



Law Society  
of Scotland

# Legal Aid – fee regulations

1 March 2022



## Introduction

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### Key questions

Though there have been some changes to fees since 2019, several key challenges remain:

- Why is it that, years after the independent review of legal aid, there is still no periodic review of legal aid that, at the very least, takes inflation into account?
- Is the Scottish Government concerned by the declining numbers of solicitors undertaking legal aid work and, if so, what is the government's strategy for dealing with it?
- Does the Scottish Government share the growing concern that this reduction will limit access to justice, particularly in more rural areas of Scotland and if so what is its strategy for addressing this?
- Is the Scottish Government confident that there is currently sufficient capacity in the defence bar to address the backlog of cases which exist?
- How does the Scottish Government intend to address concerns around retention of defence agents, given the significant disparity between salaries available for legal aid firms and equivalent work in the public sector?

### Importance of legal aid

Legal aid is central to access to justice in Scotland, helping people in over 250,000 cases each year in difficult, life-changing situations. Whether facing criminal prosecution, family separation, discrimination, housing problems, debt or other issues, legal aid is available through a network of around 700 firms in towns and cities across Scotland. When the system works as intended, it ensures that access to justice is available to all, not only those with the means to pay legal fees.

The legal aid system however is badly in need of overhaul. It has become overly bureaucratic and complex to navigate - both for individuals seeking support and for the solicitors who provide this essential service. The governing legislation introduced back in 1986 pre-dates both the Scottish Parliament and the introduction of human rights legislation now central to many of these cases.

There is an urgent need to review payment for this work if solicitors are to be able to build business models around continuing provision of legal aid work. Before the recent minor uplifts, most fees had remained static for at least a decade and for some types of work they have not increased in absolute terms for a generation. This left firms unable to invest in the future or ill-equipped to meet the financial shock resulting from Covid-19.

Because of the complexity of the system and the challenges around funding, there has been a substantial reduction in the number of firms available to offer legal aid work. Between 2010 and 2020, the number of firms providing civil legal aid decreased by 16% and the number of criminal firms has decreased by 25%.

More concerningly, 7.5% fewer legal aid firms were paid for legal aid work in 2020-21 than in 2019-20, clearly indicating that the pace of that decline has been increased by the pandemic. Many firms and several Bar Associations have joined a boycott<sup>1</sup> of the court duty and police station duty schemes in response to the stagnation in legal aid rates.

Urgent action is needed to simplify the legal aid system and to place its funding on a sustainable footing, taking inflation into account in the setting of realistic fee levels in future. The Criminal Justice Committee itself called for “immediate action on fee rates” in its January 2022 report<sup>2</sup>.

The regulations presented to the Committee provide for a 5% uplift in rates, enacting a commitment made by the Cabinet Secretary in November 2020. They also amend duty fees and provide a new rate for attendance at a sitting on a court holiday or weekend.

These measures represent yet another real terms cut in legal aid rates and fall far below what is required. One of the key challenges facing the sector is the salary and conditions disparity between private legal aid firms and public sector organisations. Many new entrants to the legal profession and experienced practitioners are increasingly attracted by pay and conditions in the public sector which simply cannot be matched by firms who predominantly rely on legal aid fees.

The 5% uplift was insufficient to address this when first announced and there has been no recognition of the impact of inflation on this figure since. Even taking into account recent minor uplifts in fees, legal aid rates will be around 50% lower in real terms than when the Scottish Parliament was first convened in 1999. By comparison, over that time, rates for PDSO solicitors have quite rightly increased by well over 60%, commencement salaries for Police constables have increased by 64%. MSPs’ salaries are also set by taking into account inflation and the salaries of other legislators and have increased by 58.5%.

The regulations also introduce rates for attendance at sittings held on a court holiday or a weekend. We have previously stated that the profession opposes these sittings, but if they must take place fees should be at least double the standard rates to take account of the additional workload and antisocial hours required. There has been no consultation on this and Ministers will be aware that sittings on court holidays have been boycotted by many bar associations since their attempted introduction. The rates presented in these regulations are very unlikely to address this.

The Minister has regularly referred to the £20m in emergency funding provided to firms over the course of the pandemic, but this must be seen in light of the £32m reduction in legal aid grants over this period. Money has been removed from the system, not added, due to the demand-led nature of legal aid and the downturn in business over the pandemic. Meanwhile there has been significant investment in the prosecution, judiciary and courts system designed to address the lengthening backlog. Legal aid firms must also receive urgent investment if there are to be sufficient defence agents to address the backlog.

<sup>1</sup> <https://www.bbc.co.uk/news/uk-scotland-scotland-business-57082176>

<sup>2</sup> Scottish Parliament Criminal Justice Committee [SP Paper 75](#), 1<sup>st</sup> report 2022 (Session 6) line 365

The Government has this week made proposals for further regulations to be introduced later this year to reform solemn and summary criminal legal aid fees which we will consider further. We believe though that the level of funding proposed is again not sufficient to resolve the current crisis. The proposals amount to 7.5% of additional funding for these cases overall, but make changes to individual rates which may reduce payments, such as for sheriff court summary certificates with four deferred sentences. Other rates increased include enhanced rates for second and subsequent days of trial at the JP court, which are in practice very rare and so will have limited impact. Particularly given the high rate of inflation, even these subsequent regulations which will no doubt be before the committee later this year will do little to allay the fundamental challenges faced by the sector.

Our legal aid system is at breaking point and immediate investment is required if it is to continue to exist in any meaningful form in the years to come. The regulations before you do nothing to address this.

## Inflation and the impact on legal aid rates in real terms

Inflation is currently running at a level not seen for 30 years, putting increased strain on the value of fee income. The CPI increased by 5.4% in January 2022, the highest rate since the 7% recorded in January 1992.

Legal aid rates increased by 3% in 2019, 5% in 2021 and are due to increase a further 5% in 2022. When these rates were introduced, CPIH inflation was running at 2% (2019), 1.6% (2021)<sup>3</sup> and the Bank of England currently projects rates to increase to 7% by the time the 2022 regulations come into force<sup>4</sup>.

This follows an extended period where rates remained static and in some areas, such as the payment of travel expenses, were cut in 2011 in response to the global financial crisis.

Inflation has reduced fees in real terms, while the work required in these cases has increased in complexity. The impact of inflation on fees can be illustrated with key summary and solemn fees:

- The summary fixed fee was established in 1999, and set at £500; the fee regulations before the Scottish Parliament would increase this fee to £562.12, a 12.4% increase from the 1999 level; CPI inflation for the period has been 60.9%
- The advocacy fee for solemn legal aid was set at £19.00 per quarter hour in 2010, the stage of the last structural reform of solemn fees; the fee regulations before the Scottish Parliament would increase this fee to £20.79, a 9.3% increase from the 2010 level; CPI inflation for the period has been 28.7%

CPI and CPI-H inflation - 2012-2021

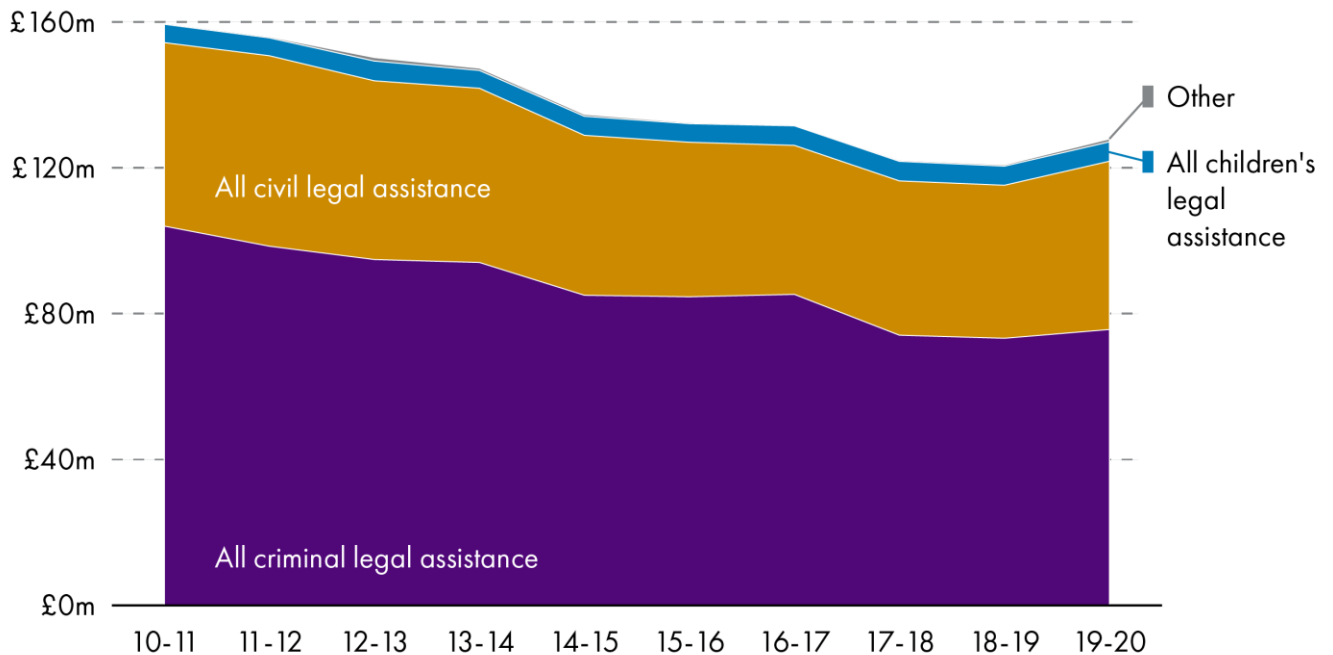


<sup>3</sup> <https://www.statista.com/statistics/310582/uk-cpih-rate/>

<sup>4</sup> <https://www.bankofengland.co.uk/knowledgebank/will-inflation-in-the-uk-keep-rising>

## SLAB data – expenditure on legal aid

SLAB's annual report<sup>5</sup> demonstrates the downward trend in legal aid expenditure:

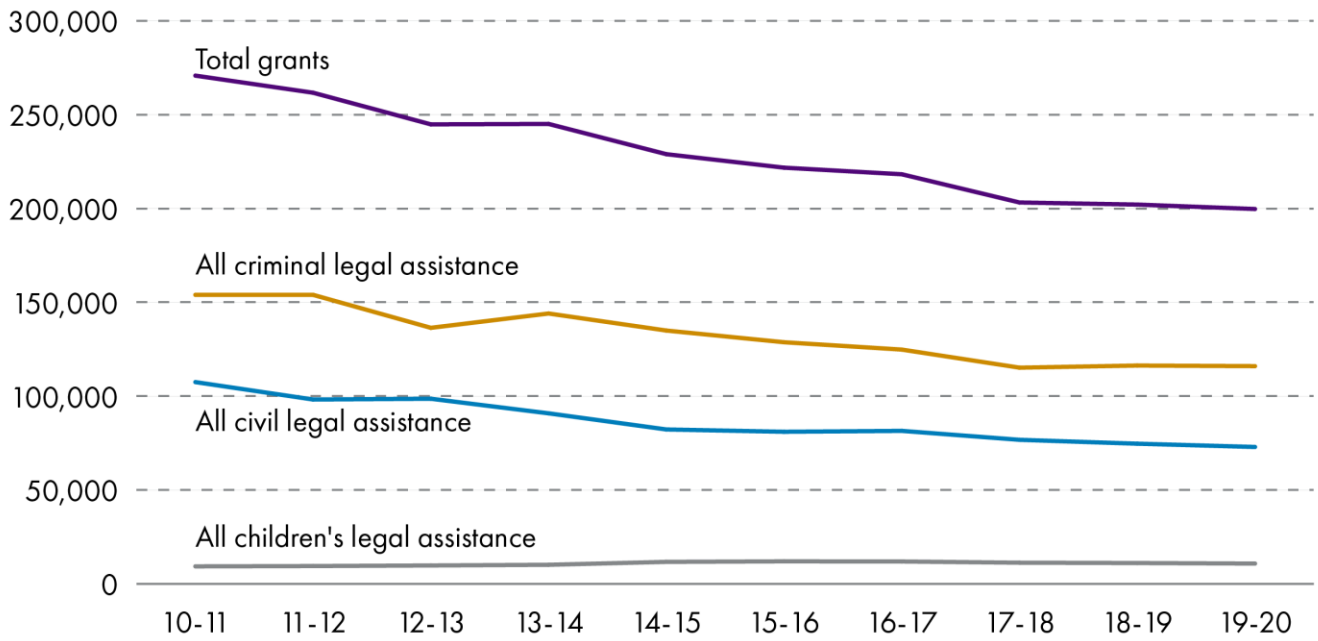


- The legal aid expenditure budget is £138m for the 2021-22 financial year, down from £160m in 2010-11
- For context, the legal aid budget in 2000-01 was £130.5m<sup>6</sup>, equivalent to £242.8m in 2021 prices
- This excludes SLAB's operating costs. The budget for this is £12.2m for the 2021-22 financial year. Operating costs have remained roughly stable at around £12m since 2010-11.

<sup>5</sup> <https://www.slab.org.uk/app/uploads/2020/11/SLAB-Annual-Report-2019-20-Appendix-1-Key-Statistics.pdf>

<sup>6</sup> <https://web.archive.org/web/20010116120800/http://www.slab.org.uk/console/index.htm>

The total number of grants also demonstrates a significant downward trend<sup>7</sup>:



<sup>7</sup> <https://www.slab.org.uk/app/uploads/2020/11/SLAB-Annual-Report-2019-20-Appendix-1-Key-Statistics.pdf>

## Legal aid – providers and expenditure

### Registered criminal legal aid providers

There is a requirement for firms and practitioners to register for criminal legal aid (and similarly for children’s legal aid, though only firms need to register for civil legal aid). At 7 June 2021, there were **425 firms and 1054 solicitors** registered to carry out this work. 269 of these firms are also registered for civil legal aid and 156 solely for criminal legal aid.

SLAB no longer includes details of registered firms and practitioners in its annual reports, though historic data from the stage that they did includes:

## CRIMINAL LEGAL AID - REGISTERED FIRMS AND SOLICITORS

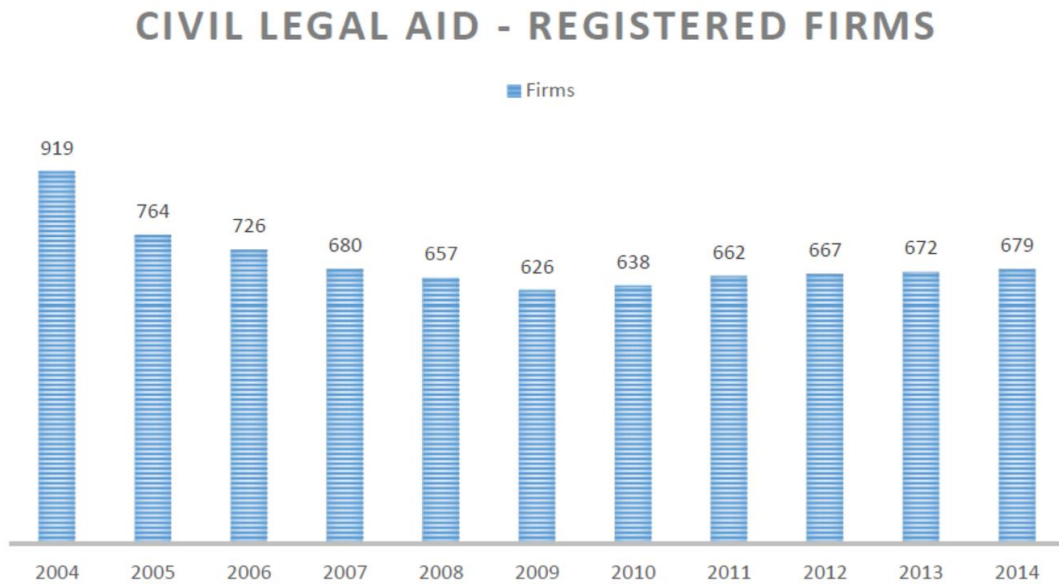


Comparing registrations currently with registrations in 2011, there has been a **decline in the last decade of 26% in the number of firms and 25% in the number of solicitors**. This reduction predated the **current pandemic**, with the number of firms reducing from 577 in 2013 to 491 in 2017. If the same trend were seen in the next decade, the number of practitioners would reduce from **425 firms and 1054 practitioners in 2021 to 314 firms and 790 solicitors by 2031**.



## Registered civil legal aid providers

At 27 January 2022, there were 553 firms registered for civil legal aid. Historic data for registered civil legal aid firms is:

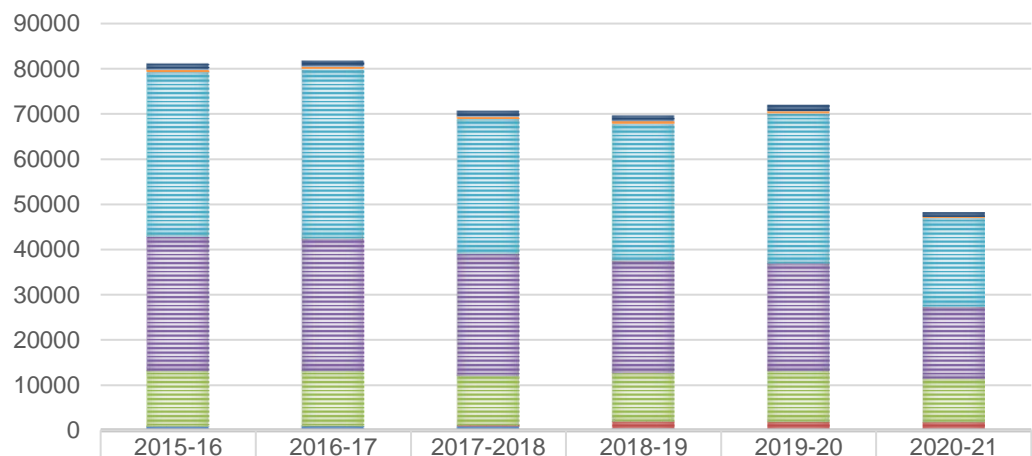


The number of registered civil legal aid firms has declined by 17% in the period from 2012 to 2022. If the same trend were seen over the next decade, the number of civil firms registered would reduce to 459.

## Criminal legal aid – expenditure by type

The expenditure on criminal legal aid is declining: **in the five year period to 2019-20, criminal legal aid expenditure reduced by 10%, from £84.6m to £75.9m**. By comparison, criminal legal aid expenditure was £98.1m in 2009-10, seeing a **26% decline in criminal legal aid expenditure over the decade to 2019-20**. The reduction in expenditure between 2019-20 and 2020-21 was severe, from £75.9m to £52m, a decline of 31% in a twelve month period, Not including the costs of duty, VIPER, PDSO, SCL and Glasgow Court Advisers, criminal legal aid expenditure over the last five years (£'000) is:

### CRIMINAL LEGAL AID EXPENDITURE - BY TYPE



	2015-16	2016-17	2017-2018	2018-19	2019-20	2020-21
Appeals	1348	1290	1217	1187	1319	990
Court Granted Legal Aid	517	544	524	530	528	222
Solemn Legal Aid	36337	37473	29818	30297	33102	19590
Summary Legal Aid	29738	29272	26947	24830	23802	15949
Criminal ABWOR	12271	12128	11024	10785	11262	9658
Criminal Justice Act - Advice and Assistance and ABWOR	0	0	172	1521	1577	1471
Advice and Assistance	891	1003	929	424	340	333

## Criminal legal aid – payments to solicitors, solicitor advocates and advocates

In the five financial years to 2019-20, **payments to solicitors have decreased by 14% and payments to solicitor advocates by 8%**. The decline between 2019-20 and 2020-21 was 33%. By comparison, though payments to advocates have varied through this period, there has not been a net increase or decrease. Total payments (£'000) are:

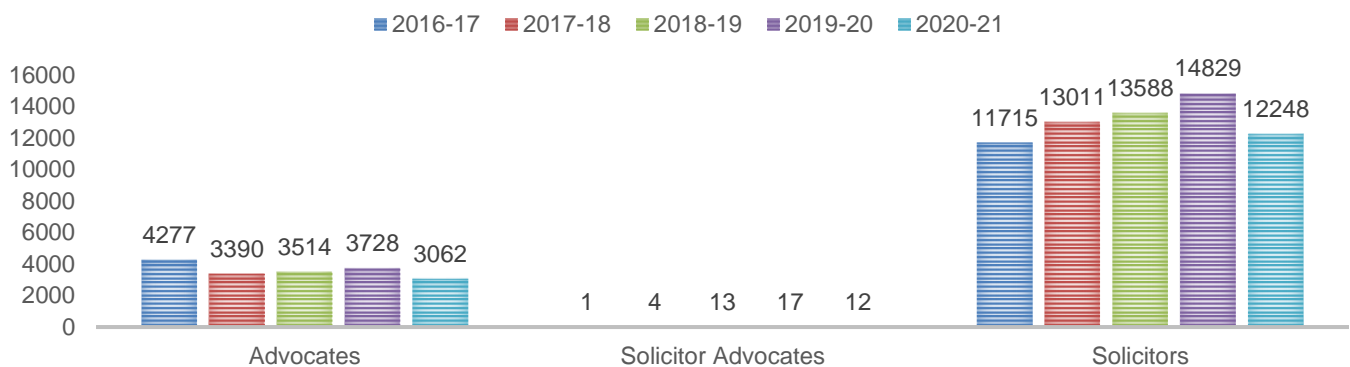
## Criminal legal aid – case types and average case cost

Average case costs in the five financial years to 2019-20 have increased for all criminal aid types, save advice and assistance, though the number of cases has declined for all aid types:

- There has been an **11% decline in the number of ABWOR cases, a 24% decline in summary cases, a 10% decline in solemn cases and a 5% decline in appeals**
- There has been an increase of **4% in the average case cost for ABWOR, 4% for summary, 2% for solemn and 3% for appeals; the average case cost for advice and assistance has decreased by 13%**

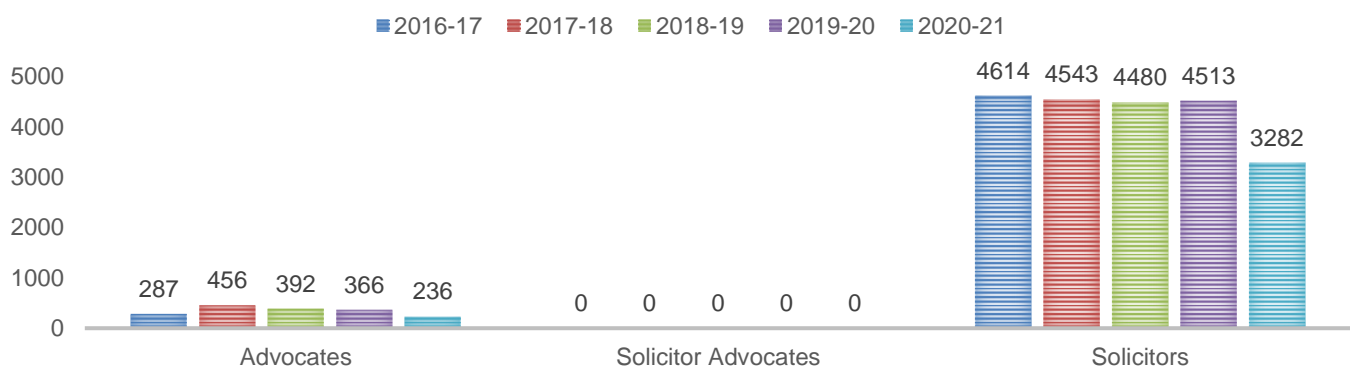
## Civil legal aid – payments to advocates, solicitor advocates and solicitors

### CIVIL LEGAL AID - PAYMENTS TO ADVOCATES, SOLICITOR ADVOCATES, SOLICITORS



## Children's legal aid – payments to advocates, solicitor advocates and solicitors

### CHILDREN'S LEGAL AID - PAYMENTS TO ADVOCATES, SOLICITOR ADVOCATES, SOLICITORS

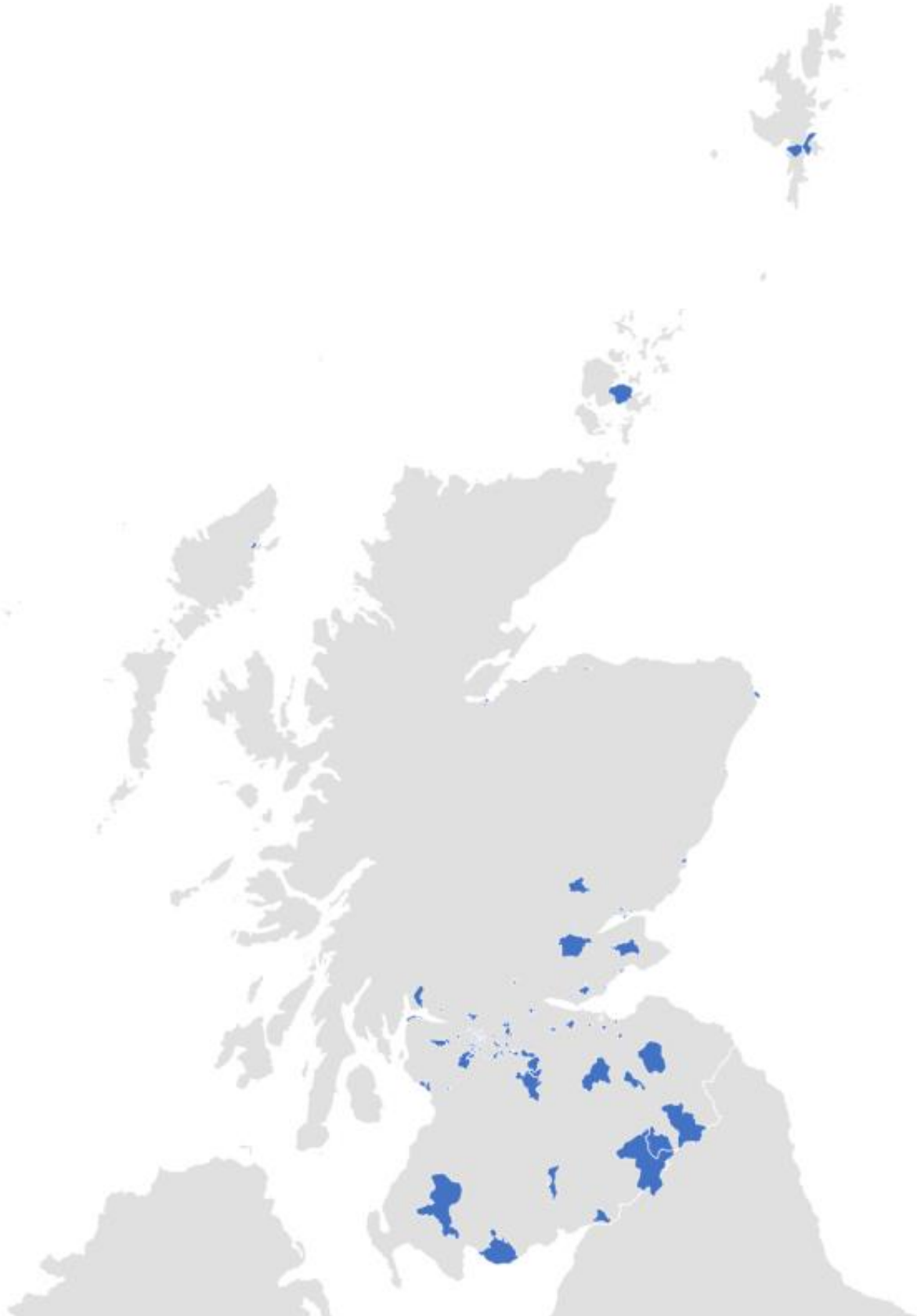


## Criminal legal aid – geography

There were 493 firms registered for criminal legal aid in August 2015 and 425 registered in June 2021, a decline of 14% over the six year period: 184 firms registered in 2015 are no longer registered in 2021 and 116 firms registered in 2021 were not registered in 2015.

For firms that have left the register since 2015, the average number of registered criminal practitioners is 1.9 and the median 1; for firms that have registered since 2015, the average number of registered criminal practitioners is 2.1 and the median 1. This suggests that there has not been consolidation into larger practice units over the period.

The locations (by postcode) in which these firms are no longer registered are:





Some of the firms no longer registered for criminal legal aid since 2015 may have reformed in different structures over the period. The locations (by postcode) in which firms have newly registered are:



## Fee cuts during economic downturn

### *Savings target*

Citing economic pressures as a result of the economic downturn, SG and SLAB announced that significant 'efficiency savings' would need to be made from the Legal Aid Fund in 2011. The savings target was introduced by the Cabinet Secretary for Justice in November 2010, aiming to secure savings of £11.9m in 2011-12 (or a 7.4% saving on the basis of expenditure, which was £161.4m in 2010-11). It was further projected that the savings could be up to £16m in future financial years

### *Negotiations*

The majority of the cuts were required from criminal legal aid, particularly summary criminal legal aid, as these cases generally have the shortest duration. Elements considered included:

- The number of new PDSO staff to be recruited and the number of new offices
- The court and police duty allocations to be provided to the PDSO in these locations
- The level of the summary fixed fee and the stipendiary magistrate fee
- The level of cut to travel fees for civil and criminal work

### *Cuts introduced*

The measures ultimately advanced by SG and SLAB included:

- Reduction in the summary fixed fee for sheriff court work from £515 to £485
- Reduction in the stipendiary magistrate fee from £515 to £390
- Half fee for duty cases
- A 50% reduction in the travel fee for advice and assistance, ABWOR and legal aid cases
- Providing PDSO with 35% allocation for court and police duty plans in office locations
- Additional 12 PDSO staff recruited

### *Impact*

Though legal aid expenditure did reduce in future financial years, the decline in civil cases was a significant driver for this change, as access to justice issues arising from the economic downturn alleviated.

SLAB advised that the savings anticipated from the PDSO expansion had not been realised. The duty allocations caused immediate concern for practitioners, with PDSO taking slots on busier days where more new business might be received, covering some specific courts and declining to cover others; in short, 'cherry-picking' of the duty plan. Concerns still remain around the lack of a level playing field in duty allocation.

The cut to travel fees led to significant challenges in rural provision. Firms in these areas closed in the decade following, and the number of firms, for instance, from the central belt to travel to other areas in Scotland also reduced.

*Current status*

Reversal of the cuts was [requested by the EBA in 2019](#) and by the Law Society in 2020; these requests have been refused.



## Impact of pandemic

The impact of the pandemic has been severe and profound. Expenditure on legal aid declined from £130.9m in 2019-20 to £99.1m in 2020-21, a decline of 24%. For individual aid types, comparing 2019-20 and 2020-21:

- There was a 13% reduction in civil legal aid expenditure (an 8% reduction in advice and assistance and ABWOR and a 17% decline in legal aid)
- There was a 31% reduction in criminal legal aid expenditure (a 2% reduction in advice and assistance, an 8% reduction in ABWOR, a 33% reduction in summary legal aid, a 41% reduction in solemn legal aid and a 25% reduction in appeals)
- There was a 29% reduction in children's legal aid expenditure

There were 734 firms receiving a payment from SLAB in 2019-20, and 679 in 2020-21, a reduction of 7.5% over twelve months.