

Business and Regulatory Impact Assessment

Title of Proposal

The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020

Introduction

Background

The Coronavirus (Scotland) Act 2020 (“the 2020 Act”) introduced measures to facilitate financial support to the legal profession in Scotland, by way of enabling payment of interim fees for work completed, prior to legal advice and/or proceedings concluding. The 2020 Act amended the Legal Aid (Scotland) Act 1986 in accordance with this policy objective, in recognition of the disruption resulting from novel coronavirus and its adverse effect on legal services providers who carry out legal aid work.

Supplementary measures have since been identified that will further support the legal profession, both in terms of cash-flow and with adhering to social distancing and travel guidance for public health purposes, following detailed discussions with the Scottish Legal Aid Board (“the Board”). To give effect to these measures, amendments to legal aid regulations are required.

In addition, the Coronavirus Act 2020 has introduced provisions to enable that a special restriction or requirement can be placed upon an individual, subject to a right of appeal to a sheriff. No specific provision was made in that Act or in the 2020 Act for attendant legal assistance to be met by the Legal Aid Fund. Currently, civil legal aid could be made available to support a person seeking to take proceedings to the sheriff court, but this is subject to certain statutory tests, including financial eligibility, being met. In other areas, namely mental health law, civil restrictions on a person’s liberty can be challenged with access to legal support funded by non-means tested Assistance By Way of Representation (ABWOR).

Against this background, the Scottish Government seeks to introduce a Scottish Statutory Instrument to amend a number of legal aid regulations.

Objective

The specific amendments to secondary legislation are detailed below with reference to the related policy objectives. These amendments will remain in place for the “emergency period” only, which will be defined in accordance with the expiry of provisions as determined by the 2020 Act.

- i) To remove residual prohibitions against payment of interim fees that exist in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 and the Criminal Legal Aid (Scotland) (Fees) Regulations 1989. The related amendments will provide the legislative fixes required to deliver the stated policy intention under the Coronavirus (Scotland) Act 2020, to facilitate payment for legally aided work undertaken prior to a matter being concluded.
- ii) To provide express provision under the Advice and Assistance (Scotland) Regulations 1996 to allow payment of interim fees in cases where it may be possible for expenses to be obtained or for property to be recovered or preserved. The related amendment will provide the legislative fix required to deliver the stated policy intention under the Coronavirus (Scotland) Act 2020, to facilitate payment for legally aided work undertaken prior to a matter being concluded. To mitigate potential risk to the Legal Aid Fund, express provision will also enable these fees to be recouped at the conclusion of the matter, should such an award of expenses, or recovery or preservation of property occur. There is currently no express legislative provision to recoup such interim fees.
- iii) To remove a statutory prohibition in the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 against solicitors delegating matters to duty solicitors. This will support adherence to Scottish Government guidance on reduced travel and social distancing, as well as supporting that solicitors do not require to travel to attend court more than would otherwise be necessary.
- iv) To amend the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 to remove the “half fee” rule which may otherwise dis-incentivise the nominated solicitor for instructing the solicitor who is the duty solicitor from appearing with the client from custody and pleading not guilty. This will support adherence to Scottish Government guidance on reduced travel and social distancing where a solicitor with an existing client relationship with an accused is to be instructed in relation to a new matter in which the client is appearing from custody.
- v) To amend the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to provide non-means tested ABWOR for individuals with a right of appeal to a sheriff against

special restrictions or requirements imposed further to COVID-19 legislation. Although civil legal aid would be available for such matters proceeding to a sheriff, subject the relevant statutory tests, including financial eligibility, being addressed, ABWOR is granted by the solicitor not SLAB, and is more appropriate in these circumstances.

Rationale for Government intervention

To implement required changes in order to: extend the scheme of permitted interim payments for legally aided work; to support adherence to social distancing and promote public health; and to assist individuals subject to new forms of restriction against their civil liberties accessing to justice.

Consultation

- **Within Government**

The Scottish Legal Aid Board is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. SLAB has been consulted in the development of this instrument.

- **Public Consultation**

No public consultation was carried out and would not have been possible due to the urgent nature of the proposed regulations.

- **Business**

The Faculty of Advocates (the Faculty) is an independent body of lawyers who have been admitted to practise as advocates before the courts of Scotland. It is expected that the Faculty will be supportive of these measures.

The representative body for solicitors and solicitor advocates in Scotland is the Law Society of Scotland (the Society). It is expected that the Society will be supportive of these measures.

Options

Option 1: Do Nothing

Aspects of legally aided work will continue to be precluded from accessing payment of interim fees; legislation that prohibits or discourages delegation to duty solicitors will remain in place; and access to justice in respect of special

restrictions and requirements will remain subject to means and merits assessment by SLAB.

Option 2: Bring forward Legislation

Legislate for amended provisions, as noted above, during the emergency period.

Benefits

Option 1: Do Nothing

There are no benefits to this option.

Option 2: Bring forward Regulations

The measures will assist both legal aid providers and persons seeking access to justice during the emergency period.

Costs

Option 1: Do Nothing

There would be no immediate additional costs to this approach. However should legally aided advice provision be reduced, due to cash-flow issues, there would potentially be increased costs to the Scottish Government in increased funding to the Civil Law Assistance Office and Public Defence Solicitors Office.

Option 2: Bring forward Regulations

It is considered this legislation to be cost neutral.

Scottish Firms Impact Test

Competition Assessment

Having applied the Competition and Markets Authority competition filter, the proposal will not impact on competition within the legal aid market. This legislation does not directly or indirectly limit the number or range of suppliers. It does not limit the ability of suppliers to compete or reduce suppliers'

incentives to compete vigorously.

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.

Legal Aid Impact Test

Negligible. In any event the costs need to be considered in the context of the landscape within which the amendments will be operative – namely a material reduction in the volume of applications and less expenditure through the Legal Aid Fund.

Enforcement, sanctions and monitoring

The proposals will be enacted through secondary legislation. The Board will monitor the implications of these measures and has responsibility for administering the Scottish Legal Aid Fund.

Implementation and delivery plan

This legislation will come into force in June 2020.

Post-implementation review

The Board monitor changes and report to the Scottish Government any negative impacts.

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

Recommendation

Dismiss Option 1

Although option 1 would have no additional cost, it would bring no improvements and is likely to have a long term detrimental impact to the legal aid advice landscape.

Recommend Option 2

Option 2 would allow for business continuity for legal aid providers, protecting the current provision and securing it for the future.

Declaration and publication

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: Humza Yousaf

Date: 3rd June 2020

**Humza Yousaf
Cabinet Secretary for Justice**

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