

Equalities, Human Rights and Civil Justice Committee  
Tuesday 17 September 2024  
18th Meeting, 2024 (Session 6)

## Negative subordinate legislation consideration

### Overview

1. At this meeting, the Committee will consider the following Scottish Statutory Instruments (SSIs), which are subject to annulment by resolution of the Parliament until 2 October 2024 and 11 October 2024 respectively.
  - The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2024 (SSI 2024/178) – the Policy Note and any associated documents are at [Annexe A](#).
  - The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2024 (SSI 2024/216) – the Policy Note and any associated documents are at [Annexe B](#).

The Committee is invited to consider the instruments and decide what, if any, recommendations to make.

2. More information about the instruments are summarised below:

**Title of instrument:** [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) Regulations 2024](#) (SSI 2024/178)

**Laid under:** [The Legal Aid \(Scotland\) Act 1986](#)

**Laid on:** 20 June 2024

**Procedure:** Negative

**Deadline for committee consideration:** 30 September 2024

**Deadline for Chamber consideration:** 2 October 2024

**Commencement:** 3 October 2024

and

**Title of instrument:** [The Legal Aid and Advice and Assistance \(Miscellaneous Amendment\) \(Scotland\) \(No. 2\) Regulations 2024](#) (SSI 2024/216)

**Laid under:** [The Legal Aid \(Scotland\) Act 1986](#)

**Laid on:** 29 August 2024

**Procedure:** Negative

**Deadline for committee consideration:** 7 October 2024

**Deadline for Chamber consideration:** 11 October 2024

**Commencement:** 12 October 2024

## **The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2024 (SSI 2024/178)**

3. These Regulations amend existing legal aid regulations to provide that payments in respect of (i) Carer's Allowance Supplement and (ii) any Care-Experienced Students Bursary are to be disregarded by the Scottish Legal Aid Board (SLAB) when calculating financial eligibility for civil or children's legal aid or advice and assistance. Certain of these payments are also excluded from 'clawback' to the Scottish Legal Aid Fund.
4. Regulation 2 amends the Advice and Assistance (Scotland) Regulations 1996 to disregard the payments for the purposes of advice and assistance. It also excludes the payments from bearing fees and outlays when forming part of any recovered or preserved property in proceedings.
5. Regulation 3 amends the Civil Legal Aid (Scotland) Regulations 2002 to make equivalent provision for the purposes of civil legal aid.
6. Regulation 4 amends the Children's Legal Assistance (Scotland) Regulations 2013 to disregard the payments for the purposes of children's legal aid.

## **The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2024 (SSI 2024/216)**

7. These Regulations amend existing legal aid regulations to provide that any (i) human trafficking or exploitation victim payment, (ii) Miscarriage of Justice Compensation Payment, (iii) compensation payment made in relation to the Grenfell Tower Fire, (iv) Infected Blood Compensation Scheme payment and (v) payment of Carer's Allowance is to be disregarded by the Scottish Legal Aid Board (SLAB) when calculating financial eligibility for civil or children's legal aid or advice and assistance. Certain of these payments are also excluded from 'clawback' to the Scottish Legal Aid Fund.
8. The Regulations also make provision to introduce counsel fees for written submissions when these are required by the court.

## **Procedure**

9. Under the negative procedure, an instrument is laid after it is made, and is subject to annulment by resolution of the Parliament for a period of 40 days beginning on the day it is laid.

10. Once laid, the instrument is referred to:

- the Delegated Powers and Law Reform (DPLR) Committee, for scrutiny on various technical grounds, and

- a lead committee, whose remit includes the subject-matter of the instrument, for scrutiny on policy grounds.
11. Any MSP may propose, by motion, that the lead committee recommend annulment of the instrument. If such a motion is lodged, it must be debated at a meeting of the Committee, and the Committee must then report to the Parliament (by the advisory deadline referred to above).
12. If there is no motion recommending annulment, the lead committee is not required to report on the instrument.

## **Delegated Powers and Law Reform Committee consideration**

13. The DPLR Committee considered SSI 2024/178 at its meeting on 3 September 2024 and reported on it in its [49<sup>th</sup> Report, 2024](#). The DPLR Committee considered SSI 2024/216 at its meeting on 10 September 2024 and reported on it in its [51<sup>st</sup> Report, 2024](#). The DPLR Committee made no recommendations in relation to either instrument.

## **Committee consideration**

14. So far, no motion recommending annulment of either instrument has been lodged.
15. Members are invited to consider the instruments and decide whether there are any points they wish to raise. If there are, options include:
- seeking further information from the Scottish Government (and/or other stakeholders) through correspondence, and/or
  - inviting the Minister (and/or other stakeholders) to attend the next meeting to give evidence on the instrument.

It would then be for the Committee, at the next available meeting, to consider the additional information gathered and decide whether to make recommendations in relation to the relevant instrument(s).

16. If members have no points to raise, the Committee should note the instrument (that is, agree that it has no recommendations to make).
17. However, should a motion recommending annulment be lodged later in the 40-day period, it may be necessary for the Committee to consider the instrument again.

## **Clerks to the Committee September 2024**

## **Annexe A: The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2024 (SSI 2024/178) – Policy Note**

The above instrument was made in exercise of the powers conferred by sections 12(3), 17(2B), 36(1) and (2)(a) and 42 of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

### **Purpose of the instrument**

This instrument amends existing legal aid regulations to provide that payments in respect of (i) Carer's Allowance Supplement and (ii) any Care-Experienced Students Bursary are to be disregarded by the Scottish Legal Aid Board (SLAB) when calculating financial eligibility for civil or children's legal aid or advice and assistance. Certain of these payments are also excluded from 'clawback' to the Scottish Legal Aid Fund.

### **EU alignment consideration**

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

### **Policy objectives**

This instrument amends existing regulations to provide that payments in respect of Carer's Allowance Supplement and any Care-Experienced Students Bursary are to be disregarded when SLAB is calculating a person's disposable capital and income for the purposes of assessing their financial eligibility for civil or children's legal aid or advice and assistance. The regulations relating to civil legal aid and advice and assistance are also amended to the effect that any such payments are excluded from bearing fees and outlays when forming part of any recovered or preserved property in proceedings.

Carer's Allowance Supplement is an extra payment for people in Scotland who are in receipt of Carer Support Payment or Carer's Allowance on a particular date. It was introduced by s.81 of the Social Security (Scotland) Act 2018. It is paid twice a year as a lump sum (currently £288.60).

Carer Support Payment is currently disregarded when SLAB assesses financial eligibility for legal assistance, but Carer's Allowance Supplement is not. The Carer's Allowance Supplement is a means tested payment and those in receipt would almost certainly meet the financial requirements for full civil or children's legal aid or advice and assistance. This instrument acknowledges that and removes the requirement for unnecessary consideration by SLAB.

The Care-Experienced Students Bursary is a non-repayable allowance of £9000 which is paid to those completing an eligible course of further or higher education who have been looked after before they were 18 by a local authority in the UK. Care experienced people are often disproportionately disadvantaged in comparison to their peers. This bursary provides financial support in accessing further education

opportunities and closing the attainment gap. This instrument will allow SLAB to disregard the bursary when assessing financial eligibility.

## **Summary**

This instrument provides that:

- Carer's Allowance Supplement payments are to be disregarded in the assessment of a person's financial eligibility for civil or children's legal aid and advice and assistance.
- Care-Experienced Students Bursary payments are to be disregarded in the assessment of a person's financial eligibility for civil or children's legal aid and advice and assistance.
- Such payments are also excluded from bearing fees and outlays when forming part of any recovered or preserved property in civil legal aid and advice and assistance proceedings.

## **Consultation**

No formal consultation has been conducted on these regulations, but the content is the result of extensive engagement with representatives of the Scottish Legal Aid Board. Draft regulations have been shared with the Scottish Legal Aid Board, the Faculty of Advocates and Law Society of Scotland.

## **Impact assessments**

The following impact assessments were considered:

[Child Rights & Wellbeing Impact Assessment](#) – no negative impacts on children and young people.

[Equality Impact Assessment](#) – no negative impacts on groups with protected characteristics.

[Business & Regulatory Impact Assessment](#) – additional spend to the legal aid fund identified and a BRIA has been completed.

Fairer Scotland Duty – not required.

Strategic Environmental Assessment – not required.

Data Protection Impact assessment – not required.

## **Financial effects**

A Business and Regulatory Impact Assessment (BRIA) has been completed and is linked above. The SLAB have estimated that the impact on the legal aid fund will be minimal.

## **Annexe B: The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2024 (SSI 2024/216) – Policy Note**

The above instrument was made in exercise of the powers conferred by sections 12(3), 17(2B), 33(2) and (3)(a), (b) and (f), 36(1) and (2)(a) and 42 of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

### **Purpose of the instrument**

This instrument amends existing legal aid regulations to provide that any (i) human trafficking or exploitation victim payment, (ii) Miscarriage of Justice Compensation Payment, (iii) compensation payment made in relation to the Grenfell Tower Fire, (iv) Infected Blood Compensation Scheme payment and (v) payment of Carer's Allowance is to be disregarded by the Scottish Legal Aid Board (SLAB) when calculating financial eligibility for civil or children's legal aid or advice and assistance. Certain of these payments are also excluded from 'clawback' to the Scottish Legal Aid Fund.

This instrument also makes provision to introduce counsel fees for written submissions when these are required by the court.

### **UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 compatibility**

The Scottish Ministers have made the following statement regarding children's rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2024 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

### **EU alignment consideration**

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

### **Policy objectives**

#### **Disregards of certain payments in relation to legal aid schemes**

This instrument amends existing regulations to provide that any payment of a kind listed above is to be disregarded when SLAB is calculating a person's disposable capital and income for the purposes of assessing their financial eligibility for civil or children's legal aid or advice and assistance. The regulations relating to civil legal aid and advice and assistance are also amended to the effect that any such payments are excluded from bearing fees and outlays when forming part of any recovered or preserved property in proceedings.

(i) Human trafficking or exploitation victim payment

Section 9 of the Human Trafficking and Exploitation (Scotland) Act 2015 confers powers and duties on the Scottish Ministers to provide certain types of support for victims of human trafficking. Section 10 of that Act provides a regulation making power enabling Ministers to make provision for similar support for victims of the offences under section 4 of the 2015 Act, in respect of slavery, servitude and forced or compulsory labour. Such provision is now set out in the Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018. [Any payments made by way of support provided under a Modern Slavery Victim Care Contract, the Home Office contract to provide care to adult victims of modern slavery in England and Wales, are also caught by the provision made in this instrument.]

(ii) Miscarriage of justice compensation payment

Individuals in Scotland can apply for compensation if they've been wrongfully convicted of or charged with a crime. There are two compensation schemes for miscarriages of justice – a statutory scheme and an ex gratia scheme. Further details are available at:

<https://www.mygov.scot/compensation-miscarriage-justice>. Similar schemes operate in the rest of the UK, and are also caught by the provision made in this instrument.

(iii) Grenfell Tower payment

Recent civil and criminal cases have resulted in compensation payments being made to firefighters, bereaved family members, survivors and residents affected by the Grenfell Tower fire of June 2017. Provision is made in the instrument in respect of any payment made to a person by way of compensation, damages or legal expenses in connection with the fire.

(iv) Infected blood compensation scheme payment

Section 49 of the Victims and Prisoners Act 2024 provides that the Secretary of State or the Minister for the Cabinet Office must establish a scheme, known as the Infected Blood Compensation Scheme, for making payments to persons eligible under that section of the Act. The first set of regulations to establish the Scheme and give the Infected Blood Compensation Authority the powers to pay compensation will come into force on 23 August 2024. Further details are available at:

<https://www.gov.uk/government/collections/infected-blood-compensation-scheme>.

(v) Carer's allowance

Carer's Allowance is a UK Government non-contributory benefit that provides a weekly payment to individuals who spend at least 35 hours a week caring for someone, currently set at £81.90. To be eligible for Carer's Allowance, the carer, the person they care for and the type of care they provide must meet certain criteria, in accordance with section 70 of the Social Security Contributions and Benefits Act 1992.

## **Counsel fees for written submissions**

This instrument also makes provision to introduce counsel fees for written submissions in criminal cases, where these are required by the court. There is currently no fee for counsel for drafting written submissions at the request of the court in most types of criminal appeal, though the Sheriff Appeal Court and High Court now routinely order such submissions in appeal hearings. The lodging of submissions in advance is seen as an efficiency measure that allow the courts to fix shorter more focussed hearings.

## **Summary**

This instrument provides that each of the following is to be disregarded in the assessment of a person's financial eligibility for civil or children's legal aid and advice and assistance:

- any human trafficking or exploitation victim payment
- any miscarriage of justice compensation payment
- any Grenfell Tower fire compensation payment
- any infected blood compensation scheme payment
- any Carer's Allowance payment.

Such payments are also excluded from bearing fees and outlays when forming part of any recovered or preserved property in civil legal aid and advice and assistance proceedings.

Provision is made for counsel fees in criminal appeal cases for drafting written submissions where these are required by the court.

## **Consultation**

No formal consultation has been conducted on these regulations, but the content is the result of extensive engagement with representatives of the Scottish Legal Aid Board. Draft regulations have been shared with the Scottish Legal Aid Board, the Faculty of Advocates and Law Society of Scotland.

## **Impact assessments**

The following impact assessments were considered:

[Child Rights & Wellbeing Impact Assessment](#) – no negative impacts on children and young people.

Equality Impact Assessment – no negative impacts on groups with protected characteristics.

[Business & Regulatory Impact Assessment](#) – additional spend to the legal aid fund identified.

Fairer Scotland Duty – not required.



Strategic Environmental Assessment – not required.

Data Protection Impact assessment – not required.

### **Financial effects**

A Business and Regulatory Impact Assessment (BRIA) has been completed and is linked above. The SLAB have estimated that the impact of the counsel fees on the legal aid fund will be a maximum of £25k per annum. The impact of the disregards is assessed to have minimal impact.