

Final
Business and Regulatory Impact Assessment

Title of Proposal

The Children's Legal Assistance (Miscellaneous Amendments and Consequential Provisions) (Scotland) Regulations 2021

Purpose and intended effect

- **Background**

Prior to implementation of the Age of Criminal Responsibility (Scotland) Act 2019 ("the 2019 Act"), where a child aged eight or over was behaving in a way that was causing or risked causing significant harm to another person, a police constable was able to arrest the child on suspicion that the child had committed an offence. Once section 1 of the 2019 Act (which raises the age of criminal responsibility from 8 to 12) comes into force, this power will not be available in relation to eight to 11 year olds. This is because children in this age group will no longer be considered as able to commit an offence, and therefore the police will not be able to arrest them on suspicion of committing an offence.

This instrument makes children's legal assistance available in relation to proceedings under Part 4 of the Age of Criminal Responsibility (Scotland) Act 2019; in particular, for a child to have legal representation before the sheriff and any appeal from the sheriff, and for the other persons eligible for children's legal assistance in connection with such proceedings and appeals, to be specified along with the eligibility criteria to be applied.

These regulations specify when children's legal assistance is available automatically or available on application to the Scottish Legal Aid Board, and state the conditions that must be met for children's legal assistance to be made available. They also provide that first instance and appellate proceedings are not to be treated as distinct for the purposes of applications for children's legal assistance and detail when work may be undertaken on the basis of special urgency.

The 2019 Act provides for orders in relation to children to allow for the investigation of their actions notwithstanding that they will not have committed offences. These orders, when granted, largely permit the sort of interventions the police would otherwise be able to do in respect of suspects – searches, interviews and the taking of prints and samples etc. The legal aid provisions are to allow for representation in respect of applications for these orders, to ensure the rights of the children in the course of those proceedings.

- **Objective**

The objective of this instrument is to support the implementation and commencement of the Age of Criminal Responsibility Act 2019 (“the 2019 Act”). The objective of the legal aid provisions is to allow for representation in respect of applications for orders, to ensure the rights of the children in the course of those proceedings.

- **Rationale for Government intervention**

Legislation is required to support the implementation and commencement of the 2019 Act by allowing for legal aid to be automatically made available for children subject to proceedings under Part 4 of the 2019 Act and for the categories of people that are identified in that Part of that Act as having an interest in the proceedings. This will ensure access to justice and the rights of the child are protected.

Consultation

- **Within Government**

The Scottish Legal Aid Board (SLAB) is a non-departmental public body which administers legal aid in Scotland and is accountable to the Scottish Government. SLAB have been consulted in the development of these draft Regulations. Officials have also worked closely with the Scottish Government Legal Directorate and the Age of Criminal Responsibility Implementation Team in developing these regulations.

- **Public Consultation**

No public consultation was carried out due to the technical nature of the proposed regulations.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA). The LSS, the FoA and SLAB have been consulted on these draft Regulations.

The Edinburgh Bar Association, Glasgow Bar Association and Aberdeen Bar Association have also been consulted in the development of these regulations.

Options

Option 1: Do Nothing

Option 2: Bring forward Regulations

Benefits

Option 1: Do Nothing

The current arrangements for legal aid will remain in place and legal aid will be available on a limited basis.

Option 2: Bring forward Regulations

Legal aid will automatically be made available for children subject to proceedings under Part 4 of the 2019 Act and for the categories of people that are identified in the 2019 Act as having an interest in the proceedings

Costs

Option 1: Do Nothing

No costs are associated with this option.

Option 2: Bring forward Regulations

There may be some additional cost to the Scottish Legal Aid Fund as applicants who previously may not have qualified for legal assistance, or would have had to pay a contribution, will now be eligible.

It is unknown how many orders will be made and whether more than one party will seek representation, e.g. the child and a parent. This payment is not directly comparable to any previously covered in Children's Legal Aid.

Based on assumptions made by SLAB that the cost will be £500 for the initial hearing, or £1000 where two interested parties require legal aid, the cost to the Scottish Legal Aid Fund is estimated at £30,000 per annum; however, this could be higher or lower depending on the frequency of use of the provisions in Part 4 of the 2019 Act.

Scottish Firms Impact Test

As stated in the Consultation section above, consultation took place with the LSS and the FoA as representatives of the profession.

The profession includes solicitors employed in firms, partners and sole practitioners. Should there be any impact as a result of these proposals, the majority of providers affected are likely to be small providers (both small and micro sized businesses¹) due to the dominance of small legal service providers in the legal aid market. In SLAB's 2010 survey of legal aid solicitors, partners were asked how many solicitors their firm employed across Scotland. Almost half of the firms (48%) employed between 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

As the number of these cases that require access to legal aid are estimated to be relatively small, there is likely to be minimal impact on firms or sole practitioners.

Competition Assessment

Having applied the Competition and Markets Authority competition filter, these proposals will not impact on competition within the civil legal aid market. These Regulations do not directly or indirectly limit the number or range of suppliers. They do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

Consumer Assessment

These regulations will not have an impact on consumers.

¹ Small businesses have less than 50 employees; micro businesses have less than 10 employees.

Test run of business forms

There will be no requirement for new forms. All legal aid applications are currently submitted online through SLAB's Legal Aid Online.

Digital Impact Test

These regulations will not have a digital impact.

Legal Aid Impact Test

There may be some additional cost to the Scottish Legal Aid Fund as applicants who previously may not have qualified for legal assistance, or would have had to pay a contribution, will now be eligible.

Based on assumptions made by the Scottish Legal Aid Board that a cost will be £500 for the initial hearing, or £1000 where two interested parties require legal aid, the cost to the Scottish Legal Aid Fund is estimated at £30,000 per annum; however, this could be higher or lower depending on the frequency of use of the provisions in Part 4 of the 2019 Act

Enforcement, sanctions and monitoring

The proposals will be set down in secondary legislation. The proposals do not, otherwise, create any new enforcement or monitoring mechanisms. SLAB has responsibility for administering the Scottish Legal Aid Fund and will monitor the implications of these measures.

Implementation and delivery plan

Subject to Parliamentary pressures, these Regulations are expected to come into force in October 2021.

Post-implementation review

SLAB monitors changes and reports to the Scottish Government any negative impacts.

The Law Society of Scotland will also report any negative impacts on the legal profession to both SLAB and the Scottish Government.

Summary and recommendation

It is recommended that the amendments to the current legal aid regulations in Scotland are implemented (**Option 2**).

Declaration and publication

Sign-off for Final BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: Ash Denham

Date: 26th August 2021

**Ash Denham
Minister for Community Safety**

**Scottish Government Contact point:
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