Equalities, Human Rights and Civil Justice Committee
Thursday 5 November 2026
9th Meeting, 2026 (Session 7)

Note by the Clerk on the Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/267)

Overview

1. At this meeting, the Committee will consider the following Scottish Statutory Instrument (SSI), which is subject to the negative procedure. The Committee is invited to consider the instrument and decide what, if any, recommendations to make.

2. More information about the instrument is summarised below:

   Title of instrument: Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/267)

   Laid under: Legal Aid (Scotland) Act 1986

   Laid on: 24 September 2026

   Procedure: Negative

   Deadline for committee consideration: 16 November 2026 (Advisory deadline for any committee report to be published)

   Deadline for Chamber consideration: 18 November 2026 (Statutory 40-day deadline for any decision whether to annul the instrument)

   Commencement: These Regulations come into force on 19 November 2026, with the exception of Regulations 4 and 5, which come into force on 14 December 2026 to align with relevant amendments being introduced by the Criminal Legal Aid and Assistance by Way of Representation (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/107).

Procedure

3. Under the negative procedure, an instrument is laid after it is made, and is subject to annulment by resolution of the Parliament for a period of 40 days beginning on the day it is laid.

4. Once laid, the instrument is referred to:

   - the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and

   - a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.

5. Any MSP may propose, by motion, that the lead committee recommend annulment of the instrument. If such a motion is lodged, it must be debated at a meeting of the Committee, and the Committee must then report to the Parliament (by the advisory deadline referred to above).

6. If there is no motion recommending annulment, the lead committee is not required to report on the instrument.

Delegated Powers and Law Reform Committee consideration

7. The DPLR Committee considered the instrument on 27 October 2026 and reported on it in its 12th Report, 2026 (Session 7). The DPLR Committee agreed to draw the instrument to the attention of the Parliament under reporting ground (c) – that it purports to have retrospective effect where the parent statute confers no express authority so to provide.

8. The DPLR Committee also noted that it is unusual to make retrospective provision in the absence of express authority to do so, and therefore drew the Scottish Government's reasons for considering such an approach necessary in the circumstances to the attention of the Equalities, Human Rights and Civil Justice Committee.

9. Correspondence issued to the Scottish Government by the DPLR Committee and the Scottish Government's response is included at Annexe C.

Purpose of the instrument

10. These Regulations make provision to implement an increase of 13% to two types of legal aid fees which had been "inadvertently omitted" from previous regulations. The instrument also makes some technical changes relating to the fees payable in summary criminal proceedings where there has been a change of solicitors.

11. Regulation 3 amends the Advice and Assistance (Scotland) Regulations 1996 ("the 1996 Regulations") to increase fees and outlays for assistance by way of representation, and advice and assistance, provided under the National Security Act 2023 by 13%. This aligns the fees under Parts 7 and 8 of schedule 3 of the 1996 Regulations with the fee increase introduced by the Legal Aid and Advice and Assistance (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2026. These Regulations were considered by the Session 6 Equalities, Human Rights and Civil Justice Committee and came into force on 1 September 2026. A summary of the proposed fee increases is included at Annexe B.

12. Regulation 2 provides that the fee increase provided for in regulation 3 will apply retrospectively from 1 September 2026.

13. Regulation 4 amends the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 ("the 1999 Regulations") in relation to the fixed payments provided for solicitors who have carried out criminal legal aid work in summary criminal proceedings. It provides that where fees are payable in respect of more than one type of legal aid, only the highest fee payable in respect of the work

carried out is to be paid. It also creates more flexibility for splitting payments when more than one solicitor has been involved in a case. In addition, it makes several minor and technical amendments.

14. Regulation 5 makes further provision in relation to splitting payments when there has been a change of solicitor.

15. The Policy Note accompanying the instrument is included at Annexe A. It includes a summary of consultation undertaken on the instrument and the anticipated financial effects. The following impact assessments have been carried out:

    - Business and Regulatory Impact Assessment (BRIA)

    - Child Rights and Wellbeing Impact Assessment (CRWIA)

16. The BRIA states that the Regulations will have a positive impact on the legal profession in terms of receiving the fee uplift that was previously committed to and receiving the fees they are entitled to in summary proceedings. It confirms that the Scottish Legal Aid Board (SLAB) will be affected as the body which operates the Legal Aid Fund. It is also expected that the Regulations will have a positive impact on consumers of legal aid services as it "provides an increase in remuneration for those providing publicly-funded legal assistance."

17. The CRWIA states that the Regulations are expected to have a positive impact on children's rights by enhancing "the stability and sustainability of the legal profession thereby improving children's access to legal representation across criminal and civil matters, and promoting their ability to protect their interests and rights."

Committee consideration

18. So far, no motion recommending annulment has been lodged.

19. Members are invited to consider the instrument and decide whether there are any points they wish to raise. If there are, options include:

    - seeking further information from the Scottish Government (and/or other stakeholders) through correspondence, and/or

    - inviting the Minister (and/or other stakeholders) to attend the next meeting to give evidence on the instrument.

    It would then be for the Committee, at the next meeting, to consider the additional information gathered and decide whether to make recommendations in relation to the instrument.

20. If members have no points to raise, the Committee should note the instrument (that is, agree that it has no recommendations to make).

21. However, should a motion recommending annulment be lodged later in the 40-day period, it may be necessary for the Committee to consider the instrument again.

Clerks to the Committee
November 2026

Annexe A: Scottish Government Policy Note

The above instrument was made in exercise of the powers conferred by section 33(2), (3)(b), (3)(f) and (3A) of the Legal Aid (Scotland) Act 1986(a). The instrument is subject to negative procedure.

Purpose of the instrument

The Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 makes provision to implement an increase of 13% to two types of legal aid omitted from previous regulations. It also makes some technical changes relating to the fees payable in summary criminal proceedings where there has been a change of solicitors.

Policy Objectives

This instrument is required to increase the fees prescribed in Parts 7 and 8 of schedule 3 of the Advice and Assistance (Scotland) Regulations 1996[1] (S.I. 1996/2447). These fees were intended to be included in fees increases that were made by the Legal Aid and Advice and Assistance (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2026[2] (S.S.I. 2026/144) but were inadvertently omitted.

The instrument is also required to make amendments to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999[3] (S.I. 1999/491) and the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008[4] (S.S.I. 2008/240) following amendments to both by the Criminal Legal Aid and Assistance by Way of Representation (Miscellaneous Amendment) (Scotland) Regulations 2026[5] (S.S.I. 2026/107). These changes primarily seek to clarify how fees are apportioned when there is a change of solicitor in summary criminal proceedings.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Ministers have made the following statement regarding children's rights:

> In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 ('the Act'), the Scottish Ministers certify that, in their view, the Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 are compatible with the UNCRC requirements as defined by section 1(2) of the Act.

[1] https://www.legislation.gov.uk/uksi/1996/2447/contents
[2] https://www.legislation.gov.uk/ssi/2026/144/contents/made
[3] https://www.legislation.gov.uk/ssi/1999/48/contents/made
[4] https://www.legislation.gov.uk/ssi/2008/240/made
[5] https://www.legislation.gov.uk/ssi/2026/107/contents

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

The Scottish Legal Aid Board made the Scottish Government aware of the issues being rectified by this instrument. The Scottish Government consulted with representatives of the legal aid profession during 2025 in relation to the wider policy intent in respect of all regulations are that are being amended.

Impact Assessments

Impact assessments were done for the Legal Aid and Advice and Assistance (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2026 and the Criminal Legal Aid and Assistance by Way of Representation (Miscellaneous Amendment) (Scotland) Regulations 2026. We are satisfied that these impact assessments remain accurate, and the changes to be applied are in line with those assessed in relation to the earlier SSI and the practical impact of these further changes is expected to be marginal. A Child Rights and Wellbeing Impact Assessment (CRWIA) has been completed for this instrument to comply with the statutory requirement, and a Business and Regulatory Impact Assessment (BRIA) was considered appropriate. As this instrument addresses inadvertent omissions affecting a very small and limited number of cases, and no negative impacts on groups with protected characteristics are anticipated, an Equality Impact Assessment (EQIA) was not required.

Financial Effects

A BRIA was done for the Legal Aid and Advice and Assistance (Fees) Miscellaneous Amendment) (Scotland) Regulations 2026 and the Criminal Legal Aid and Assistance by Way of Representation (Miscellaneous Amendment) (Scotland) Regulations 2026 which these regulations amend. Whilst the regulations are making minor amendments to ensure a fee uplift to all legal aid fees, and other changes to the legal aid framework, can operate as intended, a BRIA was still completed for these regulations to assess their impact. The impact of this policy on business is minimal, but is likely to be positive to the relevant stakeholders.

Scottish Government
Justice Directorate

September 2026

Annexe B: Amendment of the Advice and Assistance (Scotland) Regulations 1996

In schedule 3 (table of fees allowable to solicitors)—

- In Part 7 (table of fees allowable to solicitors for assistance by way of representation for proceedings under schedule 6 of the National Security Act 2023)—

  (i) in paragraphs (a) and (c), for “£62.59” substitute “£70.73”,
  (ii) in paragraph (b), for “£93.87” substitute “£106.08”,
  (iii) in paragraph (d), for “£7.28” substitute “£8.23”.

- In Part 8 (table of fees allowable to solicitors for advice and assistance in relation to section 27 and schedule 6 of the National Security Act 2023)—

  (i) in paragraph 3(a) (standard rate), for “£143.93” substitute “£162.65”,
  (ii) in paragraph 3(a) (higher rate), for “£191.42” substitute “£216.31”,
  (iii) in paragraph 3(b)(i) (standard rate), for “£250.29” substitute “£282.83”,
  (iv) in paragraph 3(b)(i) (higher rate), for “£332.89” substitute “£376.17”,
  (v) in paragraph 3(b)(ii) (standard rate), for “£62.59” substitute “£70.73”,
  (vi) in paragraph 3(b)(ii) (higher rate), for “£83.24” substitute “£94.07”,
  (vii) in paragraph 4 (standard rate), for “£37.56” substitute “£42.45”,
  (viii) in paragraph 4 (higher rate), for “£49.95” substitute “£56.45”,
  (ix) in paragraphs 5(a) and (b) (standard rate), for “£14.53” substitute “£16.42”,
  (x) in paragraphs 5(a) and (b) (higher rate), for “£19.33” substitute “£21.85”.

Annexe C: Correspondence between the DPLR Committee and the Scottish Government

The Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/267)

On Friday 2 October 2026, the Committee asked the Scottish Government:

1. The instrument appears to make retrospective provision in relation to the fee increases provided for by regulation 3. However, the parent Act does not appear expressly to authorise the exercise of the relevant powers so as to make retrospective provision.

   a) Does the Scottish Government agree that no such express authority exists?
   b) If so, what is the Scottish Government's justification for relying on the cited powers to make retrospective provision?

On Tuesday 6 October 2026, the Scottish Government responded:

Whilst the Scottish Government agrees that there is no express statutory power in the Legal Aid (Scotland) Act 1986 ("the 1986 Act") to make retrospective provision in relation to the fee increases provided for by regulation 3, it is of the view that the cited powers can be relied on to make retrospective provision. The Scottish Government consider that in the absence of clear words, the test to be applied is whether it would be unfair to apply the provisions retrospectively. The Government has had particular regard to whether the effect of the provision would be detrimental to those whom it affects and confirm that in this case it would not. Section 33 of the 1986 Act provides the power to make regulations in respect of the fees and outlays of solicitors and counsel, including the rates or scales of payment.

The Legal Aid and Advice and Assistance (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2026 (S.S.I. 2026/144) were intended to apply a 13% increase to all fees and outlays for legal aid and advice and assistance from 1 September 2026, but two fees tables were inadvertently omitted. Regulation 3 of these Regulations amends the Advice and Assistance (Scotland) Regulations 1996 to implement the 13% increase on the two omitted fees tables.

The retrospective effect of regulation 3 will be entirely to the benefit of any legal practitioners involved in the relevant legal aid work. Without the retrospective provision, legal practitioners would not be entitled to claim the uplifted fees that they expected to be applied from 1 September 2026.

It may be worth noting that the degree of retrospection in this case is limited. The Scottish Government is aware that no fees have ever been claimed from the tables being amended by these regulations. As the retrospective effect applies between 1 September 2026 and 19 November 2026, it is highly likely that no fees will be claimed retrospectively.

On the basis of the above, the Scottish Government is content that the Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 are intra vires. The 1986 Act in general (and section 33 in particular), which provides for a comprehensive and flexible system of payment in respect of publicly-funded legal representation does not prevent such an approach.

It is also worth noting that Parliament's concern about the *vires* of legislating with retrospective effect by virtue of the powers conferred by the 1986 Act has previously been addressed by the Scottish Government on a number of occasions. It was addressed in oral evidence to the Justice 1 Committee in relation to the Criminal Legal Aid (Scotland) (Fees) Amendment (No. 2) Regulations 2005 (SSI 2005/584) where it was explained to the Committee that in determining whether retrospective legislation is *ultra vires* the Government has regard, in particular, to whether its effects are detrimental to those whom if affects (SP OR J1 7 December 2005, col 2643). It was raised again in respect of SSI 2009/203.