

EXPLANATORY MEMORANDUM TO THE

LEGAL AID (SCOPE) REGULATIONS (NORTHERN IRELAND) 2010 – S.R. 2010 No. 9

1. This Explanatory Memorandum has been prepared by the Northern Ireland Court Service and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument amends the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 in two respects:

- (a) to bring within the scope of legal aid applications to vary or discharge restraining orders made under Article 7 or 7A of the Protection from Harassment (Northern Ireland) Order 1997;
- (b) to make consequential amendments arising from the abolition of the Asylum and Immigration Tribunal and the transfer of its functions to the First-tier Tribunal.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Legislative Context

- 4.1 Schedule 1 to the 1981 Order describes the proceedings for which legal aid may be given under Article 9 of the Order. This instrument amends Schedule 1.

- 4.2 The Protection from Harassment (Northern Ireland) Order 1997 extends the courts' powers in Northern Ireland to impose a restraining order, on conviction or acquittal of any offence, protecting a person from conduct which amounts to harassment or fear of violence. Corresponding provisions have been introduced in England & Wales. The prosecution, defendant or any other person named in the order can apply to the court to have the order varied or discharged. Currently, legal aid is available for the defendant in such proceedings but not for any other person named in the order, including the victim. This instrument ensures the availability of funding in such cases which are funded by way of civil legal aid. The Legal Advice and Assistance (Amendment) Regulations (Northern Ireland) 2010 – S.R. 2010 No. 10 make corresponding provision in respect of cases funded by way of assistance by way of representation.

- 4.3 The Tribunals, Courts and Enforcement Act 2007 brings together individual tribunals into a new, unified tribunal structure. The Act creates a two-tier tribunal system: a First-tier Tribunal and an Upper Tribunal. The Upper Tribunal primarily, but not exclusively, reviews and decides appeals arising from the First-tier Tribunal. Under the Act the Asylum and Immigration Tribunal will be abolished and its functions transferred to the First-tier Tribunal. Onward appeals against decisions of the First-tier Tribunal will be made to the Upper Tribunal. This instrument makes consequential amendments to the 1981

Order to ensure the continued availability of funding under those new administrative arrangements.

5. Territorial Extent and Application

5.1 This instrument applies to Northern Ireland only.

6. European Convention on Human Rights

6.1 As this instrument is subject to the negative resolution procedure, and does not amend primary legislation, no statement is required.

7. Policy background

- *What is being done and why*

7.1 In respect of the amendments referred to in paragraph 2.1(a), the Domestic Violence, Crime and Victims Act 2004 extends the courts' powers to impose a restraining order upon a person ("the defendant") protecting another person from conduct which amounts to harassment or will cause a fear of violence. Previously, such an order could only be made under Article 7 of the Protection from Harassment (Northern Ireland) Order 1997 where the defendant was convicted of an offence under that Order. However, the 2004 Act amended the 1997 Order to provide that a restraining order can now be made where the defendant is convicted of *any* offence.

7.2 Furthermore, the 2004 Act inserted a new provision (Article 7A) into the 1997 Order empowering a court to impose a restraining order when the defendant is acquitted of an offence, if it considers it necessary to do so to protect a person from harassment by the defendant. (The 2004 Act also made corresponding amendments to the Protection from Harassment Act 1997 in England & Wales.)

7.3 Restraining orders made in Northern Ireland are considered part of the criminal proceedings in which the defendant has been convicted or acquitted. Therefore, legal aid is currently available for those proceedings.

7.4 Under the 1997 Order the prosecution and defendant, or any person named in the restraining order, can apply to the court to have the order varied or discharged. Criminal legal aid is available for the defendant in any such proceedings. This, however, is not the case for any other person named in the order, including the victim. It is government policy that legal aid should be available for third parties in these circumstances. However, applications to vary or discharge restraining orders are currently out of scope for civil legal aid. This instrument now addresses that.

7.5 In respect of the amendments referred to in paragraph 2.1(b), under the current system a challenge to the decision of the Asylum and Immigration Tribunal (AIT) is by way of an application to the High Court for reconsideration and legal aid funding (with limited exceptions) is subject to the grant of a costs order by the judge, retrospectively, at the end of the reconsideration process.

7.6 The new structure, with the First-tier Tribunal and its onward appeal process to the Upper Tribunal, will replace the system of legal aid funding through costs orders and remove the judiciary from the decision making process. Permission

to appeal to the Upper Tribunal may be granted by the First-tier Tribunal; if the First-tier Tribunal refuses permission, an application for permission to appeal can be made directly to the Upper Tribunal.

- 7.7 Where a judge grants permission to appeal to the Upper Tribunal, costs for the case will be claimable and an application can be made to the Northern Ireland Legal Services Commission. If permission has not been granted, no claim from the legal aid fund can be made (subject to some limited exceptions).
- 7.8 Consequential amendments to the 1981 Order are needed to give effect to the transfer of functions and to ensure continuous legal aid coverage during the transition.
- 7.9 The amendments include replacing references to the AIT with the First-tier and Upper Tribunals. It is also necessary to remove references to the reconsideration process to the High Court as this will no longer apply. These changes replicate the position in England & Wales.

- **Consolidation**

- 7.10 The on-going reform programme for legal aid in Northern Ireland is expected to lead to the commencement of ‘civil legal services’ under the Access to Justice (Northern Ireland) Order 2003, together with supporting regulations, within two years. For that reason, we do not plan to bring forward a consolidated version of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 at this time.

8. Consultation outcome

- 8.1 Since the amendments made by this instrument are:
- (a) in respect of the funding of applications to vary or discharge restraining orders, giving effect to changes made by way of primary legislation in accordance with government policy, and
 - (b) in respect of the abolition of the Asylum and Immigration Tribunal and the funding of onward appeals in such cases, essentially of a minor technical nature,

we have not conducted a separate consultation in respect of the instrument. Stakeholders have been consulted on the respective primary pieces of legislation.

9. Guidance

- 9.1 No specific guidance will be issued by the Northern Ireland Court Service. However, as part of our normal practice when bringing forward secondary legislation, the Court Service will be writing to relevant stakeholders – including the Law Society of Northern Ireland and the General Council of the Bar of Northern Ireland – to provide them with copies of these instruments and to explain the changes they will make.
- 9.2 An entry is also included in the Law Society’s monthly publication ‘*The Writ*’ to inform the legal profession of the new legislation and the changes made.

9.3 Furthermore, the Northern Ireland Legal Services Commission, which is responsible for the administration of legal aid here, will issue circulars to the legal profession detailing the changes being made to the legal aid scheme by this instrument – and by the Legal Advice and Assistance (Amendment) Regulations (Northern Ireland) 2010, referred to at paragraph 4.2 – and explaining how they operate. The circulars will be published on the Commission’s website at <http://www.nilsc.org.uk/>

10. Impact

10.1 No impact on the private, voluntary or public sectors is foreseen. Accordingly, an Impact Assessment has not been prepared on this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The Court Service and the Northern Ireland Legal Services Commission keep the operation of the legal aid scheme in Northern Ireland under review generally. However, the operation of this instrument will not be specifically monitored.

13. Contact

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