

POLICY NOTE

THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) (NO. 4) REGULATIONS 2023

SSI 2023/XXX

The above instrument will, if approved by the Scottish Parliament, be made in exercise of the powers conferred by sections 9(1) and (2)(a), (b), (dd), (e), 17(2B), 31(9), 33(2) and (3)(a), (b) and (f), 36(1) and (2)(a) and (b), and 42 of the Legal Aid (Scotland) Act 1986⁽¹⁾ and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Summary

This instrument:

- amends the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993, Advice and Assistance (Scotland) Regulations 1996, Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003, Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 and Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 to make provision for advice and assistance and assistance by way of representation (“ABWOR”) to be available to persons arrested under section 27 of the National Security Act 2023 (“the Act”);
- amends the Civil Legal Aid (Scotland) Regulations 2002 and Children’s Legal Assistance (Scotland) Regulations 2013 to provide that –
 - (a) any payment by way of the new form of social security assistance known as carer support payment (provision for which is made in the Carer's Assistance (Carer Support Payment) (Scotland) Regulations 2023) is to be disregarded for the purposes of financial assessment regarding eligibility for Civil Legal Aid and Children’s Legal Assistance, and
 - (b) the requirement set out in section 17(2B) of the Legal Aid (Scotland) Act 1986 that a party must repay any liability to the Legal Aid Fund from property recovered or preserved for them does not apply to any money payable by way of a carer support payment;
- amends the Civil Legal Aid (Scotland) (Fees) Regulations 1989 and Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to make minor corrections relating to Counsel Fees.

Policy Objectives

This instrument makes provision to ensure that legal advice and assistance will be available to persons arrested under section 27 of the [National Security Act 2023](#) (“the 2023 Act”). Section 27 and Schedule 6 of the 2023 Act will, if commenced, create a procedural framework for the arrest of persons reasonably suspected to be involved in ‘foreign power threat activity’.

(1) 1986 c. 47.

Current provision for legal advice and assistance does not cover all the circumstances of detention in relation to such activity, and this SSI will make further provision to ensure that an appropriate regime is in place to ensure that advice and assistance and ABWOR can be provided to persons arrested under these provisions in the 2023 Act. Without additional provision there is a risk that persons are arrested under the 2023 Act and are unable to access legal advice, assistance and representation.

Sections 95 to 102 of the 2023 Act came into force on 11 July 2023. The rest of the provisions, including those to which these Regulations relate, come into force on such day as the Secretary of State may by regulations appoint. Commencement of these provisions is expected in the final months of 2023 or early 2024.

This instrument also makes provision for any carer support payment to be disregarded by the Scottish Legal Aid Board when assessing a person's financial eligibility for civil legal aid or children's legal assistance, and for such payments to be excluded from recovery where a person has a liability to the Scottish Legal Aid Fund in relation to civil legal aid proceedings.

Carer Support Payment is intended to improve outcomes for unpaid carers by providing financial assistance to those providing regular and substantial care to someone in receipt of a qualifying disability benefit.

The Scottish Government is committed to ensuring that individuals living in Scotland do not lose access to justice as a result of receiving monies through the Carer Support Payment. The Scottish Government considers that it would not be appropriate for individuals in receipt of Carer Support Payment to be put in a position which could threaten their access to justice.

This payment would usually automatically be considered as part of an applicant's financial resources when being assessed to determine their eligibility for publically funded legal assistance. As a result, an applicant might find that they require to make a contribution to legal fees or costs or may even become ineligible for any publically funded legal assistance by virtue of receiving such payments. They may also find there are required to use this payment to repay their liability to the Scottish Legal Aid Fund.

The Scottish Government does not consider it would be appropriate to disadvantage these individuals by taking account of these payments and therefore considers it correct to disregard payments in this way.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU. The instrument would have been made in the same terms had the UK still been within the EU.

Consultation

The Faculty of Advocates has been consulted on Counsel Fee amendments.

Consultation regarding the National Security Act and the application of the disregard of the carers payment has taken place with the Scottish Legal Aid Board.

Impact Assessments

A BRIA has been completed alongside this instrument.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. Negligible impact on the Legal Aid Fund is expected as a result of the disregard. The impact of the provisions contained in the National Security Act 2023 are estimated by the Scottish Legal Aid Board to be under £10,000 annually.

Scottish Government
Justice Directorate

September 2023