

Consideration of subordinate legislation by the Education, Children and Young People Committee

1. This note provides information about the [Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 2\) Regulations 2021](#).
2. These regulations may also be referred to by their Scottish Statutory Instrument number which is SSI 2021/333
3. These regulations are being considered under the negative procedure.

Timeline for considering these regulations

4. These regulations were laid before the Scottish Parliament on **23 September 2021**
5. They were considered by the Delegated Powers and Law Reform Committee (DPLRC) at its meeting on **5 October 2021**. The Committee had no comments and the report produced by the Committee is [available here](#).
6. They will be considered by the Education, Children and Young People Committee at its meeting on **27 October 2021**.
7. If the committee wishes to produce a report on these regulations, it must do so by **15 November 2021**.

Is there a requirement to hear evidence from the Cabinet Secretary on these regulations?

8. No.

Purpose of the regulations

9. The policy note states that the Scottish Government is committed to ensuring that individuals living in Scotland should not lose access to legal aid for which they would otherwise have qualified solely as a result of receiving, only in redress of historical in-care abuse to which the 2021 Act applies, any of the following:
 - (i) a payment made under Part 4 of the 2021 Act,
 - (ii) a payment made under the non-statutory advanced payment scheme, or
 - (iii) certain other payments, meaning any of an award of damages or compensation from a court, a payment in settlement of a claim (whether or not court proceedings were commenced), an award of compensation under the Criminal Injuries Compensation Scheme or a payment under any other statutory or non-statutory scheme.

10. The policy note also states that were this instrument not to be made, the payments listed at (i), (ii) or (iii) above would automatically be considered as part of an applicant's financial resources from which legal fees should be paid when being assessed by the Scottish Legal Aid Board (SLAB) to determine their eligibility for publicly 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 publicly funded legal assistance.
11. A copy of the Scottish Government's Policy Note is included in [Annexe A](#).
12. An extract from the DPLRC report on the regulations is provided in [Annexe B](#).

Consultation

13. The policy note states that the representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA) were both consulted on these regulations.

Impact Assessment

14. The policy note states that an Equality Impact Assessment and Child Rights and Wellbeing Impact Assessment have been completed and there are no equality impact issues or child rights and wellbeing issues.

Financial Impact

15. A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached in [Annexe C](#).
16. The policy note states that there will be some additional cost to the Scottish Legal Aid Fund in respect of this policy to provide exemptions for payments from the advance payment scheme, under Part 4 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and certain other payments as defined above. This is because people who previously may not have been entitled to publicly funded legal assistance, or would have had to pay a contribution, may now be entitled to legal assistance once the specified payments are disregarded when calculating eligibility for publicly funded legal assistance.

Procedure

17. These regulations are being considered by Education, Children and Young People Committee under the negative procedure.

18. This means that the regulations become law immediately, i.e. as soon as they have been laid before the Scottish Parliament. These regulations can, however, be annulled up to 40 days after this has happened.
19. Rule 10.4 of the Scottish Parliament's standing orders states that any Member of the Scottish Parliament can lodge a Parliamentary motion within the 40-day time period seeking an annulment of regulations.
20. All regulations considered under the negative procedure are scrutinised by both the Delegated Powers and Law Reform Committee (on various technical grounds) and by a lead committee (on policy grounds).
21. If a motion to annul is tabled, the lead committee will consider this and then hold a vote. If the motion is disagreed to (i.e. MSPs believe the regulations are OK as they are), then the regulations will remain in their current form.
22. If, however, the majority of MSPs on the lead committee agrees the regulations should be annulled, then a further motion is lodged by the Parliamentary Bureau. This is then voted on by the whole Parliament.
23. If that is also agreed to (i.e. the majority of MSPs agree with it), then Scottish Ministers must revoke (withdraw) the instrument. It will no longer be law and the Scottish Government must lay a new set of regulations before the Scottish Parliament.
24. Each negative instrument appears on a committee agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow correspondence to be entered into or a Minister or officials invited to give evidence.
25. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendation on it.
26. The Committee is invited to consider the instrument.

Jane Davidson

Committee Assistant

Education, Children and Young People Committee

22 October 2021

Annexe A**POLICY NOTE****THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) (NO. 2) REGULATIONS****2021 SSI 2021/333**

The above instrument is to be made in exercise of the powers conferred by sections 12(3), 17(2B), 36(2)(a) and 42 of the Legal Aid (Scotland) Act 1986) and by all other powers enabling them to do so. The instrument is subject to the negative procedure.

This instrument will allow for payments made under Part 4 of the Redress for Survivors (Historical Child Abuse in Care) Act 2021 (“the 2021 Act”) and certain other payments not covered by the statutory financial redress scheme to be disregarded from financial assessments for legal aid eligibility.

Background

On 23 October 2018 in the Scottish Parliament, the Deputy First Minister offered an unreserved apology on behalf of the Scottish Government to all those who were abused as children in care and committed to establish a financial redress scheme for the survivors of historical abuse in-care.

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill was introduced to the Scottish Parliament on 13 August 2020 and received unanimous support. The Bill became an Act on 23 April 2021. The Act seeks to provide tangible recognition of the harm caused to those who were abused as children in relevant residential care settings before 1 December 2004.

The Act allows survivors of historical child abuse in care in Scotland prior to 2004 the opportunity to apply for financial redress payments of up to £80,000 from a new independent body to be set up, Redress Scotland, who will assess applications.

In 2019, while work was on-going to develop the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (now the 2021 Act), an advanced payment scheme was established to provide redress payments to survivors of historical in care abuse who were older or had a terminal illness. This was to ensure that those survivors had the immediate benefit towards redress by way of an advance payment.

Policy Objectives

The Scottish Government is committed to ensuring that individuals living in Scotland should not lose access to legal aid for which they would otherwise have qualified solely as a result of receiving, only in redress of historical in-care abuse to which the 2021 Act applies, any of the following:

- (i) a payment made under Part 4 of the 2021 Act,
- (ii) a payment made under the non-statutory advanced payment scheme, or
- (iii) certain other payments, meaning any of an award of damages or compensation from a court, a payment in settlement of a claim (whether or not court proceedings were commenced), an award of compensation under the Criminal Injuries Compensation Scheme or a payment under any other statutory or non-statutory scheme.

Were this instrument not to be made, the payments listed at (i), (ii) or (iii) above would automatically be considered as part of an applicant's financial resources from which legal fees should be paid when being assessed by the Scottish Legal Aid Board (SLAB) to determine their eligibility for publicly 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 publicly funded legal assistance.

The Scottish Government does not consider that it would be appropriate to disadvantage individuals by requiring them to utilise their redress payments in this manner. It is critical that a payment to compensate survivors of abuse does not impact on the ability of such persons to access justice in the future. The Scottish Government therefore considers it correct to disregard these payments from financial assessment when calculating legal assistance eligibility in Scotland.

The main purpose of this instrument is to amend the Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996/2447), the Civil Legal Aid (Scotland) Regulations 2002 (S.S.I. 2002/494) and the Children's Legal Assistance (Scotland) Regulations 2013 (S.S.I. 2013/200) so that payments listed at (i), (ii) and (iii) above will be disregarded by SLAB when assessing the disposable capital or income of a person who wishes to receive advice and assistance, civil legal aid or children's legal aid.

This instrument also makes a minor correction to an incorrect reference to the Advice and Assistance (Scotland) Regulations 1996 (S.I. 1996/2447) made in the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2020 (S.S.I. 2020/424).

Consultation

The representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA). The LSS, the FoA and SLAB have been consulted on these regulations.

Impact Assessments

An Equality Impact Assessment and Child Rights and Wellbeing Impact Assessment have been completed on this instrument and are attached. There are no equality impact issues or child rights and wellbeing issues.

Financial Effects

A Business and Regulatory Impact Assessment has been completed on the instrument and is attached.

There will be some additional cost to the Scottish Legal Aid Fund in respect of this policy to provide exemptions for payments from the advance payment scheme, under Part 4 of the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and certain other payments as defined above. This is because people who previously may not have been entitled to publically funded legal assistance, or would have had to pay a contribution, may now be entitled to legal assistance once the specified payments are disregarded when calculating eligibility for publically funded legal assistance.

It has been estimated that there are likely to be around 9,500 applicants for redress payments in total, split between survivor and next of kin applicants.

The estimated cost to the Scottish Legal Aid Fund of this Redress for Survivors disregard is approximately between £375 and £2,369 per individual, depending on the type of legal assistance that is required.

It should be noted, however, that as only around 2% of the Scottish population access legal aid each year and, as SLAB will still take into account an applicant's disposable income and other aspects of their capital not related to redress scheme payments for the purposes of financial eligibility assessment, the number of individuals to whom this Redress for Survivors disregard will apply is likely to be relatively small.

Scottish Government
Justice Directorate
21 September 2021

Annexe B

Extract from the Delegated Powers and Law Reform Committee's [12th Report](#) of 2021

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2021 (SSI 2021/333)

The Committee also determined that it did not need to draw the Parliament's attention to the instruments and documents set out at the end of this report.

Annexe C

Business and Regulatory Impact Assessment

Title of Proposal

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2021

Purpose and intended effect

Background

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021

On 23 October 2018, the Scottish Government announced its plans to introduce a scheme to provide financial redress to the survivors of child abuse in-care prior to 2004 and in 2019, an advance payment scheme was established to provide redress payments for survivors of historical in care abuse who were older or had a terminal illness while work was on-going to develop the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill (now Act).

The Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 was introduced on 13 August 2020 and seeks to provide tangible recognition of the harm caused to those who were abused as children in relevant residential care settings before 1 December 2004.

The Act allows for Survivors of historical child abuse in care in Scotland to have the opportunity to apply for financial redress payments of up to £80,000.

The Act will also set up a new independent body, Redress Scotland, to assess applications for financial redress. Survivors can apply for a fixed rate redress payment of £10,000 or an individually assessed redress payment which will involve a more detailed examination of their experience. The individually assessed redress payment levels are set at £20,000, £40,000 or £80,000.

Redress payments will be conditional upon the applicant signing a waiver relinquishing their right to continue or raise civil actions in respect of the abuse, against the Scottish Government or those organisations on the contributor list. This approach to seeking financial contributions is grounded in the principles that the scheme must be developed in a way that is fair, open, transparent, and managed with integrity.

The redress scheme will contribute to the Scottish Government's objective of creating lasting change in the care system, as detailed in The Government's Programme for Scotland 2019-20.

Objective

- **Rationale for Scottish Government intervention**

Legislation is required in Scotland to allow payments related to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and other relevant payments as set out in the Act to be disregarded from financial assessment when calculating legal assistance eligibility in Scotland.

Consultation

- **Within Government**

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

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA). The LSS, the FoA and SLAB have been consulted on these draft Regulations.

Options**Option 1: Do Nothing**

Benefits - The current arrangements will continue and civil and criminal legal assistance will continue to be available subject to financial eligibility tests which would include payments related to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and other related payments as set out in the Act.

Costs - No costs are associated with this option.

Option 2: Amend the current legal aid Regulations in Scotland

Benefits – Payments related to the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 and other relevant payments as set out in the Act will be disregarded from the relevant financial assessments for legal aid eligibility.

Costs – There will some additional cost to the Scottish Legal Aid Fund regarding the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Act 2021 as people who previously may not have been entitled to publically funded legal assistance, or would have had to pay a contribution, may now be entitled to legal assistance.

The Redress Bill Team have estimated that there will be around 9,500 applicants in total split between survivor and next of kin applicants.

The estimated cost to the Scottish Legal Aid Fund of the Redress for Survivors disregard will be approximately £375 - £2,369 per individual, depending on the type of legal assistance that is required.

It should be noted, however, that as only 2% of the Scottish population access legal aid each year and as SLAB will still have consideration of an applicant's disposable income and other aspects of their capital not related to this payment for the purposes of financial eligibility, the number of individuals to whom this disregard apply will likely be relatively small.

Scottish Firms Impact Test

As stated in the Consultation section above, consultation took place with the LSS and the FoA as representatives of the profession.

The profession includes solicitors employed in firms, partners and sole practitioners. Should there be any impact as a result of these proposals, the majority of providers affected are likely to be small providers (both small and micro sized businesses¹) due to the dominance of small legal service providers in the legal aid market. In SLAB's 2010 survey of legal aid solicitors, partners were asked how many solicitors their firm employed across Scotland. Almost half of the firms (48%) employed between 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

As the number of these cases that require access to legal aid are estimated to be relatively small, there is likely to be minimal impact on firms or sole practitioners.

Competition Assessment

Having applied the Competition and Markets Authority competition filter, these proposals will not impact on competition within the civil legal aid market. 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 / Financial Implications

There may be some additional cost to the Scottish Legal Aid Fund as applicants who previously may not have qualified for legal assistance, or would have had to pay a contribution, will be now be eligible.

The Redress Bill Team have estimated that there will be around 9,500 applicants in total split between survivor and next of kin applicants.

The estimated cost to the Scottish Legal Aid Fund of the Redress for Survivors disregard will be approximately £375 - £2,369 per individual, depending on the type of legal assistance that is required.

It should be noted, however, that as only 2% of the Scottish population access legal aid each year and as SLAB will still have consideration of an applicant's disposable income and other aspects of their capital not related to this payment for

¹ Small businesses have less than 50 employees; micro businesses have less than 10 employees.

the purposes of financial eligibility, the number of individuals to whom this disregard apply will likely be relatively small.

Enforcement, sanctions and monitoring

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

Implementation and delivery plan

These Regulations are expected to come into force by December 2021.

Post-implementation review

SLAB monitor changes and report to the Scottish Government any negative impacts.

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

Recommendation

It is recommended that the amendments to the current legal aid regulations in Scotland are implemented (**Option 2**).

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: Ash Denham

Date: 21/09/2021

Ash Denham

Minister for Community Safety

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