

# Final Business and Regulatory Impact Assessment

## Title of Proposal

The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2015

## Purpose and intended effect

- **Background**

The UK Government believes that there is a need to introduce legislation in order to reduce the terrorism threat to the UK. Approximately 550 individuals of interest to the police and security services have travelled from the UK to Syria and that region since the start of the conflict in Syria. It is estimated half of those have returned. In the context of this heightened threat to national security, the Government is fast-tracking a *Counter-Terrorism and Security (CTS) Bill*; in order to strengthen the legal powers and capabilities of law enforcement and intelligence agencies to disrupt terrorism and prevent individuals from becoming radicalised in the first instance.

On 1st September 2014, the Prime Minister announced that legislation would be brought forward in a number of areas to stop people travelling overseas to fight for terrorist organisations or to engage in terrorism-related activity and subsequently returning to the UK; and to deal with those already in the UK who pose a risk to the public. The proposals in that Bill would ensure that the law enforcement and intelligence agencies can disrupt the ability of people to travel abroad to fight, in countries such as Syria and Iraq, and control their return to the UK. The Bill aims to enhance operational capabilities to monitor and control the actions of those within the UK who pose a threat, and would help to combat the underlying ideology that supports terrorism.

The Bill will introduce 2 new provisions:

1. The retention of travel documents for an initial period of 14-days; including the ability of an individual to make oral or written submissions in connection with an application to the Court on or behalf of the police to seek an extension of the default time limit to 30-days.

The Bill makes it a criminal offence for a person, who is required to hand over all travel documents in their possession, if he or she fails without reasonable excuse to do so or who intentionally obstructs, or seeks to frustrate, a search for these documents.

2. Temporary exclusion orders (TEO), which prevent the individual from returning to the UK unless their return is either in accordance with a "permit to return" issued by the Secretary of State or they are deported to the UK by the state they are in.

The Bill makes it a criminal offence for an individual subject to a TEO to return to the United Kingdom in contravention of the “restriction on return” specified in the order.

The CTS Bill was introduced to the House of Commons on 26 November 2014. The Bill received Royal Assent on 12 February 2015. Commencement dates differ for different sections in the Bill. The power to seize passports at ports will commence the day after Royal Assent, on 13 February 2015.

- **Objective**

The new criminal offences are subject to existing criminal procedure and are therefore already captured by the existing provisions of both the Legal Aid (Scotland) Act 1986 (the “1986 Act”) and its secondary legislation.

Civil legal aid is available in Scotland under the 1986 Act in relation to all civil proceedings before the courts listed at Part I of Schedule 2 (with the exception of those proceedings excluded by Part II of that Schedule).

The new civil proceedings created by the Bill would therefore appear to be captured by the primary legislation. However, given the tight timescales for these new processes, the aim is to amend secondary legislation to make *assistance by way of representation* (ABWOR) available for the civil proceedings.

- **Rationale for Government intervention**

The need for these provisions has come about because even though civil legal aid would be available for the new civil offences, the timescale of the application process would make the availability of legal aid impracticable, and, therefore, a risk for access to justice.

## **Consultation**

- **Within Government**

The Scottish Legal Aid Board (“The Board”) is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. The Board has been consulted from an early stage in the development of these regulations through regular discussions and exchange of draft versions of accompanying documentation.

- **Public Consultation**

A draft of the provisions was shared with the Board prior to laying.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (“the Society”). The Society has been notified of the intended amendment to ABWOR provisions.

## **Options**

### **Option 1: Do nothing**

This would mean making no changes to regulations for new civil proceedings under the CTS Bill, constituting an access to justice risk.

Civil legal aid would be available for the civil proceedings relating to TEOs and seizure of travel documents. However civil legal aid would not be appropriate. Whilst the special urgency provisions, under regulation 18 of the civil legal aid regulations, would be available in circumstances where the applicant could suffer prejudice, the process would be cumbersome. The applicant would still need to lodge an application for civil legal aid within 30 days of the solicitor commencing special urgency work, failing which no payment can be made for the work undertaken by the solicitor. Once lodged, the Board would require to wait at least for the regulatory period of 14 days for the lodging of objections to pass. A financial as well as a merits test would have to be applied and detailed scrutiny of the applicants financial circumstances made, if these circumstances and, indeed, the applicant were available. These financial tests are required in a civil application in terms of section 15 of the 1986 Act.

### **Option 2: Make regulations to provide ABWOR for new civil proceedings under the CTS Bill**

Regulations would make ABWOR available for new civil proceedings under the CTS Bill. The solicitor would make ABWOR available, subject to notification to the Board and the usual ABWOR “back end” check carried out by the Board to satisfy itself that the relevant tests had been applied by the solicitor.

## **Sectors and groups affected**

These measures will largely impact on the Board and those solicitors’ firms providing advice and representation for civil proceedings.

### **Benefits**

#### **Option 1: Do nothing**

Regulations would not be amended to make (ABWOR) available for the civil proceedings.

#### **Option 2: Make regulations to provide ABWOR for new civil proceedings under the CTS Bill**

Making provision for ABWOR would allow those appearing at these types of proceedings to receive timeous legal representation, providing assured access to justice.

## **Costs**

### **Option 1: Do nothing**

The cost of representation under civil legal aid would be approximately the same as option 2 under ABWOR given the nature of the proceedings. However in practice civil legal aid would not be available in time therefore no cost would be incurred, as a result access to justice would be hindered.

### **Option 2: Make regulations to provide ABWOR for new civil proceedings under the CTS Bill**

The Board forecasts that the provision of ABWOR for these proceedings will cost less than £10,000 per annum. The total number of cases for the TEOs and seizure of travelling documents is expected to be 4 per annum. An upper cost per hearing is expected to be up to £1000. Each applicant may have a number of hearings and, on occasion, counsel may be required. On the assumption that each case requires 2 hearings, the figure would be less than £10,000 and therefore constitute a minimal effect on the legal aid fund.

## **Scottish Firms Impact Test**

As stated in the consultation section, the representative body for solicitors in Scotland, the Law Society of Scotland (“the Society”) has been notified of the intended amendment to ABWOR provisions.

The Society’s work on legal aid issues is led by the criminal and civil legal aid negotiating teams, each being panels of solicitors who work in these fields, either as a sole practitioner or a member of a Firm. These panels are responsible to the Council of the Society. The criminal and civil legal aid negotiating teams have been informed of the development of these Regulations.

No face-to-face discussions with business have taken place as these regulations are consequential changes as a result of new civil proceedings under the CTS Bill. The CTS Bill has been introduced by the UK Government and introduces 2 new civil provisions one of these provisions – retention of travel documents - is expected to come into force by 13 February.

The amendments are expected to have minimal, though beneficial, impact on business as they allow for timeous availability of publicly funded legal aid. An Equality Impact Assessment has been carried out on these proposals. The Scottish Government does not believe the regulations will give rise to any adverse impacts on groups with protected characteristics as defined in the Equality Act 2010.

### **Competition Assessment**

In our view, having applied the Competition and Markets Authority competition filter, the proposal will not impact on competition within the legal aid market. These Regulations do not directly or indirectly limit the number or range of suppliers, limit the ability of suppliers to compete, or reduce suppliers' incentives to compete vigorously.

### **Test run of business forms**

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

### **Legal Aid Impact Test**

Making ABWOR available for TEOs and seizure of travelling document proceedings under the CTS Bill is likely to cost less than £10,000 per annum to the Legal Aid Fund.

### **Enforcement, sanctions and monitoring**

The amendments made to ABWOR provision do not create any new enforcement or monitoring mechanisms. The Board will monitor the implications of these measures and has responsibility for administering the Fund.

### **Implementation and delivery plan**

These Regulations will come into force on 1 April 2015.

- **Post-implementation review**

The Scottish Government and the Board will review the impact of this legislation within 10 years through consideration of analysis of data which is collected routinely by the Board.

### **Summary and recommendation**

Our recommendation is that option two is taken forward. Making provision for ABWOR to be available for TEOs and retention of travelling documents proceedings will protect access to justice and is estimated to be of low cost to the Legal Aid Fund.

• **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p><b>Scottish Ministers</b></p> <p>No new regulations would be required.</p> <p><b>Scottish Legal Aid Board</b></p> <p>None</p> <p><b>Solicitors</b></p> <p>None</p> <p><b>Clients</b></p> <p>None</p>	<p><b>Scottish Ministers</b></p> <p>Less than £10,000; this is a theoretical cost as civil legal aid would not be available in time, therefore access to justice would be hindered.</p> <p><b>Scottish Legal Aid Board</b></p> <p>Administration cost of processing/rejecting civil legal aid applications.</p> <p><b>Solicitors</b></p> <p>Applications for civil legal aid would not be processed effectively for the new proceedings.</p> <p><b>Clients</b></p> <p>Would not necessarily be eligible to receive civil legal aid for this type of proceeding and may have to either appear without representation or pay for private representation.</p>
2	<p><b>Scottish Ministers</b></p> <p>Access to justice will not be hindered</p> <p><b>Scottish Legal Aid Board</b></p> <p>None</p> <p><b>Solicitors</b></p> <p>Would be able to receive public funds timeously for representing clients at this type of proceeding.</p> <p><b>Clients</b></p> <p>Could qualify for publicly funded legal representation for this type of proceeding and would not have to either appear without representation or pay for private representation</p>	<p><b>Scottish Ministers</b></p> <p>Less than £10,000 per year.</p> <p><b>Scottish Legal Aid Board</b></p> <p>Small change to administration of ABWOR for these proceedings</p> <p><b>Solicitors</b></p> <p>None</p> <p><b>Clients</b></p> <p>None</p>

**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:**

**Date: 18 February 2015**

**Paul Wheelhouse  
Minister for Community Safety and Legal affairs**

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