



OFFICIAL REPORT
AITHISG OIFIGEIL

Equalities, Human Rights and Civil Justice Committee

Tuesday 28 March 2023

Session 6



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EQUALITIES, HUMAN RIGHTS AND CIVIL JUSTICE COMMITTEE
8th Meeting 2023, Session 6

CONVENER

*Joe FitzPatrick (Dundee City West) (SNP)

DEPUTY CONVENER

*Maggie Chapman (North East Scotland) (Green)

COMMITTEE MEMBERS

*Karen Adam (Banffshire and Buchan Coast) (SNP)

*Pam Duncan-Glancy (Glasgow) (Lab)

*Pam Gosal (West Scotland) (Con)

*Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)

*Fulton MacGregor (Coatbridge and Chryston) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Denise Swanson (Scottish Government)

Shona Urquhart (Scottish Government)

Elena Whitham (Minister for Community Safety)

LOCATION

The James Clerk Maxwell Room (CR4)

Scottish Parliament

Equalities, Human Rights and Civil Justice Committee

Tuesday 28 March 2023

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Joe FitzPatrick): Good morning, and welcome to the eighth meeting of the Equalities, Human Rights and Civil Justice Committee in 2023. We have received no apologies for the meeting.

Our first agenda item is a decision on whether to take in private item 6, which is consideration of correspondence received from the Minority Ethnic Carers of People Project—MECOPP. Do members agree to take that item in private?

Members indicated agreement.

Subordinate Legislation

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2023 [Draft]

10:00

The Convener: The second item is consideration of an affirmative instrument, the draft Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2023.

I welcome to the meeting Elena Whitham, Minister for Community Safety. I also welcome her supporting officials: Shona Urquhart, legal aid policy lead; Denise Swanson, deputy director civil law and legal system; and Emma Thomson, solicitor in the Scottish Government's legal directorate.

I refer members to paper 1 and invite the minister to speak to the draft regulations.

The Minister for Community Safety (Elena Whitham): Good morning, convener and members. Thank you for the opportunity to speak to the committee about the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No 2) Regulations 2023.

The instrument has been laid to deliver changes to legal aid regulations, primarily to ensure continuing access to justice in Scotland. It provides for an overall 10.25 per cent uplift in legal aid fees, distributed via a combination of targeted fee reforms and uplifts and overall increases.

The solemn and summary criminal fee reforms have been revised to ensure that, augmented by increases in specific fees, they deliver an overall increase of 10.3 per cent in fees payable for such cases. All other criminal fees not affected by fee reforms will be uplifted by 10.2 per cent. All civil and children's fees will be uplifted by 10.2 per cent.

Restoring the criminal justice system in light of the impact of the Covid pandemic is critical to all involved in the justice system. The instrument implements a long-standing commitment to reform solemn and summary fees to deliver simplification and to better recognise preparatory work that is undertaken before a trial. The changes are a vital part of the Scottish Government's wider strategic reform objectives.

The amendments to legal aid fees will also support the recover, renew, transform programme through enhanced remuneration where it is appropriate for there to be early resolution in cases. By supporting early resolution, the reforms will reduce the number of cases for which trial

diets are fixed. That will assist with the courts recovery programme in tackling a backlog of cases due to the Covid lockdown and providing a more timely conclusion for victims and witnesses of crime.

That gives a brief overview of the draft regulations and their context. I am happy to answer any questions.

Maggie Chapman (North East Scotland) (Green): Good morning, minister, and thank you for coming. I am sure that you are aware of correspondence from the Law Society of Scotland about the society's anxieties about the timescales of the fee review that is planned for a few years' time and the relationship of that review with benchmarking. You said something about the legal aid reforms in answer to questions last week, but will you give a bit more information about why the connection between benchmarking and the fee review is so important? Given that situation, how can we address some of the concerns about the urgency for review that the Law Society and others have expressed?

Elena Whitham: Last December, my predecessor as minister sent a letter to the Criminal Justice Committee with some annexes that it might be helpful for us to share with this committee in relation to its consideration of how we reform legal aid in the future.

In his report on the independent strategic review of legal aid in 2018, Martyn Evans stated that he was unable to recommend any concrete legal aid fee reforms because of the complexity of the system. Given the necessity of benchmarking the use of public money, I am clear that we need to gather in all the data. That will be important for enabling us to set out from the beginning what those reforms will look like.

As I said, it is a complex state of affairs and it would be helpful if we can provide that information to the committee to help members to understand the situation as we go forward in reform. We need to ensure that we take the time to get that right. There is no rushing that.

Maggie Chapman: Okay—I know that other members probably want to come in on the same point, so I will leave it there.

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): Minister, is it sustainable to freeze the fees until 2026, until the outcome of the benchmarking that you talk about feeds into the budgeting process? That is something that the Law Society highlighted.

Elena Whitham: If the regulations today are agreed, once implemented, that will give an £11 million increase from April, which is going to be of benefit. In order to understand how we need to

increase the fees going forward, we have to have that benchmarking information and that data. It might be helpful if I bring in Shona Urquhart at this point to speak a bit more directly to the question that Rachael Hamilton has asked.

Shona Urquhart (Scottish Government): The question about 2026 came from the initial meeting of the new research advisory group that we have set up. That date is not set in stone, because we need to do a lot of work to put the benchmarking in place. As the review and the new payment panel have shown, at the moment, we are simply adding a percentage on to the fees as they are now. We do not know whether the starting point of those fees was correct in the first place. As you will see from the paper that we supplied to the Criminal Justice Committee, that fairly arbitrary level does not take into account the costs of providing legal aid advice, running an office and having staff. We do not have any of that data, because it does not exist on the public sector side. The information does not take into account things such as private client fees, so we need to get that data from the profession.

We have got to the point where the profession is willing to get on board and engage with the process. As I said, we have started that process: we have had meetings with the research advisory group and we are looking at tendering for a contractor to provide the research that the panel recommended.

Pam Duncan-Glancy (Glasgow) (Lab): Thank you, minister—and your officials—for joining us this morning. I will take the question of fees a little further. I am sure that the minister has seen the letter from the Law Society, which says:

“It is simply not palatable to wait this length of time for a mechanism to review fees”.

I take the point about the amount of information that is required to set the starting point, but my understanding was that the review happened a number of years ago, so why we are still where we are now? Minister, are you in a position to say whether there will be any review of the fees in the interim period? If not, will you at least review the impact of the regulations within the next 12 months?

Elena Whitham: Yes—I am very happy to look at the impact of the regulations as we go forward. As Shona Urquhart has set out, the 2026 date is not set in stone. We are now in a position where we are able to work as fast as possible to implement what we can. It is also helpful to understand that, as Shona Urquhart has already said, the profession is now on board with the process, which is really important. After Martyn Evans's report came out, we also had the pandemic. Although some issues have held us

back a bit, we will now, collectively, work as quickly as we can on that measure.

Since I came into post, I have had many conversations with the Law Society and the Faculty of Advocates, and we are setting up a working group, which will be co-chaired by all of us, to look at the future of the legal profession. That will include issues not just about reform but about diversity and how we retain people who are entering the profession; it is a jigsaw of things that all have to come together.

Although I understand some of the issues that have been raised in the Law Society's letter, the letter itself does not actually represent the full state of play at the moment and the good will being shown by everybody around the table as we try to get a sustainable legal aid system for the whole of Scotland.

Pam Duncan-Glancy: Thank you. Convener, can I go on to my next question, which is on the retention of staff, or do you want to bring in other members who might have questions on fees?

The Convener: If your question is on this instrument, just go ahead.

Pam Duncan-Glancy: The minister has just brought up the issue of retention, which is really key. Indeed, in the evidence session that we held with a number of organisations on access to justice, we heard that the availability of legal aid solicitors was a huge problem. I just want to get the figures right: the organisations talked, specifically, about huge inequalities in the availability of solicitors and said that, in the 139 poorest areas, there are only 29 legal aid firms—it is either 22 or 29; I will check in a second. In any case, there is only a handful of firms in those areas compared with others.

In view of that, and setting it against the fact that the fees do not appear in any way commensurate with the sort of costs that are involved and that, as a result of the current structure, solicitors who have been working in legal aid are now moving into other areas of law, can the minister set out how the instrument is going to change any of that? If it is not going to do that, what will?

Elena Whitham: The purpose of the instrument is to carry out some of the reform of the section 76 fees, which will help by resolving cases before they get to trial, where that is appropriate. I should also mention the across-the-board uplift in fees for the different sectors in the justice system.

However, I think that we need to take a wider look and think about the diversity issues; indeed, a group has been set up to look at those issues in detail. The figures quoted in the letter are of concern to me, too, but I should point out that, in some of the areas that we are talking about, there

are really fantastic law centres that are being supported by the Scottish Legal Aid Board and the Scottish Government. They are going to see a 10 per cent increase in their funding, too.

I announced yesterday that a lot of the organisations that are funded through the Scottish Government and the Scottish Legal Aid Board for access to justice projects have had their funding agreed for the year ahead, and some of those projects are in some of our most deprived areas, too. Therefore, although I understand the concern that has been raised, I draw some level of comfort from knowing that there are law centres doing a fantastic job in those areas and that we are going to support them.

It might be helpful if I bring in Denise Swanson at this point.

Denise Swanson (Scottish Government): I want to make just a couple of points. First of all, if we look again at Martyn Evans's review and the direction in which legal aid has been going, we see that it is all about connecting advice services with legal advice and representation services so that we get a bit of a continuum. That is why the Scottish Legal Aid Board manages a lot of the Scottish Government's grant-funding programmes under which funding goes to very local third sector organisations for the provision of advice; indeed, those are the programmes for which the minister has confirmed the continuation of funding. We are talking about partnerships with citizens advice bureaux, local authority advice providers and so on—it is quite a good partnership approach.

Alongside that are the law centres, which provide a lot of social justice-type support, advice, assistance and representation. The reforms provide us with an opportunity to look at different fee and payment mechanisms that are not available to us under the current statutory framework. We work very closely with the law centres; I have very frequent meetings with the Scottish Association of Law Centres—in fact, I am meeting the association again next week. I know that it is a key issue and that it is in the forefront of ministers' minds as the reform programme is being developed.

As for the statistics that you have highlighted with regard to providers, I do not know whether you are referring to the Law Society report, but I have to say that I am not sure whether that is as representative as it might be.

10:15

On the availability of solicitors, they are quite often corralled around where courts sit, which is not necessarily terribly far away from where people who need to access advice services live. For example, it was considered that there were no

solicitors in one area of Edinburgh, but if you were to walk 15 minutes along the road to Leith Walk, you would find that there is a plethora of solicitors. We need to work with the data carefully, but that is not to detract from the fact that there is perhaps inequality of provision across Scotland.

I am sorry if that answer went on a wee bit.

Pam Duncan-Glancy: I appreciate that answer. The Law Society said that, as a result of that inequality, in the region of tens of thousands of people are missing out on access to justice. If I am honest, I am not sure that going 15 or 20 minutes down the road is exactly what people are looking for. The fact that people in our poorest areas are sharing a very small number of legal aid firms between them probably suggests that there is a bigger problem, and that is borne out by the number of people who are not accessing justice. I hope that something can be done about that through the reviews.

I have a final very quick question. There are a number of issues relating to thresholds for legal aid. It is considered that there might be quite a bit of unmet need, as many people do not qualify for legal aid. Is the Government collecting figures on that?

Elena Whitham: I have thought about the thresholds and what they mean for people who do not have access to legal aid. I am definitely keen to understand the figures, but I do not know whether those are available—

Denise Swanson: I am sorry to interrupt, but we are working with the Scottish Legal Aid Board to try to put together a picture of the levels of entitlement and whether the eligibility criteria are affecting people's ability to get legal aid, particularly during a cost of living crisis. We need to look at some issues relating to expenditure.

We are also interested in the work on merits, because the merits test might be a bit of a challenge in relation to accessing legal aid. That work is on-going. The Scottish Legal Aid Board is collating some data on that for us.

Elena Whitham: It is very helpful to set that out. In relation to the thresholds and people's expenditure, the picture during a cost of living crisis is very different from the one a couple of years ago. We absolutely need to be cognisant of that.

Pam Duncan-Glancy: Thank you.

The Convener: As there are no further questions, we will move to agenda item 3, which is consideration of the motion for approval of the affirmative instrument. I invite the minister to move motion S6M-08058.

Motion moved,

That the Equalities, Human Rights and Civil Justice Committee recommends that the Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2023 [draft] be approved.—[*Elena Whitham*]

Motion agreed to.

The Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on the affirmative Scottish statutory instrument that we have just considered. Do members agree to do that?

Members indicated agreement.

The Convener: I thank the minister and her officials for attending the meeting.

**First-tier Tribunal for Scotland Local
Taxation Chamber and Upper Tribunal for
Scotland (Rules of Procedure)
(Miscellaneous Amendment) Regulations
2023 (SSI 2023/40)**

**Marriage and Marriage Registration
(Prescription of Forms) (Scotland)
Amendment Regulations 2023 (SSI
2023/53)**

**Marriage Between Civil Partners
(Procedure for Change and Fees)
(Scotland) Amendment Regulations 2023
(SSI 2023/55)**

The Convener: Agenda item 4 is consideration of three negative Scottish statutory instruments. I refer members to paper 2.

As members have no comments to make on the instruments, does the committee agree to make no recommendations in relation to them?

Members indicated agreement.

The Convener: That concludes our formal business in public. We will move into private to consider the remaining items on our agenda.

10:20

Meeting continued in private until 11:04.

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