

Equalities, Human Rights and Civil Justice Committee

19th Meeting, 2023 (Session 6), Tuesday 3 October 2023

Subordinate legislation

Note by the Clerk

Purpose of the paper

1. This paper invites the Committee to consider the following re-laid draft affirmative instrument:
 - [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 4\) Regulations 2023 \[draft\]](#) - Policy Note and any associated documents are at [Annexe A](#).

2023/Re-laid Draft: The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 4) Regulations 2023

2. This instrument replaces the draft instrument dealing with the same matters laid on 6 September 2023. Regulation 2 of that earlier version made a technical amendment to paragraph 2A(a)(iii) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. However, the amendment in regulation 2 gave rise to potential confusion. Following discussion with the Committee's legal advisers, the Scottish Government withdrew the draft instrument on 15 September 2023 and clarified the wording of the amendment prior to it being re-laid on 19 September 2023.
3. The instrument is made under powers in the [Legal Aid \(Scotland\) Act 1986](#) and makes provision for the following changes to the criminal and civil legal aid schemes:
 - criminal legal aid is made available to pay for advice and representation by a solicitor for persons arrested and detained under sections of the National Security Act 2023 because they are suspected of being involved in foreign power threat activity

- social security ‘carer support payments’ will be disregarded in assessment of eligibility for civil legal aid and children’s legal assistance and any liability to repay money to the Legal Aid Fund will not take account of these payments
- amendments are made to legal aid provision for an increase in Solicitors’ and Counsel’s fees payable which cover the following Regulations:
 - Amendment of the Civil Legal Aid (Scotland) (Fees) Regulations 1989
 - Amendment of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989
 - Amendment of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993
 - Amendment of the Advice and Assistance (Scotland) Regulations 1996
 - Amendment of the Civil Legal Aid (Scotland) Regulations 2002
 - Amendment of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003
 - Amendment of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008
 - Amendment of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011
 - Amendment of the Children’s Legal Assistance (Scotland) Regulations 2013

Delegated Powers and Law Reform Committee Consideration

4. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on [26 September 2023](#) and agreed that it did not need to draw the Parliament’s attention to the instrument on any grounds within its remit.

Equalities, Human Rights and Civil Justice Committee Consideration

Procedure for Affirmative instruments

5. The draft instrument was re-laid on 19 September 2023 referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to affirmative procedure (Rule 10.6) and due to come into force on 15 November 2023. It is for the Equalities, Human Rights and Civil Justice Committee to recommend to the Parliament whether the instrument should be approved.
6. The Minister for Victims and Community Safety has, by motion [S6M-10545](#), proposed that the Committee recommends the approval of the instrument.

7. The Minister for Victims and Community Safety is due to attend the Committee meeting on 3 October to answer any questions on the instrument and to move the motion for approval.
8. **It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 13 November 2023. Thereafter, the Parliament will be invited to approve the instrument.**
9. **The Committee is asked to delegate to the Convener authority to approve a short, factual report on the instrument for publication.**

Clerks to the Committee
September 2023

Annexe A

Scottish Government Policy Note

The above instrument will, if approved by the Scottish Parliament, be made in exercise of the powers conferred by sections 9(1) and (2)(a), (b), (dd), (e), 17(2B), 31(9), 33(2) and (3)(a), (b) and (f), 36(1) and (2)(a) and (b), and 42 of the Legal Aid (Scotland) Act 1986(1) and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Purpose of the instrument

This instrument:

- amends the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993, Advice and Assistance (Scotland) Regulations 1996, Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003, Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 and Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 to make provision for advice and assistance and assistance by way of representation (“ABWOR”) to be available to persons arrested under section 27 of the National Security Act 2023 (“the Act”)
- amends the Civil Legal Aid (Scotland) Regulations 2002 and Children’s Legal Assistance (Scotland) Regulations 2013 to provide that–
 - (a) any payment by way of the new form of social security assistance known as carer support payment (provision for which is made in the Carer’s Assistance (Carer Support Payment) (Scotland) Regulations 2023) is to be disregarded for the purposes of financial assessment regarding eligibility for Civil Legal Aid and Children’s Legal Assistance, and
 - (b) the requirement set out in section 17(2B) of the Legal Aid (Scotland) Act 1986 that a party must repay any liability to the Legal Aid Fund from property recovered or preserved for them does not apply to any money payable by way of a carer support payment
- amends the Civil Legal Aid (Scotland) (Fees) Regulations 1989 and Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to make minor corrections relating to Counsel Fees.

Policy objectives

The instrument makes provision to ensure that legal advice and assistance will be available to persons arrested under section 27 of the National Security Act 2023 ("the 2023 Act"). Section 27 and Schedule 6 of the 2023 Act will, if commenced, create a procedural framework for the arrest of persons reasonably suspected to be involved in 'foreign power threat activity'.

Current provision for legal advice and assistance does not cover all the circumstances of detention in relation to such activity, and this SSI will make further provision to ensure that an appropriate regime is in place to ensure that advice and assistance and ABWOR can be provided to persons arrested under these provisions in the 2023 Act. Without additional provision there is a risk that persons are arrested under the 2023 Act and are unable to access legal advice, assistance and representation.

Sections 95 to 102 of the 2023 Act came into force on 11 July 2023. The rest of the provisions, including those to which these Regulations relate, come into force on such day as the Secretary of State may by regulations appoint. Commencement of these provisions is expected in the final months of 2023 or early 2024.

This instrument also makes provision for any carer support payment to be disregarded by the Scottish Legal Aid Board when assessing a person's financial eligibility for civil legal aid or children's legal assistance, and for such payments to be excluded from recovery where a person has a liability to the Scottish Legal Aid Fund in relation to civil legal aid proceedings.

Carer Support Payment is intended to improve outcomes for unpaid carers by providing financial assistance to those providing regular and substantial care to someone in receipt of a qualifying disability benefit.

The Scottish Government is committed to ensuring that individuals living in Scotland do not lose access to justice as a result of receiving monies through the Carer Support Payment. The Scottish Government considers that it would not be appropriate for individuals in receipt of Carer Support Payment to be put in a position which could threaten their access to justice.

This payment would usually automatically be considered as part of an applicant's financial resources when being assessed to determine their eligibility for publically funded legal assistance. As a result, an applicant might find that they require to make a contribution to legal fees or costs or may even become ineligible for any publically funded legal assistance by virtue of receiving such payments. They may also find there are required to use this payment to repay their liability to the Scottish Legal Aid Fund.

The Scottish Government does not consider it would be appropriate to disadvantage these individuals by taking account of these payments and therefore considers it correct to disregard payments in this way.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU. The instrument would have been made in the same terms had the UK still been within the EU.

Consultation

The Faculty of Advocates has been consulted on Counsel Fee amendments.

Consultation regarding the National Security Act and the application of the disregard of the carers payment has taken place with the Scottish Legal Aid Board.

Impact assessments

The following impact assessments have been completed:

Business and Regulatory Impact Assessment: [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 4\) Regulations 2023 \(legislation.gov.uk\)](https://legislation.gov.uk)

Financial effects

Negligible impact on the Legal Aid Fund is expected as a result of the disregard. The impact of the provisions contained in the National Security Act 2023 are estimated by the Scottish Legal Aid Board to be under £10,000 annually.