



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

9th Meeting, 2021 (Session 5)

Tuesday 2 March 2021

The Committee will meet at 10.30 am in a virtual meeting and be broadcast on www.scottishparliament.tv.

1. **Public petitions:** The Committee will consider the following petitions—

PE1370 by Dr Jim Swire, Professor Robert Black QC, Robert Forrester, Father Patrick Keegans and Iain McKie on Justice for Megrahi;

PE1458 by Peter Cherbi on a register of interests for members of Scotland's judiciary.

2. **Subordinate legislation:** The Committee will consider the following negative instrument—

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/56)

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The papers for this meeting are as follows—

Agenda item 1

Note by the Clerk

J/S5/21/9/1

Agenda item 2

Note by the Clerk

J/S5/21/9/2

Letter from the Law Society of Scotland

J/S5/21/9/3

Justice Committee

9th Meeting, 2021 (Session 5), Tuesday 2 March 2021

Consideration of petitions

Background

1. This paper updates Members on the public petitions currently before the Committee as we approach the end of the parliamentary session.
2. On 26 November 2020, the Public Petitions Committee wrote to all committees requesting an update on any outstanding petitions and reminding committees of the options at the end of a session:
3. If a referred petition is not closed before the end of a parliamentary session, it will revert to the next session of Parliament for consideration. The Public Petitions Committee has asked what what petitions, if any, should revert to the next session of Parliament and for an outline of why any petition should remain open and what specific action the Committee believes should be taken when Session 6 commences.

PE 1458 – Register of Judicial Interests

4. [PE1458](#) is a petition by Peter Cherbi calling on the Scottish Parliament to urge the Scottish Government to create a Register of Pecuniary Interests of Judges Bill or amend present legislation to require all members of the Judiciary in Scotland to submit their interests and hospitality received to a publicly available Register of Interests.
5. This petition was first lodged in December 2012. The petition was referred to the Justice Committee on 31 May 2018. A chronology of consideration is available [here](#).
6. The petition has been considered on a number of occasions (the last occasion being 10 March 2020), including seeking evidence from the Scottish Government and the judiciary. Both of these organisations have indicated that they do not support the case for a Register ([Scottish Government letter](#) and [letter from Lord Carloway](#))

PE 1370 – Independent Inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988

7. [PE1370](#) is a petition by Dr Jim Swire, Professor Robert Black QC, Mr Robert Forrester, Father Patrick Keegans and Mr Iain McKie on behalf of Justice for Megrahi on opening an independent inquiry into the 2001 Kamp van Zeist conviction of Abdelbaset Ali Mohamed al-Megrahi for the bombing of Pan Am flight 103 in December 1988.

8. This petition was first lodged in November 2010 and was referred to the Justice Committee in June 2011. A chronology of consideration is available [here](#)
9. At its meetings on 27 September 2016, 17 January 2017, 2 May 2017 , 5 September 2017 and 19 December 2017 the Committee agreed to keep the petition open pending the completion of Operation Sandwood (now completed).
10. At its meeting on 27 March 2018, the Committee decided to keep the petition open, and write to Police Scotland and the Scottish Criminal Cases Review Commission requesting information on issues raised during discussion of the petition; and ask the Scottish Parliament Information Centre to provide a briefing on the petition.
11. Following the meeting on 27 March 2018, the Scottish Criminal Cases Review Commission (SCCRC) announced a review into the subject matter broadly covered by the petition in order to decide whether it would be appropriate to refer the matter for a fresh appeal. The Committee intended, therefore, to keep the petition open pending the outcome of that review but agreed it would not be considering the petition until the review is complete.
12. In March 2020, the Scottish Criminal Cases Review Commission completed its review and referred the case of the late Abdelbaset Ali Mohamed al-Megrahi to the High Court of Justiciary for determination. In January 2021, the Court of Appeal rejected both grounds of appeal from Megrahi's family. According to media reports, the family are lodging an appeal to the UK Supreme Court.

Action

13. **Members are asked to consider the petitions remaining before the Committee in light of the request from the Public Petitions Committee.**

**Clerks to the Committee
February 2021**

Justice Committee

9th Meeting, 2021 (Session 5), Tuesday 2 March 2021

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:
 - [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) Regulations 2021](#) [see page 3];
2. If the Committee agrees to report to the Parliament on the instrument it is required to do so by **8 March 2021**.

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the instrument at its meetings on 9 February 2021. The Committee agreed that it did not need to draw the instrument to the attention of the Parliament on any grounds within its remit.

Procedure for negative instruments

4. 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).
5. 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.
6. 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.
7. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

8. 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.
9. 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

10. 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>

11. **The Committee is invited to consider the instrument.**

POLICY NOTE**The Legal Aid and Advice and Assistance (Miscellaneous Amendments)
(Scotland) Regulations 2021****SSI 2021/56**

The above instrument was made in exercise of the powers conferred by sections 33(2), (3)(a), (b), (c) and (f), and (3A), and 36(1), (2)(a), (d) and (e) of the Legal Aid (Scotland) Act 1986 and all other powers enabling Scottish Ministers to do so. The instrument is subject to negative procedure.

Purpose of the instrument

To apply a 5% 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) and make provision for additional or increased payments be available to counsel in prescribed circumstances.

Policy Objective

These Regulations have been brought forward in order to increase all legal aid and advice and assistance fees and outlays payable to solicitors and counsel by 5%. Amendments are made to the following Scottish Statutory Instruments by regulations 3 – 7 and schedules 1 – 17 of these Regulations in order to effect this increase –

- the Civil Legal Aid (Scotland) (Fees) Regulations 1989
- the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 (“the Criminal 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

These Regulations also makes amendments to provide for exceptional payments to counsel in certain circumstances. The Government is of the view that the Criminal Regulations 1989 do not contain sufficient provision to allow the Scottish Legal Aid Board (SLAB) to make additional payments to counsel where, in exceptionally lengthy or complex cases, they require to undertake additional work in order to prepare a note of appeal or an opinion on the merits of an appeal. Regulation 4(4) of these Regulations inserts a new regulation into the Criminal Regulations 1989 giving SLAB discretionary powers to authorise an additional payment where certain conditions are met.

The Regulations also make amendments to the Criminal Regulations 1989 to support continuity of counsel. Regulation 4(9) amends the relevant Notes in the fee regulations to provide that where junior counsel has been leading on a case, with

other junior counsel being led by them, they will continue to be entitled to the fee at that rate even where the counsel being led by them becomes unavailable and they continue alone (with the court's approval).

Consultation

No formal consultation has been conducted on these regulations but the Cabinet Secretary for Justice has discussed the 5% increase with representatives of the Law Society of Scotland, the Aberdeen Bar Association, the Edinburgh Bar Association, the Glasgow Bar Association and the Scottish Legal Aid Board.

Impact Assessments

We anticipate that these regulations will have no significant impact on child rights and wellbeing, data protection, the environment, island communities or socio-economic disadvantage and accordingly we have not prepared the following impact assessments:

- Data Protection Impact Assessment
- Strategic Environmental Impact Assessment
- Island Communities Impact Assessment
- Fairer Scotland Duty Assessment

- Consideration was given to completing an Equality Impact Assessment and a Child Rights and Wellbeing Impact Assessment, and it was determined no negative impacts on groups with protected characteristics identified

We have undertaken the following impact assessments:

- [Business & Regulatory Impact Assessment](#) – additional spend to the legal aid fund identified and a BRIA has been completed.
- Equality Impact Assessment. Stage 1 completed; no negative impacts on groups with protected characteristics identified.

Financial Effects

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

For financial impact in respect of the uplift to all fees, and based on current levels of business, we can anticipate the following additional spend to the Legal Aid Fund in Scotland over the next three years: an additional £2.8m in 2021/22, £4.7m in 2022/23 and £4.8 thereafter. The delay in full spend is due to the length of time it takes some civil cases to conclude.

Minimal costs can be expected in respect of the discretionary powers to provide additional payment for 'preparation of the note of appeal and counsel's opinion on the merits of the appeal in exceptional circumstances' as this is likely to be utilised rarely, whereas savings from 'junior counsel acting alone' are expected to cancel out the cost of the aforementioned, as this measure is likely to realise savings to the legal aid fund. On balance there is likely to be a minimal saving to the fund, the

value of which is non-quantifiable as it is difficult to predict the number of cases that will be applicable. It is not foreseen, however, that there will be any negative effect on the Scottish Legal Aid Fund as a result of these regulations. The impact of this policy on business is minimal, but is likely to be positive to the relevant stakeholders.

Scottish Government
Justice Directorate

January 2021

Justice Committee

9th Meeting, 2021 (Session 5), Tuesday 2 March 2021

SSI – Letter from the Law Society of Scotland

Background

1. This paper consists of a letter from the Law Society of Scotland (see Annex) in relation to the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2021.

Action

2. **Members are asked to take the correspondence into account during their deliberations.**

**Clerks to the Committee
February 2021**

Dear Convener,

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2021

We are writing to you regarding the above regulations before the Justice Committee, to provide additional information regarding legal aid through the current pandemic, which we hope will be helpful for the committee's scrutiny. We are aware that the Cabinet Secretary for Justice also wrote to you regarding these, in his letter of 3 February 2021.

We support these regulations, which will implement a 5% uplift to legal aid fees for civil, children's and criminal work. We see this increase as an important first step towards addressing the historic underfunding of the legal aid sector and the significant impact of the current pandemic on access to justice.

Every aspect of Scottish society has been affected by Covid-19. Legal aid practices have been particularly vulnerable, because of the restrictions around court proceedings, because of their size as SMEs or micro-businesses and because historic underfunding left them ill-equipped to face the economic shock of the current crisis. Prior to 2019, there had been no increase to most legal aid fees since 2008, and some since 1992. Additionally, many fees had been cut during the economic downturn. Between 2008 and 2019, inflation increased by 34% overall, based on the Consumer Price Index. That resulted in a real terms cut in legal aid fees over the same period of around 26%. Correspondingly, there has been a marked decline in the number of providers registered to provide legal aid: 16% fewer firms registered for civil legal aid and 26% fewer firms registered for criminal legal aid between 2010 and 2020.

The impact of Covid-19 on the legal aid sector has been severe. In the first two quarters of 2020, the number of criminal cases registered were 21% lower than the same period the previous year, and the number of cases disposed were 60% lower. Though there was some recovery as 2020 concluded, the most recent lockdown has again posed significant challenges for practitioners across Scotland.

These regulations are important in supporting the legal aid sector, and a further 5% increase has been agreed by the Scottish Government in twelve months. Two other elements of support have also been announced by Scottish Government. The first, a resilience fund of up to £9m to support firms affected by the significant reduction in court work through the pandemic, which opened for applications on 10 February 2020. We are monitoring the progress of this scheme, as it is crucial that there is straightforward and swift support to allow practitioners to continue providing access to justice. The second element is a traineeship fund of up to £1m, allowing for the part-funding of up to 40 trainees into legal aid practice, which we anticipate will open in March 2020. This scheme should assist in recruitment of the next generation of lawyers committed to legal aid. Recruitment into the sector has been challenging,

with many firms unable to afford the costs of training and many prospective trainees unsure about the longer term sustainability of the sector.

These support measures will assist legal aid firms through the ongoing crisis, though it is important they form part of wider reform to the provision of legal aid. One of the difficulties that contributed to the historic underfunding of the sector has been that there is no mechanism for periodic review of fees to ensure that these remain fit for purpose and take into account the rising costs of inflation over time. A legal aid fee review panel was established to consider these issues in 2018, but unfortunately did not conclude its work because of the current crisis. We hope that this work can be completed in order to place legal aid on a more sustainable footing in future.

We also support the simplification of legal aid. As you may see from the regulations before the Justice Committee, the current scheme is complex, with additional requirements introduced through regulations over considerable time since the Legal Aid (Scotland) Act 1986 was enacted. The letter from the Cabinet Secretary for Justice alludes to some fee reforms that were ultimately not progressed at this stage in face of opposition from practitioners. There are areas, such as the introduction of a section 76 fee to facilitate early resolution of solemn cases, that we have consistently supported. However, as the proposals for this fee would have seen reductions to fees in other areas, or more work included within the work covered by fixed fees, it was not possible to support these measures. We remain, however, willing to work with Scottish Government around a viable way forward.

Providing a vital service not just through the current crisis but also the economic downturn over the last decade that preceded it has been increasingly challenging for practitioners. Many have left the sector, morale has been low amongst those that remain and there has been widespread concern about the future sustainability of practice in this area. The measures introduced by the Scottish Government, including these regulations, are an important step to resolve these issues and we hope this information assists in the scrutiny of the current regulations.

Yours faithfully,

Ian Moir and Patricia Thom,
Conveners Legal Aid Committee