



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

10th Meeting, 2019 (Session 5)

Tuesday 19 March 2019

The Committee will meet at 11.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decision on taking business in private:** The Committee will decide whether to take item 5 in private.

2. **Subordinate legislation:** The Committee will take evidence on the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] from—

Ash Denham, Minister for Community Safety, Denise Swanson, Head of Access to Justice Unit, and Emma Stevenson, Directorate for Legal Services, Scottish Government.

3. **Subordinate legislation:** Ash Denham (Minister for Community Safety) to move—

S5M-16239—That the Justice Committee recommends that the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] be approved.

4. **Subordinate legislation:** The Committee will consider the following negative instruments—

Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/68);

Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75);

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

5. **Prosecution of Elder Abuse:** The Committee will consider a draft letter to the Scottish Government.

6. **Post-legislative scrutiny of the Police and Fire Reform (Scotland) Act 2012 (in private):** The Committee will continue its consideration of a draft report.

Stephen Imrie
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: justicecommittee@parliament.scot

The papers for this meeting are as follows—

Agenda items 2 and 3

Paper by the clerk - Draft SSI J/S5/19/10/1

Agenda item 4

Paper by the clerk - Negative SSIs J/S5/19/10/2

Agenda item 5

Private paper 1 - Prosecution of Elder Abuse J/S5/19/10/3 (P)

Private paper 2 - Prosecution of Elder Abuse J/S5/19/10/4 (P)

Agenda item 6

Private paper - Police and Fire Reform (Scotland) Act 2012 J/S5/19/10/5 (P)

Justice Committee

10th Meeting, 2019 (Session 5), Tuesday 19 March 2019

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

[Services of Lawyers and Lawyer's Practice \(EU Exit\) \(Scotland\) \(Amendment etc.\) Regulations 2019 \[draft\]](#)

Introduction

2. This instrument is made under the powers conferred on devolved authorities in the European Union (Withdrawal) Act 2018 to deal with deficiencies arising from EU withdrawal. A [protocol](#) has been agreed between the Scottish Government and Scottish Parliament which sets out the process for committees dealing with such instruments.

3. The protocol sets out three categories of SSIs – high, medium or low – to assist committees' prioritisation in terms of scrutiny. The Scottish Government has categorised the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 as medium.

4. Under the protocol, the lead committee has the opportunity, in advance of its policy scrutiny, to recommend to the Scottish Government that the parliamentary procedure attached to the instrument should be changed. This is known as "sifting". At its meeting on [26 February 2019](#), the Committee agreed that the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 had been laid under the appropriate procedure (affirmative procedure).

5. At its meeting on 19 March 2019, the Committee will consider the policy content of the instrument, in accordance with the usual procedure for affirmative instruments.

6. The instrument is being made to address deficiencies in retained EU law in relation to the services of lawyers and lawyer's practice if the UK leaves the EU on 29 March 2019 without a negotiated settlement (i.e. without a deal).

7. Further details on the purpose of the instrument can be found in the policy note attached at **Annexe A**.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

8. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 26 February 2019 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

9. The Justice Committee is required to report to the Parliament on the instrument by 31 March 2019. The Minister for Community Safety has lodged motion S5M-16239 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 19 March to answer any questions on the instrument and to move the motion for approval.

10. A written submission has been received from the Law Society of Scotland. This is attached at **Annexe B**.

11. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 31 March 2019. Thereafter, the Parliament will be invited to approve the instrument.

12. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.

ANNEXE A

Policy Note

**Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland)
(Amendment etc.) Regulations 2019 [draft]**

The above instrument was made in exercise of the powers conferred by paragraph 1(1) and (3) of schedule 2, and paragraph 21(b) of schedule 7, of the European Union (Withdrawal) Act 2018. The instrument is subject to affirmative procedure.

Summary Box

The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland, in line with a similar approach being taken in England, Wales and Northern Ireland. It will also provide for a range of rights for Swiss nationals, or others who are professionally recognised in Switzerland and who have Swiss legal qualifications to practice in Scotland under certain conditions.

Policy Objectives

The purpose of this instrument is to end the preferential practising rights of EU and EFTA lawyers in Scotland. These are provided for by a reciprocal European framework consisting of Directives and implementing legislation. The Directives will cease to apply in the UK on EU Exit and the reciprocity on which they depend will accordingly cease. This instrument will, therefore, revoke the implementing legislation, thereby realigning the position of EU and EFTA lawyers with other "third country" lawyers. This is subject to transitional provision, to give certain EU and EFTA lawyers the time to make the necessary changes to their practice to comply with the new regulatory framework.

The instrument will also make provision in relation to the UK-Swiss Withdrawal Agreement dated 20 December 2019. Swiss nationals who have legal qualifications recognised by a regulator before Exit Day will have their rights recognised in Scotland permanently; for qualified Swiss lawyers or Swiss lawyers who have not completed their qualifications to register up to 4 years after exit day; for Swiss lawyers and non-Swiss lawyers established or working for a Swiss law firm on a permanent basis, to continue providing services in the UK under contracts extant (live) on exit day for 90 days a year, for the length of the contract, up to 5 years (with scope to for extension by the Joint Committee).

Explanation of the law being amended by the regulations

In the UK, the European Communities (Services of Lawyers) Order 1978 implements the Lawyer's Services Council Directive (77/249/EEC) which allows EU, EFTA and Swiss lawyers to provide services in the UK on a temporary or "fly in fly out" basis, under their home state professional title.

The Lawyer's Establishment Directive (98/5/EC) (LED) was implemented in Scotland by the European Communities (Lawyer's Practice) (Scotland) Regulations 2000.

These Regulations allows lawyers who have registered with the relevant legal services regulator to practise activities that are normally reserved to solicitors and advocates (with some restrictions) under their home state professional title on a permanent basis. Such lawyers, termed “registered European lawyers” (REL) may establish joint practices with solicitors or other lawyers or practise as sole practitioners in much the same way as Scottish solicitors or advocates. They may also seek admission as solicitors or advocates following three years of practice in Scotland or may seek to gain admission as solicitors or advocates through a transfer examination.

Directive 2002/309EC implements the Swiss-EU Free Movement of Persons Agreement in EU law, extending the two relevant Directives – the Lawyers Services Directive and the Lawyers Establishment Directive to Swiss Nationals.

Reasons for and effect of the proposed change or changes on retained EU law

If the UK leaves the EU without a deal, the relevant EU Directives that allow for reciprocal practice and establishment arrangements will no longer apply to the UK. This instrument will realign EU and EFTA lawyers with lawyers qualified in third countries so that they are subject to the same regulatory framework. The provision of temporary services under the Lawyer’s Services Council Directive 1977 will cease in Scotland should the UK leave the EU without a deal. Registered European lawyers will also no longer be able to practise under their home state professional title or be able to seek admission as a solicitor or advocate under the ‘three years’ experience’ route in Scotland. However, they will be able to gain admission as a solicitor or advocate through alternative examination routes open to third country qualified lawyers.

The instrument provides transitional arrangements (up to 11 pm on 31 December 2020) so that relevant lawyers are given adequate time to make alternative arrangements to comply with the new regulatory framework, such as changing practice or transferring qualifications.

Should the UK leave the EU without reaching an agreement, the UK will still be subject to World Trade Organisation (WTO) General Agreement on Trade in Services (GATS) rules.

Specifically, ‘most favoured nation’ (MFN) rules prohibit preferential treatment of any signatory state above another (unless one of the permitted exceptions applies). This instrument ensures alignment with the UK’s WTO commitments, and ensures robust regulatory oversight of third country lawyer access to the provision of regulated legal services in Scotland.

EU and EFTA lawyers who have transferred to the Scottish legal profession through the three years’ practice route under the 2000 Regulations or who have taken any transfer examination will be able to retain their Scottish professional title.

The UK Government has negotiated a separation agreement with Switzerland, dealing with the bilateral issues arising from EU law ceasing to apply to the UK, when the UK leaves the EU. The agreement applies from the end of the transitional period as proposed in an Act of Parliament as from Exit Day or from Exit Day in the case that a UK-EU Withdrawal Agreement is not agreed.

This SSI reflects the provisions of the UK-Swiss Separation Agreement applicable to the provision of legal services in Scotland. The Agreement provides continuity for Swiss lawyers working in Scotland, allows Swiss lawyers to provide services on a temporary basis in Scotland for up to 90 days per calendar year under a contract extant on exit day for up to 5 years (subject to extension by Joint Committee), whilst providing certainty for Swiss lawyers intending to work in Scotland on a permanent basis in the future.

Statements required by European Union (Withdrawal) Act 2018

Statement that in their opinion Scottish Ministers consider that the regulations do no more than is appropriate

The Minister for Community Safety, Ash Denham, has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 does no more than is appropriate”. This is the case because instrument amends deficiencies arising from withdrawal from the EU. In the event of EU exit with no deal, the framework for reciprocal arrangements relating to the provision of legal services would no longer be in place. By revoking the 1978 Order and the 2000 Regulations, the instrument ensures compliance with World Trade Organisation rules. The instrument provides for a transition period that would mitigate consequences for those affected by these provisions and allow them reasonable time to take action to comply with the new regulatory framework.

Statement as to why the Scottish Ministers consider that there are good reasons for the regulations and that this is a reasonable course of action

The Minister for Community Safety, Ash Denham, has made the following statement “In my view there are good reasons for the provisions in this instrument, and I have concluded they are a reasonable course of action given that the reciprocal arrangements in respect of lawyers practice in the EU and EFTA (with the exception of Swiss-qualified lawyers) will no longer apply.

Statement as to whether the SSI amends, repeals or revokes any provision of equalities legislation, and, if it does, an explanation of that amendment, repeal or revocation

The Minister for Community Safety has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 does not amend, repeal or revoke a provision or provisions in the Equality Act 2006 or the Equality Act 2010 or subordinate legislation made under those Acts.

Statement that Scottish Ministers have, in preparing the regulations, had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010

The Minister for Community Safety, Ash Denham, has made the following statement “In my view the Services of Lawyers and Lawyer’s Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019 have had due regard to the need to eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Equality Act 2010.”

Additional information provided for EU Exit instruments in terms of the protocol agreed between the Scottish Government and the Scottish Parliament Statement that Scottish Ministers have, in preparing the regulations, had due regard to the guidance principles on the environment and animal welfare

This heading is not applicable.

Statement explaining the effect (if any) of the regulations on rights and duties relating to employment and health and safety and matters relating to consumer protection (so far as is within devolved competence)

This heading is not applicable

An indication of how the regulations should be categorised in relation to the significance of the change proposed.

Medium – Ministers have a limited policy choice but with more significant implications in so far as the instrument removes existing individual rights to practise and establish in Scotland.

Statement setting out the Scottish Ministers' reasons for their choice of procedure

We do not consider that this instrument is subject to the affirmative procedure for any of the reasons set out in paragraph 1(2) of schedule 7 of the European Union (Withdrawal) Act 2018. However, we believe that it should nonetheless be taken forward under that procedure for two reasons. First, the instrument removes existing individual rights to practise and establish in Scotland. The instrument primarily ensures compliance with international obligations. Secondly, in terms of ensuring consistency with precedent in relation to Parliamentary procedures, the 1978 Order itself was adopted by affirmative procedure. The 2000 Regulations were adopted by negative procedure. Further, the instrument makes amendments to primary legislation, affecting the operation of the Solicitors (Scotland) Act 1980.

Further information

Consultation

No formal consultation was carried out in relation to the Services of Lawyers and Lawyer's Practice (Amendment etc.) (EU Exit) (Scotland) Regulations 2019. However, we have engaged with relevant legal services regulatory bodies during the process of drafting this instrument.

Impact Assessments

Full impact assessments have not been prepared for this instrument. The instrument seeks to do no more than is necessary to realign EU and EFTA lawyers with lawyers qualified in third countries so that they are subject to the same regulatory framework, and to make separate arrangements for Swiss lawyers further to the UK Swiss Separation Agreement. Accordingly, there are no equality, children's or privacy impact

issues. The instrument does not alter Scottish Government's current environmental policies and priorities and, therefore the amendments do not have a significant impact on the environment.

Financial Effects

A [Business and Regulatory Impact Assessment](#) (BRIA) has been completed.

The impact of this policy on businesses providing legal services is negligible. The bodies regulating legal services in Scotland will require to make amendments to rules in the regulatory frameworks.

Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]

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.

The Society's Public Policy Committee welcomes the opportunity to consider and respond to the Inquiry by the Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019. The Committee has the following comments to put forward for consideration.

General comments

The Scottish legal tradition has always had a close relationship with the legal systems of Europe. From the earliest receptions of Feudal or Civil-Romano-Canonical Law and French law in the Medieval period to the significant influence of the Roman-Dutch law during the 17th and 18th centuries as part of the Enlightenment Scots Law has engaged with the law which applied across Europe. Lord President Cooper characterised Scots Law as "an original amalgam of Roman Law, Feudal Law and native customary law, systematised by resort to the law of nature and the Bible and illuminated by many flashes of ideal metaphysic."

We believe that although our relationship with the EU will change, nevertheless EU Law will continue to have an influence on our law. Furthermore, contact with the law of Member States is likely to develop as private international law, comparative law and public international law increase in importance. These legal influences combined with ties of family and commerce will ensure that contact between lawyers in Scotland and lawyers working in Member States will continue for the benefit of their clients.

We fully intend whatever the future relationship with the EU after exit to keep open, accessible yet robust routes to requalification for lawyers from any jurisdiction which allow them to practise within Scotland whilst also reassuring clients of their competence.

In the short term, we await confirmation of the legal position so we can be sure of the precise nature of requalification procedures should we find ourselves outside of the EU without a transitional agreement in place.

We will continue to work cooperatively with bars and law societies across the EU on matters of mutual interest.

The regulation of cross-border supply of legal services.

The existing regime to regulate the cross-border supply of legal services and the rules designed to facilitate the establishment of a lawyer in another Member State have been in force for a number of years.

There are three key pieces of EU legislation that affect the legal profession:

A. The Lawyers' Services Directive of 1977 (77/249) implemented by the European Communities (Services of Lawyers) Order 1978

This Directive governs the provision of services by an EU/EEA/Swiss lawyer in a member state other than the one in which he or she gained his or her title - known as the 'host state'. Its purpose is to facilitate the free movement of lawyers, but it does not deal with establishment or the recognition of qualifications. The directive provides that a lawyer offering services in another Member State - a 'migrant' lawyer - must do so under his or her home title. Migrant lawyers may undertake representational activities under the same conditions as local lawyers, save for any residency requirement or requirement to be a member of the host Bar.

However, they may be required to work in conjunction with a lawyer who practices before the Judicial Authority in question. For other activities the rules of professional conduct of the home state apply without prejudice to respect for the rules of the host state, notably confidentiality, advertising, conflicts of interest, relations with other lawyers and activities incompatible with the profession of law.

B. The Lawyers' Establishment Directive of 1998 (98/5) implemented by the European Community's (Lawyer's Practice) (Scotland) Regulations 2000.

This Directive entitles lawyers who are qualified in and a citizen of a Member State to practice on a permanent basis under their home title in another EU/EEA member state, or Switzerland. The practice of law permitted under the Directive includes not only the lawyers' home state law, community law and international law, but also the law of the Member State in which they are practising – the 'host' state.

However, this entitlement requires that a lawyer wishing to practice on a permanent basis registers with the relevant Bar or Law Society in that state and is subject to the same rules regarding discipline, insurance and professional conduct as domestic lawyers. Once registered, the European lawyer can apply to be admitted to the host state profession after three years without being required to pass the usual exams,

provided that he or she can provide evidence of effective and regular practice of the host state law over that period.

C. Recognition of Professional Qualifications Directive (2005/36) implemented by the European Communities (Recognition of Professional Qualifications) Regulations 2016.

Re-qualification as a full member of the host State legal profession is governed by this Directive. Article 10 of the Lawyers' Establishment Directive is essentially an exemption from the regime foreseen by the Recognition of Professional Qualifications Directive.

The basic rules are that a lawyer seeking to re-qualify in another EU/EEA member state or Switzerland must show that he or she has the professional qualifications required for the taking up or pursuit of the profession of lawyer in one Member State and is in good standing with his or her home Bar.

The Member State where the lawyer is seeking to re-qualify may require the lawyer to either:

- (a) complete an adaptation period (a period of supervised practice) not exceeding three years; or
- (b) take an aptitude test to assess the ability of the applicant to practice as a lawyer of the host member state (the test only covers the essential knowledge needed to exercise the profession in the host Member State and it must take account of the fact that the applicant is a qualified professional in the Member State of origin).

NB: The draft regulations currently before the committee do not affect the Recognition of Professional Qualifications Directive as they only relate to the Services and Establishment Directives. The Recognition of Professional Qualifications Regulations are covered by the [Recognition of Professional Qualifications \(Amendment etc.\) \(EU Exit\) Regulations 2018](#).

In addition, Directive 2006/123/EC on Services in the Internal Market which regulates the provision of services in the European Union also touches on the legal profession is implemented by the Provision of Services Regulations 2009 as amended by the Provision of Services (Amendment etc.) (EU Exit) Regulations 2018.

1. Leaving the EU with an approved Withdrawal Agreement

The Withdrawal Agreement dated 23 November 2018 contains provision to allow reciprocal arrangements to continue through the transition period under article 167 until 31 December 2020. This would allow EEA lawyers to continue to register as RELs in the UK.

2. Leaving the EU without an approved Withdrawal Agreement

The UK Government has issued a technical notice on providing services including those of a qualified professional if there's no Withdrawal Agreement in place. This states that should the UK leave the EU without a deal the reciprocal arrangements that currently exist under various EU directives would no longer apply. This would result in the end of the REL scheme. From exit day, EEA lawyers will be treated in the same way as other lawyers qualified in any other third country jurisdiction. EEA lawyers would therefore be subject to the rules that currently apply to lawyers from third countries if they wished to practice in Scotland.

3. Services of Lawyers and Lawyer's Practice (EU Exit) (Scotland) (Amendment etc.) Regulations 2019

The Regulations change the law which we have explained earlier in this note relating to the provision of legal services and the practice of law by European lawyers and Swiss lawyers in Scotland. They are designed to deal with the situation where there is no Withdrawal Agreement in place on exit day. In those circumstances the treaties will cease to apply, any reciprocal arrangements will disapply and the European Union (Withdrawal) Act 2018 will come into effect. This means that the European Communities Act 1972 which provides the legal basis for the existing legislation will be repealed and the category of retained EU law will apply.

Part 2 revokes the European Communities (Services of Lawyers) Order 1978 as it applies to Scotland and the European Communities (Lawyer's Practice) (Scotland) Regulations 2000.

Part 3 and the schedule make consequential amendments, including to the Solicitors (Scotland) Act 1980 specifically about REL's, and transitional and saving provisions.

The Regulations are made under paragraphs 1(1) and (3) of schedule 2, and paragraph 21(b) of schedule 7, of the European Union (Withdrawal) Act 2018 to address failures of retained EU law to operate effectively and other deficiencies arising from the UK's exit from the EU.

Analogous legislation relating to England and Wales has already been enacted:

The Services of Lawyers and Lawyer's Practice (Revocation etc.) (EU Exit) Regulations 2019 and the Services of Lawyers and Lawyer's Practice (Amendment) (EU Exit) Regulations 2019.

Michael P Clancy
Director Law Reform
Law Society of Scotland
13 March 2019

Justice Committee**10th Meeting, 2019 (Session 5), Tuesday 19 March 2019****Subordinate legislation****Note by the clerk****Purpose**

1. This paper invites the Committee to consider the following negative instruments:
 - [Police Pensions \(Miscellaneous Amendments\) \(Scotland\) Regulations 2019 \(SSI 2019/68\)](#) [*see page 3*];
 - [Act of Sederunt \(Taxation of Judicial Expenses Rules\) 2019 \(SSI 2019/75\)](#) [*see page 6*];
 - [Legal Aid and Advice and Assistance \(Scotland\) \(Miscellaneous Amendments\) Regulations 2019 \(SSI 2019/78\)](#) [*see page 8*];
2. If the Committee agrees to report to the Parliament on any of the instruments it is required to do so by 1 April 2019 on SSI 2019/68 and by 22 April 2019 on SSI 2019/75 and SSI 2019/78.

Procedure for negative instruments

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
4. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
5. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
6. Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *a/ways* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

9. **The Committee is invited to consider the instruments.**

**POLICE PENSIONS (MISCELLANEOUS AMENDMENTS) (SCOTLAND)
REGULATIONS 2019 (SSI 2019/68)**

Introduction

10. The instrument is made under section 1(1) of the Police Pensions Act 1976, and section 1(1) and (2)(d) and paragraph 4 (b) of schedule 2 of the Public Service Pensions Act 2013. The Regulations provide for an increase in the current employer contribution rate from 23.9% to 30.2%% applicable from 1 April 2019. The instrument also makes various adjustments to the suite of regulations covering police pensions and injury awards.

11. Further details on the purpose of the instrument can be found in the policy note (see below).

12. The instrument comes into force on 1 April 2019.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

13. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 5 March 2019 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

14. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 1 April 2019.

Policy Note: Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/68)

Employer contributions are set by regular valuations of the relevant pension scheme. The latest valuation of the police pensions schemes, applying HM Treasury Directions, provides for an increase in the current employer contribution rate from 23.9% to 30.2%% applicable from 1 April 2019. This instrument provides for this change and also makes various adjustments to the suite of regulations covering police pensions and injury awards.

Policy Objectives

The purpose of this instrument is to update and amend:

- the Police Pensions Regulations 1987 and the Police Pensions (Additional Voluntary Contributions) Regulations 1991 (to the extent both have effect in Scotland),
- the Police Pensions (Scotland) Regulations 2007,
- the Police (Injury Benefit) (Scotland) Regulations 2007, and
- the Police Pension Scheme (Scotland) Regulations 2015.

Following the completion of the scheme valuation (see the box above), the instrument introduces a revised employer contribution rate from 1 April 2019 and extends existing member contribution rates to 31 March 2020.

A new regulation is inserted into the Police Pension Scheme (Scotland) Regulations 2015 to ensure that no assignment or charge can be placed on any pension benefit payable under the scheme, consistent with the 1987 and 2007 regulations.

Changes have been introduced to the pension schemes to allow officers with Annual Allowance tax charges to request the scheme manager pays the charge on their behalf, with an appropriate debit being applied to the pension when it comes into payment.

Amendments to the Injury Benefit regulations reflect the introduction of the 2015 Scheme and ensure the continued interaction of the injury benefit and pension scheme provisions.

The amendments to the Police Pensions (Additional Voluntary Contributions) Regulations are minor for administration purposes.

Consultation

To comply with the requirements of the Police Pensions Act 1976 and the Public Service Pensions Act 2013, a draft of the instrument was issued for consultation with the Police Negotiating Board and persons likely to be affected by changes to the regulations, between 18 December 2018 and 28 January 2019. A copy of the consultation document is available on the Scottish Public Pensions Agency's website www.sppa.gov.uk.

The Scottish Police Pension Scheme Advisory Board provides advice to Scottish Ministers on the desirability of changes to the scheme, and was consulted by Scottish Ministers on the approach to be taken to rectify the employer cost cap breach in the 2016 scheme valuation. Following changes to HM Treasury Directions in February 2019, the cost cap part of that scheme valuation has been put on hold, subject to the outcome of litigation concerning the age-based transitional protections provided to members when were introduced in 2015. Details of this deferment were set out in a written statement issued by the Chief Secretary to the Treasury on 30 January 2019.

However, the overall increase to employer contributions determined by the scheme valuation is being implemented by amendments made in this instrument. The increase in employer contributions is due principally to a change in the Superannuation Contributions Adjusted for Past Experience ("SCAPE") discount rate used in unfunded public service pension scheme valuations. The UK Government confirmed in Budget 2018 a reduction to the SCAPE rate of CPI + 2.8% to CPI +2.4% for use by the scheme actuary in the 2016 valuations ("CPI" means consumer prices index). The valuation assesses what level of contribution income the scheme needs now in order to meet future liabilities. Where the SCAPE rate has been reduced, a higher the level of funding is needed now to meet those future liabilities and that results in an increase to employer contributions.

This approach to employer contributions has been taken across the public sector pension schemes covered by the Public Service Pensions Act 2013. In announcing the change to the SCAPE rate in Budget 2018 HM Treasury confirmed it would provide funding towards the additional costs for 2019/20. The extent of that funding remains under discussion and is expected to be finalised in the UK Government's Spring Statement 2019.

Impact Assessments

This instrument does not impose any additional costs or reduce existing costs for business or the Third Sector organisations. The impact of the change to the employer contribution rate will not be known until the level of HM Treasury funding is clear. At that point, SPPA will consider if a Business and Regulatory Impact Assessment is necessary.

Financial Effects

This instrument implements an increase in scheme employer contributions from the current rate of 23.9% to 30.2%, which will apply from 1 April 2019. The estimated cost of that increase is £40m for 2019/20 and it is expected HM Treasury will confirm the level of additional funding it will provide towards those costs in the Spring Statement 2019.

ACT OF SEDERUNT (TAXATION OF JUDICIAL EXPENSES RULES) 2019 (SSI 2019/75)

Introduction

15. The instrument is made under section 1(2) of the Litigants in Person (Costs and Expenses) Act 1975(b), sections 103(1), 104(1), 105(1) and 106(1) of the Courts Reform (Scotland) Act 2014(c). The Act of Sederunt makes provision regarding—

- the taxation of accounts of expenses as between party and party in civil proceedings;
- the reimbursement of losses and expenses incurred by witnesses cited to attend court in such proceedings;
- the fees payable to shorthand writers and transcribers in relation to such proceedings; and
- the sums chargeable against a debtor in respect of the work of a solicitor in instructing steps in diligence.

16. Further details on the purpose of the instrument can be found in the policy note (see below).

17. The instrument comes into force on 29 April 2019.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

18. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 12 March 2019 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

19. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 22 April 2019.

Policy Note: Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75)

Background

The Act of Sederunt provides new rules and tables of fees governing the taxation of judicial expenses in the civil courts.

On 19 November 2018, the Scottish Civil Justice Council considered and approved the draft rules developed by its Costs and Funding Committee and agreed that they be submitted to the Court of Session for consideration.

Policy Objectives

The existing rules and tables regulating the taxation of expenses and associated applications are spread across various statutory instruments. The Council was of the view that the current provisions should be replaced by a single stand-alone set of rules and associated tables of fees. The Council considered that these tables should provide for unit-based charging. That would allow for ‘across the board’ amendments to the tables of fees to be made quickly and efficiently. Accordingly these rules substantially revise the existing tables of fees to provide for unit-based charging.

They also re-cast existing provisions, and implement a number of the recommendations in chapters 2 to 4 of Sheriff Principal Taylor's *Report of the Review of Expenses and Funding of Civil Litigation in Scotland*¹, for example in relation to sanction for counsel, and certification of skilled persons. Further details are provided in the Explanatory Note to the Act of Sederunt.

In developing the rules and table of fees, efforts have been made to achieve greater consistency of practice between courts and to modernise and simplify the language where possible.

¹ Report of the Review of Expenses and Funding of Civil Litigation in Scotland, 2013

LEGAL AID AND ADVICE AND ASSISTANCE (SCOTLAND) (MISCELLANEOUS AMENDMENTS) REGULATIONS 2019 (SSI 2019/78)

Introduction

20. The instrument is made under section 33(2), (3) and (3A), of the Legal Aid (Scotland) Act 1986(a). The Regulations amend the following regulations made under the Legal Aid (Scotland) Act 1986:

- 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

21. The amendments increase fees and outlays for legal aid and advice and assistance by 3%.

22. Further details on the purpose of the instrument can be found in the policy note (see below).

23. The instrument comes into force on 26 April 2019.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

24. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 12 March 2019 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

25. Written submissions have been received from the Edinburgh Bar Association and the Law Society of Scotland. These are attached at **Annexe A**.

26. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 22 April 2019.

Policy Note: Legal Aid and Advice and Assistance (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/78)

Policy Objectives

This SSI will apply a 3% increase to fees and outlays paid to solicitors and counsel for providing work under publicly funded legal assistance (legal aid and legal advice and assistance).

Regulation 2 provides—

- that the amendments made by regulations 3, 4, 5, and 6(2), (3) and (5) apply only to fees for work done or outlays incurred on or after the 26 April 2019. Where work for a fee prescribed in schedules 1 to 11 is conducted over more than one date, the work is deemed to have been done on the day on which the work comes to an end.

- that the amendments made by regulations 6(4) and 7 apply only in relation to a case where the criminal legal assistance concerned is granted or made available on or after 26 April 2019.

Consultation

No formal consultation has been conducted on these regulations but the Minister for Community Safety has discussed the 3% increase with representatives of the Faculty of Advocates and the Law Society of Scotland. These regulations form part of the Scottish Government response to the independent review of legal aid in Scotland.

Impact Assessments

The following impact assessments were considered:

- Child Rights & Wellbeing Impact Assessment – no CRWIA required.
- Equality Impact Assessment – no negative impacts on groups with protected characteristics.
- Stage 1 completed.
- Business & Regulatory Impact Assessment – additional spend to the legal aid fund identified and a [partial BRIA](#) has been completed.
- Fairer Scotland Duty – not required.
- Strategic Environmental Assessment – not required.
- Data Protection Impact assessment – not required.

Financial Effects

Based on current levels of business we can anticipate the following additional spend to the Legal Aid Fund in Scotland – an additional £2.3m in 2019/20, £3.1m in 2020/21 and £3.2m thereafter. The delay in full spend is due to the length of time it takes some civil cases to conclude.

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

Written submission from Edinburgh Bar Association

Proposal:

- (i) Reverse temporary cuts made in 2011;
- (ii) Apply the money pledged in November 2018 along with the underspend in the money allocated for police station work to the summary Legal Aid block fee;
- (iii) Introduce the block fee system of payment for solemn Legal Aid and at the same time abolish the need for time recording

(i) Reversal of Temporary Cuts

This is well rehearsed. The fixed fees for summary Legal Aid would return to £515 and £315 and the ABWOR block in the Sheriff Court would also be £515. In solemn Legal Aid, the hourly advocacy and non-advocacy rates would return to £76 and £50.68 respectively. Travel would be paid at the full non-advocacy rate.

A full fee would be payable in respect of all summary cases. Each deferred sentence in summary Legal Aid (beyond the second sentencing diet) would attract a fee of £50.

(ii) Application of already allocated monies to summary Legal Aid block payment

The Government has pledged an increase in all Legal Aid fees of 3% from April, 2019. Legal Aid spend on criminal solicitors in the last financial year for which we have confirmed figures was £57,008,000. 3% of that figure is £1,710,000; £1.7 million if rounded down.

Of the money allocated to police station advice for the current financial year, £2.1 million has not been spent. Therefore, allocated/pledged monies aggregate £3.8 million.

If that figure is divided by the total number of summary Legal Aid grants in 2017/18 (43,819), it gives a figure of £86.72. If that is rounded down to £85 and allocated to the summary Legal Aid block fee, it gives payments of **£600** in relation to Sheriff Court cases and **£400** for the Justice of the Peace. ABWOR cases would be unaffected.

(iii) Introduction of block fees for solemn Legal Aid and abolition of time-recording

The need for time-recording in the event that block fees are introduced is rendered completely redundant as the only itemised payment would apply to advocacy time which is monitored and recorded independently.

The block fee system which has been proposed was devised specifically with the intention of cost neutrality based on rates applicable in 2016/17. As that post-dates the reductions of 2011, there would require to be some enhancement to those and, therefore, for the purpose of costings, the average case cost from 2010/11 requires to be used.

Cost of Proposals:(a) Solemn Legal Aid

The average case cost in 2010/11 immediately prior to the temporary reductions was £3,507. It is now £3,047. There has therefore been an average reduction of £460 per case.

If that is multiplied by the number of grants of solemn Legal Aid in the last financial year (9,772), that gives a cost of £4,495,120.

(b) Summary Legal Aid

The average case cost in 2010/11 was £653. It is now £595. There has therefore been a reduction of £58 per case.

If that is multiplied by the number of grants of summary Legal Aid in the last financial year (43,819), that equates to a cost of £2,541,502.

(c) ABWOR

The average case cost in 2010/11 was £499. It is now £458. There has therefore been a reduction of £41 per case.

If that is multiplied by the number of grants made in the last financial year (26,660), that equates to a cost of £1,093,060.

The total cost of these proposals is therefore:

$$£4,495,120 + £2,541,502 + £1,093,060 = £8,129,682$$

To that figure the already allocated £3.8 million then needs to be applied to give a cost of £11,929,682.

From that figure requires to be deducted the total amount rounded down (£10,000 + £75,369 (£1.72 x 43,819)) - £85,369.

That gives a total cost for the full proposals of **£11,844,313**.

This also represents the maximum possible cost because the number of SLAB grants of summary Legal Aid in the last financial year (43,819) includes grants of Legal Aid where a case has been reduced from solemn procedure. Such cases are paid on an itemised basis and would not therefore attract the increased block fee.

To put the total cost of these proposals in perspective, since the temporary cuts were made in 2011, the reduction in spend on criminal solicitors has been **£24,026,000**.

The cost of these proposals is therefore less than half the money which has been saved.

Evidence from the Edinburgh Bar Association

Legal Aid provision in Scotland is collapsing. For half a century following its inception, the system of publicly funded legal assistance played a central role in the development of Scots law and increased respect in which the Scottish system of justice was held internationally. Since 2006 however, the number of solicitors registered to provide criminal Legal Aid has reduced nationally by a quarter. In the geographical arc from East Lothian to Dumfries, there is now not a single solicitor registered to provide either civil or criminal Legal Aid who is under the age of 30. In Edinburgh, whilst the number of criminal courts has increased by a quarter since 2011, in that same period more than one third of criminal solicitors have departed, with two thirds of that figure being women.

It is no accident that the system of Legal Aid now finds itself in this predicament. Since 1992, rates of pay for Legal Aid lawyers have reduced annually in real terms. Whilst it is true that successive governments have refused to adequately fund the system of legal assistance, the problems which the system of justice now faces have become especially acute over the past decade. During that period, whilst Parliament has continued to legislate to introduce new offences, rights and evidential procedures, the Scottish Government - in collaboration with the Scottish Legal Aid Board - has overseen massive cuts in the Legal Aid budget, all in the face of consistent warnings from the legal profession as to the damage which those reductions were inflicting.

For criminal lawyers, the cuts which the Scottish Government made in 2011 have proved to be especially crippling. They were introduced with an intention that they would reduce Legal Aid expenditure by 7% and with a promise that they were temporary and would in due course be reversed. In fact, expenditure on criminal Legal Aid solicitors has reduced by more than 31% since then. In January of this year, the Edinburgh Bar Association wrote to the Minister for Community Safety and suggested to her that the time had now come for the pledge to reverse those cuts to be honoured. In the letter which we received in response, no mention was made of any intention to do so. The failure by the Scottish Government to honour the commitment which was made to Legal Aid solicitors in 2011 has ensured that trust in the Government amongst solicitors has never been lower.

To further contextualise the magnitude of the 31% cut in Legal Aid expenditure since 2011, the cost of the Public Defence Solicitors Office (PDSO) has increased by 49% in the same period. That fact cannot be reconciled with any claim that the reduction in Legal Aid expenditure corresponds to a reduction in reported crime. However, even if that well-rehearsed statement is adhered to, what the latest Legal Aid Annual Report reveals is that the 27 registered PDSO solicitors each now cost the taxpayer £83,481 a year, whereas the cost of the 1,125 in private practice is £50,584. Of course, whilst public sector lawyers work according to set hours, those in private practice have no such luxury.

The Edinburgh Bar Association has developed simple (but fully costed) proposals for criminal Legal Aid fee reform. They are attached to this consultation response. By no means would these proposals save the system of criminal Legal Aid on their own. However, they might serve to stem the continuing haemorrhage of solicitors from this critical public service. Were they enacted, they would cost the taxpayer less than half

the amount which has been saved since the “temporary” cuts were made in 2011 and which have proved to be so debilitating.

The Regulations now before Parliament seek to give effect to the 3% increase in all Legal Aid fees which was announced by the Minister in November. They must be viewed as at least some acknowledgement of the state in which the Government has allowed the Legal Aid system to slip. It would be churlish of us to invite the Justice Committee not to pass them. However, it is the view of the Edinburgh Bar Association that they will do nothing to stem the departure of Legal Aid solicitors, nothing to alleviate the hardships faced by those who remain, and nothing to restore the legal profession’s trust in the Government which has been shattered in recent years.

Edinburgh Bar Association
13 March 2019

**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%.² 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 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"³

² Explanatory Notes to the Regulations

³ 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>

Rethinking Legal Aid, An Independent Strategic Review (the Review)⁴ 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 2018.⁵ 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 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.

⁴ Martyn Evans, *Rethinking Legal Aid – An Independent Strategic Review*, (February 2018) available online at <https://www2.gov.scot/Resource/0053/00532544.pdf>

⁵ 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/>

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 £140⁶ £93⁷ and £150⁸ 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.

⁶ 1989 Regulations, Regulation 6 (1) (a)

⁷ 1989 Regulations, Regulation 6(1) (b)

⁸ 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 1989	Schedule 1, and chapters I and II of Schedule 2 have been excluded. Clarification would be appreciated.