7 text has been excluded, should read – “...travel is undertaken in addition to any of the above fees”
5.	Schedule 7	Paragraph 5(b) wording has been changed, clarification would be appreciated.
6.	Schedule 8 Paragraph 4A	The fees have been placed in the wrong row, making it unclear that they apply to each of subparagraphs (a), (b) and (c).
7.	Schedule 12 Paragraphs 3 and 4	Moving the fees from the bottom of the list of grouped fees to the top may cause confusion.
8.	Schedule 15 Paragraph 1	The layout of the table of fees is complex and has changed from its current form in the Criminal Legal Aid (Fixed Payments)(Scotland) Regulations 1999.
9.	Schedule 16 Paragraph 1	In paragraph 1(a), the provision of a fee “(where criminal legal aid has been made available in the circumstances referred to in paragraphs 11 or 12 of Part 1 of Schedule 1 above, [£504.70])” has been excluded from both columns. The existing fee is £490.
10.	Civil Legal Aid (Scotland) (Fees) Regulations	Schedule 1, and chapters I and II of

	1989	Schedule 2 have been excluded. Clarification would be appreciated.
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