

POLICY NOTE

THE ADVICE AND ASSISTANCE (PROCEEDINGS FOR RECOVERY OF DOCUMENTS) (SCOTLAND) REGULATIONS 2017

SSI 2017/291

The above instrument was made in exercise of the powers conferred on the Scottish Ministers by sections 9, 33(2)(b) and (3) and 41A of the Legal Aid (Scotland) Act 1986⁽¹⁾ and all other powers enabling them to do so.

In accordance with section 37(2) of that Act, a draft of this instrument has been laid before, and approved by resolution of, the Scottish Parliament⁽²⁾.

Background

The accused in a domestic abuse trial sought medical records relating to the principal witness ('the complainer'). An application was made by the complainer's solicitor to the Scottish Legal Aid Board ('the Board') for legal aid to oppose recovery of the medical records. The Board advised that the Legal Aid (Scotland) Act 1986 ('the 1986 Act'), and regulations made under the 1986 Act, did not make provision for legal aid for a complainer in these circumstances and legal aid was not therefore available. The Board directed the complainer's solicitor to apply to Scottish Ministers for a determination.

In May 2015, the Scottish Ministers received a request from the complainer's solicitor for a determination under section 4(2)(c) of the 1986 Act that assistance be made available to allow the complainer to be legally represented in the hearing on the recovery of her medical records.

After carefully reviewing the application, the Scottish Ministers refused the request for a determination as it was considered that the decision making process in these types of cases enables the views of complainers to be taken into account sufficiently and for their interests to be protected for the purposes of ECHR, including article 8, without the need for them to participate and be represented at the hearing to determine the matter.

The decision of Scottish Ministers to refuse the determination request was the subject of judicial review. Lord Glennie concluded **(3)** :

- that intimation to the complainer and the provision of an opportunity to be heard before an order for recovery of her medical records is made is required if there is not to be a breach of the complainer's Article 8 rights (right to respect for private and family life),

(1) 1986 c.47. Section 9 was amended by the Access to Justice Act 1999 (c.22), section 32 and the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3), sections 18(1) and 23(5). Section 33(2) was amended by the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), section 67(7)(b). Section 41A was inserted by the Crime and Punishment (Scotland) Act 1997 (c.48), section 54. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (c.46), section 53.

(2) The powers to make these Regulations are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). The Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.

(3) F v Scottish Ministers [2016] CSOH 27

- as the complainer has a right to be heard, it must follow that she is entitled to legal representation,
- that the decision of the Scottish Ministers refusing the determination should be reduced, as it was based on an error of law on right to be heard and represented, leaving the Scottish Ministers to make a new decision on a correct legal basis.

A determination was issued to allow the complainer to receive legal aid in her case, coming into force on 1 March 2016.

On the same date a general determination ('the general determination') came into force for any persons seeking to oppose the recovery of medical or other sensitive documents in criminal proceedings. There have only been a 7 applications to the Board for this type of legal advice and all have been granted. As there have been no issues with the operation of the determination, the regulations seek to mirror the effect of the determination.

The Cabinet Secretary for Justice confirmed to Parliament on 1 March 2016 that interim legal aid arrangements had been put in place in response to the ruling 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. This outlined that a sustainable arrangement to protect the interests of individuals whose sensitive records are requested in criminal court proceedings, building on arrangements already in place.

Policy Objectives: -

The purpose of the regulations is make provision for the availability of public funded assistance by way of representation (ABWOR), without reference to the financial limits under section 8 of the 1986 Act and without the need to pay client's contributions under section 11(2) of that Act, for proceedings relating to an application for an order for recovery of medical or sensitive documents in connection with criminal proceedings.

Effect of Order

Regulation 5 amends the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to add recovery proceedings to those proceedings for which ABWOR is available. Recovery proceedings are defined in paragraph (2) and follow the same formulation as paragraph 2 of the general determination with one difference. They move from the court intimating the application to the client to a more passive approach that the application for recovery of documents has been intimated to the client. This is to avoid having the court involved at this stage unnecessarily and tying down the process for such applications.

ABWOR will be available without reference to the financial limits under section 8 of the 1986 Act (availability of advice and assistance) and section 11(2) of that Act (client's contributions). This mirrors paragraph 7 of the general determination which provides that assistance under the general determination is available without reference to the financial limits in sections 8 and 11(2) of the 1986 Act.

Before approving ABWOR for recovery proceedings, the Board must be satisfied that legal representation is required to allow the person to participate effectively in the proceedings. In determining effective participation, the following factors have to be taken into consideration-

- (a) the complexity of the case, including the existence and difficulty of any points of law in issue;
- (b) the nature of legal issues involved;
- (c) the ability of the person to consider and challenge any document or information in the hearings or proceedings without the assistance of a solicitor; and
- (d) the ability of the person to present his or her views in an effective manner without the assistance of a solicitor.

Paragraph 6 of the general determination contains the same requirement for pre-approval by the Board and employs the same threshold test.

The amendments made by regulation 5 apply to applications made for ABWOR made on or after the day on which these regulations come into force .

Regulation 4 amends the Advice and Assistance (Scotland) Regulations 1996 (“the 1996 Regulations”). Schedule 3 to the 1996 Regulations contains the tables of fees allowable to solicitors with different rates for criminal and civil matters and children’s matters arising out of hearings and proceedings under the Children’s Hearings (Scotland) Act 2011. ABWOR and advice and assistance for recovery proceedings will be treated as a criminal matter. Paragraph 5(b) of the general determination provides for financial assistance to be paid out as criminal proceedings. This reflects Lord Glennie’s judgement, in *F v Scottish Ministers*, that recovery proceedings are criminal proceedings.

The amendments made by regulation 4 apply to applications for ABWOR and advice and assistance made on or after the day on which these regulations come into force .

Regulation 3 excludes recovery proceedings from the scope of criminal legal assistance for the purposes of section 25A of the Legal Aid (Scotland) Act 1986 (‘the 1986 Act’). Section 25A limits the provision of criminal legal assistance to solicitors on the Criminal Legal Assistance Register. The effect of Regulation 3 will be to allow work to be carried out by solicitors who are registered with the Board to undertake civil and/or criminal work. This flexibility will allow the full range of solicitors to provide advice and representation to those involved in recovery proceedings. The requirement for non-criminal work solicitors to be able to apply to do the work under the ABWOR provisions is a significant part of the policy objective and there is recognition that solicitors dealing with, for example, domestic violence, partner abuse etc should be able to undertake this particular work.

Consultation: -

There was a targeted consultation to ensure the Regulations met the original policy intent . Comments about the original policy intent would not be considered as this was set out in the opinion of the Court in *F v the Scottish Ministers*, as whose implementation in statute these Regulations are intended. Draft provisions were shared with the Scottish Legal Aid Board, the Faculty of Advocates, the Law Society of Scotland, the Crown Office and Procurator Fiscal Service (COPFS), Scottish Courts and Tribunal Service (SCTS), Rape Crisis Scotland, Scottish Women’s Aid and Victim Support Scotland.

Nonetheless, respondents were supportive of the policy aim to provide non-means tested legal assistance for these proceedings.

The Law Society of Scotland did not provide comments on the draft Regulations.

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 SCTS expressed concern about the regulations prescribing that the court must intimate the application, as this could tie down the process for such applications to come before the court and for the court to consider intimation. As such, the regulations only require that the application is intimated to the client without further specification.

COPFS sought clarification that proceedings initiated by them would also be covered by legal assistance. Confirmation was given that this was correct.

Rape Crisis Scotland, supported by Scottish Women's Aid, raised concerns with the reference to Article 8 rights, the use of the effective participation test and provision for appeals. These issues were addressed through separate correspondence and do not affect the content of these regulations.

Impact Assessments: -

An equality impact assessment has been completed on the draft SSI and is attached. There are no equality impact issues.

Financial Effects: -

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business will depend on the number of people (including complainers) seeking to make representations about the recovery of medical or other sensitive documents.

One of the difficulties in considering cost is there are some wide potential fluctuations in anticipated costs, due to the work ranging from very simple to the quite involved.

Access to Justice
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