

Criminal Justice Committee

**8th Meeting, 2022 (Session 6), Wednesday,
2 March 2022**

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instruments:
 - [The Parole Board \(Scotland\) Amendment Rules 2022 \(SSI 2022/10\)](#) [see page 4];
 - [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) Regulations 2022 \(SSI 2022/30\)](#) [see page 6].
2. If the Committee agrees to report to the Parliament on the first of the instruments, it is required to do so by **7 March**. The second instrument requires to be reported on by **14 March 2022**.

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the Parole Board (Scotland) Amendment Rules 2022 at its meeting on 1 February 2022.
4. The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022 were considered at its meeting on 8 February 2022.
5. **The DPLR Committee agreed that it did not need to draw either of the instruments to the attention of the Parliament on any grounds within its remit.**

Procedure for negative instruments

6. 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. The annulment process would require a motion to be agreed in the Chamber.
7. 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).
8. 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.
9. 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.
10. 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.
11. Each negative instrument appears on the Criminal 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 *always* 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.
12. 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

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

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

14. The Committee is invited to consider the instruments.

**Clerks to the Criminal Justice Committee
February 2022**

CJ/S6/22/8/2

POLICY NOTE

THE PAROLE BOARD (SCOTLAND) AMENDMENT RULES 2022

SSI 2022/10

THE CORONAVIRUS (SCOTLAND) ACT 2020 (EARLY EXPIRY OF PROVISIONS) REGULATIONS 2022

SSI 2022/11

The above instruments were made by the Scottish Ministers in exercise of the power conferred by *Section 20(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993* and *Section 13 (1) of the Coronavirus (Scotland) Act 2020*, and all other powers enabling them to do so. The instruments are subject to the negative procedure.

Summary Box

These SSIs amends the Parole Board (Scotland) Rules 2001 to allow the Parole Board for Scotland to conduct the entirety (or any part) of a parole hearing by live link and to expire early provisions in the Coronavirus (Scotland) Act 2020 which made temporary provision for use of a live link in this way.

Legislative Background

The Coronavirus (Scotland) Act 2020 (“the Act”) came into force on 7 April 2020 (except for one provision). The Act provides powers and measures which have helped to maintain essential public services in the face of unprecedented and ongoing public health challenges created by the pandemic. This includes measures to support the ongoing operation of the justice system, and support for public bodies in their response to coronavirus.

Policy Objectives

The provisions in schedule 4, paragraph 18(1) and 18(3) of the Coronavirus (Scotland) Act 2020, have allowed the Parole Board to continue to conduct oral hearings by video or tele conference. This measure has proved very successful with the Parole Board continuing to operate during the pandemic almost unaffected. To allow flexibility, provide resilience and allow for any further occasions where an emergency situation arises it is considered appropriate that these provisions should be made permanent. . This instrument amends the Parole Board (Scotland) Rules 2001 to achieve this. In person hearings will still be possible where it is in the interests of justice a face-to-face hearing takes place.

The amendments make clear that where hearings take place by video or tele conference, this allows any current rights to attend or participate in the hearing to be exercised in that way. The amendments do not create additional rights to participate

in a hearing where this is not otherwise provided for in the Parole Board (Scotland) Rules 2001.

At the same time the temporary provisions in the Coronavirus (Scotland) Act 2020 are being expired by the, Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) Regulations 2022. As the Parole Board (Scotland) Amendment Rules 2022 amend the Parole Board (Scotland) Rules 2001 with the same effect as the modifications made by the temporary provisions, the expiry will not result in any change in practice to the proceedings of the Parole Board for Scotland.

Consultation

The Scottish Government consulted with the Parole Board for Scotland about the rules amendment provisions and expiry of the temporary provisions. The Parole Board is fully supportive and confirmed the permanent provisions are necessary.

We also included the proposal to make these provisions permanent in the Coronavirus Recovery Bill consultation. The consultation found that those who agreed with making permanent the provision to allow parole hearings to take place over live link described the benefits of virtual hearings, including travel and resource savings, more flexibility and increased accessibility. Third sector organisations Victim Support Scotland and Families Outside (both of whom supported making the provision permanent) highlighted the benefits that remote parole hearings can have for victims, witnesses and families, such as opening up access to hearings and avoiding delays in the process, which in turn can reduce distress.

Some respondents who disagreed with making the provision permanent noted that it can be difficult to interpret a person's body language and demeanour or detect nuance through their virtual presence. While some recognised the need for virtual hearings during the pandemic for health and safety reasons, they felt that in the interests of procedural fairness and recognition of the seriousness of parole matters, in person hearings should be resumed when it is safe to do so. On balance it is considered appropriate to make the provisions permanent.

The Parole Board is fully supportive of the provisions in the Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) Regulations 2022 in light of the provisions included in the Parole Board (Scotland) Amendment Rules.

Impact Assessments

An EQIA has been prepared in respect of the Parole Board (Scotland) Amendment Rules 2022.

Financial Effects

The Cabinet Secretary for Justice and Veterans confirms that no BRIA is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

Scottish Government, Justice Directorate, January 2022

POLICY NOTE

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2022

SSI 2022/30

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) of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

Purpose of the instrument.

This instrument makes provision for a 5% increase to fees and outlays paid to solicitors and counsel for providing publicly funded legal assistance, makes provision for a ‘holiday court payment’ – a supplementary fee payment where legal representation is provided to persons appearing from custody on days designated as court holidays (or where the court sits on a weekend day as a result of a holiday), amends related Regulations to ensure that such holiday court payments are not subsumed within consolidated payments where these apply, and makes an amendment to clarify the applicable payment regime for certain civil legal aid work provided by counsel.

Policy Objective

These Regulations increase all legal aid and advice and assistance fees 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 Civil 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 1996 Regulations”)
- the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 (“the 1999 Regulations”)

These Regulations also remove ambiguity as to the applicable payments due to counsel for certain civil legal aid work, (in Schedule 4 of the Civil Regulations 1989, which is amended by the insertion of a new table by regulation 3(8) of these Regulations).

As the Government is of the view that additional payment should be made for criminal legal representation when provided on a day that is designated as a court holiday, amendments are made to the Criminal Regulations 1989, the 1996 Regulations and the 1999 Regulations (by regulations 4(2), 4(6), 62(b) and 7(2)) to

make provision for holiday court payments. Further provision is made in schedules 8, 12 and 17.

Finally, minor amendments are made to the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 to ensure that when holiday court payments are payable these are paid in addition to the applicable fee, and are not subsumed within a single consolidated payment, where this would otherwise apply.

Consultation

No formal consultation has been conducted on these regulations, the purpose of which is primarily to introduce a second 5% fee increase to legal aid rates (following the previous increase effected by S.S.I. 2021/56), further to a commitment made by the Scottish Government in 2020. However, throughout 2021 the Scottish Government has been involved in substantial engagement with representatives of the Law Society of Scotland, Bar Associations and the Scottish Legal Aid Board regarding support to legal aid providers and legal aid fee reform. The Faculty of Advocates has been consulted in the development of these regulations insofar as these relate to changes to fees for counsel.

Impact Assessments

The following impact assessments were considered:

Business & Regulatory Impact Assessment – additional spend to the legal aid fund has been identified and a BRIA has been completed.

Child Rights & Wellbeing Impact Assessment – these Regulations are not considered to have a significant impact on children and young people.

Equality Impact Assessment – no negative impacts on groups with protected characteristics are anticipated. Stage 1 completed.

Fairer Scotland Duty – not required

Strategic Environmental Assessment – not required

Data Protection Impact assessment – not required

Financial Effects

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

For financial impact in respect of the uplift to fees, and based on current levels of business, we anticipate the following additional spend to the Legal Aid Fund in Scotland – £4.5m in 2022/23 rising to £5.8m in 2023/24, then a full yearly impact figure of £6.0m.

The delay in full spend is due to the length of time it takes some civil cases to conclude.

It is estimated that the additional cost to the Legal Aid Fund, each year, for a supplementary fee payment being available in cases that require representation at holiday custody courts, will be in the region of £214k.

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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 2022