

POLICY NOTE

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2022

SSI 2022/XXX

The above instrument was made in exercise of the powers conferred by sections 9(1), (2)(a), (dd) and (de), 12(3), 31(9), 33(2), (3)(b) and (f) and (3A) and 36(1), (2)(a) and (g) of the Legal Aid (Scotland) Act 1986 and all other powers enabling Scottish Ministers to do so. The instrument is subject to the affirmative procedure.

Purpose of the instrument.

This instrument makes amendments to legal aid and advice and assistance regulations to remove temporary changes that were put in place during the coronavirus emergency period by The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020, including enhanced interim fee arrangements and the removal of half fee payments, and replaces these with permanent provisions with equivalent effect. The instrument also makes amendments which will enable accused persons who have been released on police undertaking (i.e. undertaking to appear when required) in summary criminal proceedings to appoint a solicitor of choice.

Policy Objective

These Regulations have been brought forward primarily in order to replace measures introduced by The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 with permanent provisions with equivalent effect. The measures in the 2020 Regulations are considered to have been of benefit to legal aid providers in providing for enhanced interim fee arrangements as well as making provision in relation to the delegation of matters by solicitors in order to assist with the management of cases and court appearances.

Provision is also made in relation to interim payments under the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). The interim payment provisions in the 1986 Act were inserted on a temporary basis by the Coronavirus (Scotland) Act 2020 and will expire on 30 September 2022. Replacement provisions with similar overall effect are proposed for insertion into the 1986 Act by Scottish Parliament bill (see the Coronavirus (Recovery and Reform) (Scotland) Bill). These Regulations amend existing regulations to ensure that interim payments under the 1986 Act can continue to be made without being subject to restrictions which would otherwise apply to the effect that recourse may only be had to the Scottish Legal Aid Fund when other sources of payment (such as recovered property) have been exhausted. These Regulations also provide that a person being prosecuted under summary procedure, and who has been liberated by police to appear at court on an undertaking, may appoint a solicitor of their choice to advise or act for them even where a duty solicitor is made available, increasing access to representation.

Amendments are made to the following regulations –

- the Civil Legal Aid (Scotland) (Fees) Regulations 1989
- the Criminal Legal Aid (Scotland) (Fees) Regulations 1989
- the Advice and Assistance (Scotland) Regulations 1996
- the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999
- the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003
- the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011

Consultation

No formal consultation has been conducted on these regulations; however throughout 2021 and 2022 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.

Impact Assessments

The following impact assessments were considered:

Child Rights & Wellbeing Impact Assessment – not required declaration completed

Equality Impact Assessment – not required declaration completed

Business & Regulatory Impact Assessment – BRIA has been 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.

The impact of this policy on business is that it will facilitate access to payment for work already completed.

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

May 2022