

# Business and Regulatory Impact Assessment

## Title of Proposal

### **The Criminal Legal Aid and Advice and Assistance (Scotland)(Counter-Terrorism and Border Security Amendment) Regulations 2020**

## Introduction

### **Background**

The Counter-Terrorism and Border Security Act 2019 introduces powers to stop, question and detain individuals at a port or border area in order to determine whether they are, or have been, involved in hostile activity on behalf of, or in the interests of, a State other than the UK.

Under current legislative arrangements non means-tested criminal advice and assistance is available for any person who has a right under section 32 of the Criminal Justice (Scotland) Act 2016 to have a solicitor present at interview. However, this Part of the Act is disapplied for terrorism offences under the Terrorism Act 2000. Operationally, the Scottish Legal Aid Board (SLAB) have not applied a distinction between advice at a police station for terrorism offences and any other criminal offences when registering grants of criminal advice and assistance.

Schedule 4 Paragraph 19 of the Counter-Terrorism Border Security Act 2019 amends section 8A of the Legal Aid (Scotland) Act 1986, to provide that persons who are detained in Scotland under Part 1 of Schedule 3 of the Counter-Terrorism Border Security Act 2019 or under section 41 of, or Schedule 7 to, the Terrorism Act 2000 are 'relevant clients' for the purposes of Regulations under that section which may make criminal advice and assistance available without reference to means tests. include.

### **Objective**

To provide for non means-tested advice and assistance for detentions under the Counter-Terrorism Border Security Act 2019 and Terrorism Act 2000.

An SSI is required to amend the subordinate legislation. Amended legislation will ensure a single common Scotland-wide system for dealing with all detentions in relation to provision of free criminal advice and assistance while in custody.

### **Rationale for Government intervention**

As noted above, there is a gap in provision at this present time.

## Consultation

- **Within Government**

The Scottish Legal Aid Board is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. SLAB has been consulted in the development of these Regulations.

- **Public Consultation**

No public consultation was carried out due to the technical nature of the proposed regulations.

- **Business**

The Faculty of Advocates (the Faculty) is an independent body of lawyers who have been admitted to practise as advocates before the courts of Scotland. The Faculty's representatives have been consulted in the development of these regulations.

The representative body for solicitors and solicitor advocates in Scotland is the Law Society of Scotland (the Society). The Society's engagement on legal aid issues is led by the Criminal and Civil Legal Aid Negotiating Teams, each being panels of solicitors and solicitor advocates who work in these fields, either as a sole practitioner or a member of a firm. The Society have also been consulted in the development of these regulations.

## Options

### Option 1: Do Nothing

Suspects in custody under the 2019 Act and the Terrorism Act 2000 would be able to access advice and assistance although as this would be subject to means testing, it would not be automatically available as is the case for people detained at the police station under the Criminal Justice (Scotland) Act 2016.

### Option 2: Bring forward Regulations

Bring about continuity of the right of access to non means-tested advice and assistance, by extending the existing police station advice scheme and the availability of non means-tested advice and assistance for detention under the Counter-Terrorism and Border Security Act 2019 and Terrorism Act 2000.

## Benefits

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

Option 1 would not bring forward any benefits. There would continue to be disparity between those held in custody under the 2019 Act and the Terrorism Act 2000 and those detained at the police station under the Criminal Justice (Scotland) Act 2016. It is incongruous that a person being detained in respect of investigations into crimes of this nature would not have the same automatic entitlement to legal advice and representation that a person detained in respect of a minor offence already has. Without legislative provision, the only alternative to effect such a change would be by way of a determination from Scottish Ministers.

### **Option 2: Bring forward Regulations**

Bringing forward the regulations would ensure non means-tested advice and assistance would be available for detentions under the Counter-Terrorism Border Security Act 2019 and Terrorism Act 2000 bringing it into line with those detained at the police station under the Criminal Justice (Scotland) Act 2016. It would ensure that solicitors are able to accurately claim for any additional expenses incurred by attending a port or border to represent a client.

## **Costs**

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

As option 1 is to do nothing, there would be no additional costs or savings associated with this option. Given the need for change outlined by the chosen option 2 however, the lack of additional costs imposed by option 1 would not add any positive value.

### **Option 2: Bring forward Regulations**

There would be an associated cost in extending the availability of non means-tested advice and assistance; however, it is expected that the number of persons detained under the relevant legislation will be so low as to make costs negligible.

## **Scottish Firms Impact Test**

### **Competition Assessment**

Having applied the Competition and Markets Authority competition filter, the proposal will not impact on competition within the criminal legal aid market. Such services are likely to be provided by duty solicitors, operating through the Scottish Legal Aid Board's established Duty Scheme. These Regulations do not directly or indirectly limit the number or range of suppliers. They do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

**Test run of business forms**

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

**Legal Aid Impact Test**

It is anticipated that there will be little impact on the Legal Aid fund due to the small number of individuals that are likely to be detained in Scotland under the relevant legislation.

**Enforcement, sanctions and monitoring**

The proposals will be enacted through secondary legislation. The proposals do not, otherwise, create any new enforcement or monitoring mechanisms. SLAB will monitor the implications of these measures and has responsibility for administering the Scottish Legal Aid Fund.

**Implementation and delivery plan**

These Regulations will come into force by early 2021.

**Post-implementation review**

The Scottish Legal Aid Board monitor changes and report to the Scottish Government any negative impacts.

The Law Society of Scotland and the Faculty of Advocates will also report any negative impacts on the legal profession to both SLAB and the Scottish Government.

## **Recommendation**

### **Dismiss Option 1**

Option 1 would mean there would continue to be a gap in provision for non means-tested advice and assistance under the Counter-Terrorism Border Security Act 2019 and Terrorism Act 2000. Although option 1 would have no additional cost, it would bring no improvements.

### **Recommend Option 2**

Option 2 would ensure non means-tested criminal advice and assistance is available for any detained person, regardless of whether they are suspected of terrorism offences or not.

### **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: Humza Yousaf**

**Date: 26th November 2020**

**Humza Yousaf  
Cabinet Secretary for Justice**

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