

# Final Business and Regulatory Impact Assessment

## Title of Proposal

### **The Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017**

## Purpose and intended effect

- **Background**

Under Section 4(2)(c) of the Legal Aid (Scotland) Act 1986 ('the 1986 Act'), Scottish Ministers can make legal aid available in circumstances that are not otherwise covered by the legal aid eligibility criteria in the 1986 Act. This administrative process – known as a 'determination' - can be used where a gap in legal aid provision is identified in a specific case or in a specific type of case.

Section 301A of the Criminal Procedure (Scotland) Act 1995 allows sheriffs in criminal proceedings to consider making orders which have the effect of requiring the production or recovery of certain documents. This is the legal method by which the defence, in particular, obtain authority, in the sheriff court, to obtain sensitive records which they are seeking as part of defence preparations. In early 2015, Ministers received a request for a determination to provide legal aid for representation at a hearing to consider an application from a defence solicitor for the release of a complainer's medical records (referred to as the "WF case"). The request for a determination was received from agents acting for the complainer in a domestic abuse trial that considered several charges of assault against the defender. The defence agents had sought access to the complainer's medical records to consider whether the contents were relevant to the defender's case.

The background to the request for a determination is that in the case in question, following the accused's solicitor making an application for sensitive documents, the Sheriff ordered intimation on the complainer lest she wished to express views at the hearing on the application. The solicitors acting for the complainer sought legal aid. However, the Scottish Legal Aid Board declined to make legal aid available as the 1986 Act does not make provision for legal aid for a complainer in these circumstances. The complainer's agents then applied to Scottish Ministers for a determination.

The application was refused. That decision of Scottish Ministers to refuse the determination request was the subject of judicial review. The judicial review hearing concluded on 22 January 2016 and the decision was published on 12 February 2016. Lord Glennie made a number of points in his opinion, including:

- That he considers that the person whose records are being sought is

entitled to have their ECHR rights protected effectively which translates into a right to be notified of an application to recover medical or any other sensitive records and thereafter a right to be heard in opposition.

- That the decision of Ministers, as it was based on the premise that no such rights exist, was based on an error of law. He therefore quashed the decision not to make a determination.

### **Legal Aid Provision**

A determination under Section 4(2)(c) of the Legal Aid (Scotland) Act 1986 was subsequently granted with effect from 1 March 2016 to allow the complainant to receive legal aid in her case. On the same date a wider general determination came into force for any persons seeking to oppose the recovery of medical or other sensitive documents in criminal proceedings.

- **Objective**

We propose amending the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 to make publicly funded legal assistance available for people (including complainants) seeking to make representations about the recovery of medical or other sensitive documents in criminal proceedings. This will replace the general determination that has been in place since 1 March 2016.

- **Rationale for Government intervention**

Without further Government intervention, the legal aid provision for anyone (including complainants) seeking to make representations in respect of the recovery of their medical or other sensitive documents in criminal proceedings would continue to be assured by the determination.

The policy aim is to ensure that the current legal aid provision is continued on a permanent legislative footing. The Cabinet Secretary confirmed to Parliament on 1 March 2016 that interim legal aid arrangements had been put in place in response to the ruling in the WF case and that these would be formalised in due course. The intention to put this provision on a statutory footing was also outlined in the Programme for Government (at page 68).

The legal aid system contributes to the 'Safer and Stronger' Strategic Objective. In particular, it contributes to the national outcome of "strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others" by ensuring that individuals can enforce their own legal rights through the effective function of the courts.

### **Consultation**

- **Within Government**

Policy colleagues within the Scottish Government working on procedural and gender equality issues.

The Scottish Legal Aid Board (SLAB) is a non-departmental public body which administers legal aid in Scotland and is accountable to the Scottish Ministers.

SLAB has been consulted in the development of these regulations.

- **Public Consultation**

These regulations directly affect solicitors and counsel providing legal aid services. Consultation was therefore carried out with legal aid solicitors and counsel.

The Scottish Courts and Tribunal Service were consulted along with the Crown Office and Procurator Fiscal Service.

More details of these groups are covered in the “Business” consultation section.

The following stakeholders were consulted: Rape Crisis Scotland, Scottish Women’s Aid and Victim Support Scotland, Law Society of Scotland, Faculty of Advocates

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (“the Society”). The Society’s engagement with the Scottish Government on criminal legal aid issues is led by the criminal legal aid team - a panel of solicitors who work in this field, either as a sole practitioner or a member of a firm. This team has been consulted in the development of these regulations.

The Faculty of Advocates (“the Faculty”) is the body of advocates in Scotland. The Faculty was consulted in the development of these regulations.

## Options

### Option 1: Do Nothing

Without the provision of legal aid being formalised in secondary legislation, the current method (the determination in place since 01/03/16) by which legal aid provision is delivered, will remain in place and “recovery proceedings” would not be named in the Advice and Assistance (ABWOR) (Scotland) Regulations 2003. This means that there would be no permanent legislative footing for the legal aid provision.

### Option 2: Arrangements formalised in Regulations

Assistance by way of representation (ABWOR) provision for recovery proceedings would be clearly specified in the **Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003**. This means that there would be a permanent legislative footing for the legal aid provision.

## Sectors and groups affected

These regulations will largely impact on solicitors and counsel as well as those people (including complainers) seeking to oppose medical or sensitive documents being recovered.

## **Benefits**

### **Option 1: Do Nothing**

There are no obvious benefits of doing nothing beyond the relatively minor saving of administrative and Parliamentary resources in preparing the Regulations and giving them statutory force.

### **Option 2: Arrangements formalised through Regulations**

Laying the regulations to amend the 2003 ABWOR Regulations will provide legal aid provision for recovery hearings in the Sheriff Court as the current legal aid determination does.

The Advice and Assistance (Scotland) Regulations 1996 specify the fees to be available to the solicitor shall be assessed as if the assistance by way of representation is related to a criminal matter. These are currently chargeable by solicitors in a range of different hearings.

There is unlikely to be any financial impact as a consequence of arrangements being formalised. As covered in the cost section below, there may be difficulties in considering cost in that there are some wide potential fluctuations. More information is provided below.

## **Costs**

### **Option 1: Do Nothing**

There will be no change to the costs incurred to the Legal Aid Fund as the determination would still be in place. The costs mentioned above would be saved.

### **Option 2: Arrangements formalised through Regulations**

The cost associated with making ABWOR available will depend on a variety of factors including the number of cases heard and their complexity. SLAB are unable to provide projections for future number of cases other than that provided below, due to lack of data. This is because of the very small number (7) of applications SLAB has received and paid since the general determination. Any projection based on the available data would require such wide margins of error as to be practically meaningless.

SLAB estimates on its expenditure are therefore very limited, stating only that the cost will vary according to the work undertaken.

As stated in the consultation section, consultation took place with the Law Society of Scotland, whose Legal Aid Teams engage with government on proposed changes to legislation on behalf of the legal profession. These teams comprise practising solicitors who are authorised to provide publicly-funded legal assistance.

The profession includes solicitors employed in firms, partners and sole practitioners. Again due to the very small number of cases received so far it is not possible to predict accurately what type of firm will be involved in providing this work.

There was no comment from the Law Society of Scotland and Victim Support Scotland.

The Faculty of Advocates noted concerns regarding privacy of documents. This was addressed through separate correspondence and do not affect the content of these regulations.

The Scottish Court and Tribunal Service commented that they wished to avoid having the court involved at a stage unnecessarily, and they had a concern that this requirement may tie down the process for such applications to come before the court, and in particular require the court to consider intimation. These points have been addressed in the regulations.

Rape Crisis Scotland and Scottish Women's Aid were in agreement and "strongly supports the aim of the regulations in providing non-means tested legal advice to complainers.

### **Competition Assessment**

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

- Will the measure directly or indirectly limit the number or range of suppliers?  
No: by making provision for legal aid it will enable suppliers to offer the service of providing advice to those who's records are the subject of an access request.
- Will the measure limit the ability of suppliers to compete?  
No, see above
- Will the measure limit suppliers' incentives to compete vigorously?  
No, see above
- Will the measure limit the choices and information available to consumers?  
No, see above.

### **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**

The impact on the Legal Aid Fund will depend on the number of people (including complainers) seeking to make representations about the recovery of medical or other sensitive documents in criminal proceedings.

One of the difficulties in considering cost is that there are some wide potential fluctuations in anticipated costs due to the fact that the work could range from the very simple to the quite involved – at one extreme it could be fairly simple and done by a solicitor alone, with no other heads of costs, and at the other extreme, it could involve reports from professionals or experts, or require the employment of counsel, all at potentially significant cost.

Since the current determination has been in place since 1 March 2016, there have been **7 applications** for legal aid for clients. Of these 5 have been paid where the **average case cost** has totalled **£581**.

The **total cost of the 5 applications paid is £2,906** which includes both fees and outlays.

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

The amendments made to the provision of publicly-funded criminal legal assistance do not create any new enforcement or monitoring mechanisms. SLAB will monitor the implications of these measures and has responsibility for administering the Legal Aid Fund.

### **Implementation and delivery plan**

The regulations will come into force on 20 July 2017.

- **Post-implementation review**

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

### **Summary and recommendation**

It is recommended that regulations be made as set out in option 2. This will allow legal aid provision to be formalised through subordinate legislation.

• **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>There are no significant benefits of option 1 – doing nothing - for any of the following groups:</p> <p>Scottish Legal Aid Board - None as determination would remain in place</p> <p>Solicitors - None as determination would remain in place and this sets out the fees</p> <p>Individuals (including complainers) - Representation may still be available to applicants as the determination would be in place.</p>	<p>Scottish Ministers - None</p> <p>Scottish Legal Aid Board - There would be no change to the costs incurred to the Fund</p> <p>Solicitors and Counsel - None</p> <p>Individuals (including complainers) - None</p>
2	<p>Scottish Ministers - Unable to quantify costs due to lack of available data</p> <p>Scottish Legal Aid Board - None</p> <p>Solicitors - There may a wider range of people eligible to apply for legal aid as a result of the determinations and these regulations putting the provision on a legislative footing. –This may bring in different legal practitioners with expertise in both criminal and civil law.</p>	<p>Scottish Ministers - Unable to quantify due to lack of available data - Legal aid provision would be on a legislative footing</p> <p>Scottish Legal Aid Board - None</p> <p>Solicitors - There will be no additional costs to those providing assistance as a result of these regulations</p> <p>Individuals (including complainers) - There will be no additional costs to those providing assistance as a result of these regulations</p>

**Declaration and publication**

The Cabinet Secretary or Minister responsible for the policy (or the Chief Executive of non departmental public bodies and other agencies if appropriate) is required to sign off all BRIAs prior to publication. Use appropriate text from choices below:

- Sign-off for Partial BRIAs:

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

- 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:**

**Date:**

**Annabelle Ewing**  
**Minister for Community Safety and Legal Affairs**

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