

SCOTTISH CIVIL JUSTICE COUNCIL AND CRIMINAL LEGAL ASSISTANCE BILL

DELEGATED POWERS MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Scottish Civil Justice Council and Criminal Legal Assistance Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of Bill provisions

2. The Scottish Civil Justice Council and Criminal Legal Assistance Bill takes forward two separate policies that have been identified as priorities: first, the establishment of a Scottish Civil Justice Council to replace the existing civil Rules Councils, and with a wider policy role to advise and make recommendations on improving the civil justice system in Scotland; and second, introducing financial contributions in criminal legal aid thereby ensuring that those who are able to pay towards the cost of their defence do so. The Bill will also make some changes to financial eligibility in criminal legal assistance to ensure alignment of eligibility between the relevant criminal legal assistance aid types.

Rationale for subordinate legislation

3. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing circumstances quickly, in light of experience, without the need for primary legislation; and
- ensure the proper use of parliamentary time is made.

Delegated powers

Section 6(3) – Power to substitute number of members

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Statutory Instrument**
Parliamentary procedure: **Affirmative procedure**

Provision

4. Section 6 of the Bill makes provision for the membership of the Scottish Civil Justice Council. Subsection (1) specifies the maximum number of members who may be on the Council and also specifies certain numbers relating to specified categories of membership. Subsection (3) provides that Scottish Ministers may by order amend subsection (1), substituting any number specified there for another number.

5. The power to make an order under subsection (3) includes the power to make such supplementary, incidental, consequential, transitional, transitory or saving provision as Scottish Ministers consider appropriate.

6. Subsection (6) provides that the power may not be used to modify the categories of membership themselves (including the removal of a category of membership), nor to add a category of membership.

7. This power can be used to vary:

- the maximum number of members of the Council (section 6(1)),
- the maximum number of members which may be appointed by the Lord President under section 6(1)(i),
- the number of members appointed by the Scottish Ministers, (section 6(1)(d)), and
- the minimum number of members in a category of membership (section 6(1)(e)-(h)).

Reason for taking this power

8. The use of subordinate legislation is appropriate to provide for limited adjustments to Council membership numbers, ensuring that there are sufficient members in each category to allow it to carry out its wide-ranging functions, the scope of which may require greater or fewer members to be appointed to a category from time to time. This will also ensure the Council continues to reflect the Lord President and the Scottish Court Service's responsibilities. The power to amend the maximum number of members is required so that the power to vary numbers in each category can be used flexibly to achieve that purpose.

9. Variation in the numbers of members in subsection (1) will interact with other provisions in the Bill; accordingly, the powers taken in subsection (5) are thought to be a sensible addition to facilitate such interaction.

10. By way of example:

- An order reducing the minimum number of members in a category or the overall numbers of the Council may require transitional or savings provisions relative to the tenure of existing members whose continued membership in terms of section 8 may run contrary to the effect of the variation of numbers.
- An order increasing numbers in a particular category may require the Lord President to appoint more members: the effect of section 7(1) may require to be subject to consequential, transitional or transitory provisions to allow the Lord President the appropriate time to select such members or to phase in such appointments.
- An increase in the number of Scottish Ministers' members or number in a category of member where there is to be no permanent increase in the total number of members may require transitional provisions.

Choice of procedure

11. The Scottish Ministers, under subsection (4), must consult the Lord President before making any order under section 6(3). As the power enables the Scottish Ministers to vary the composition of the Council the affirmative procedure is considered appropriate.

Section 17 – Contributions in respect of automatically available criminal advice and assistance

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

12. Section 17 of the Bill amends section 8A of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Section 8A concerns the automatic availability of criminal advice and assistance. It was introduced following the Supreme Court’s ruling in *Cadder v HMA* in 2010. As currently operated section 8A allows the automatic provision of advice and assistance to people detained under section 15A of the Criminal Procedure (Scotland) Act 1995. The amendment made by section 17 of the Bill inserts a power into a new subsection (1A) which allows Scottish Ministers to disapply the requirement to pay a contribution under section 11 to such advice and assistance.

Reason for taking this power

13. At present, as generally across both civil and criminal advice and assistance, solicitors are required to collect contributions in the circumstances in which section 8A applies even though applicants are at present automatically eligible for advice and assistance. The power to disapply the requirement to pay a contribution is needed to ensure that going forward flexibility is available in respect of the collection of contributions in these circumstances in the same way as flexibility is available in respect of eligibility for advice and assistance. Those who can afford to pay a contribution to the costs of their criminal legal assistance ought to do so. But a pragmatic and flexible approach might need to be taken in these particular circumstances in future.

Choice of procedure

14. Regulations made under this new subsection of section 8A will be subject to the same procedure as applies to the existing power in section 8A – affirmative procedure. The Scottish Government consider that affirmative procedure is appropriate when exercising a power in respect of something as fundamental as whether or not someone has to contribute to the costs of publicly funded legal assistance.

Section 18 – Availability of criminal assistance by way of representation

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Affirmative procedure

Provision

15. Section 18 inserts a new paragraph (dda) into section 9(2) of the 1986 Act. The new section 9(2)(dda) allows regulations to prescribe when the eligibility test, set out in section 9A, should apply to assistance by way of representation (“ABWOR”) provided in certain criminal proceedings, rather than the eligibility test in section 8. The new section 9A eligibility test is based on consideration of a person’s financial circumstances and whether legal representation can be met without causing undue hardship. The section 8 eligibility test is based on the person’s income, capital or receipt of certain benefits.

Reason for taking this power

16. The insertion of section 9(2)(dda) allows Scottish Ministers to prescribe the proceedings in which the new provisions in section 9A about eligibility for criminal ABWOR are to apply. This will allow Scottish Ministers to list all those proceedings where ABWOR is considered to be provided in relation to a criminal matter. As noted above, the eligibility test which will apply to ABWOR in those proceedings, as set out in section 9A, is based on a person’s financial circumstances and the risk of undue hardship being caused.

Choice of procedure

17. The power in section 9(2)(dda) will be subject to the affirmative procedure which already applies to section 9. The Scottish Government recognises that extending or altering eligibility for criminal legal assistance requires thorough parliamentary scrutiny. This is consistent with the approach taken throughout Part II of the 1986 Act, and specifically in section 9, in relation to powers which modify the eligibility criteria in relation to advice and assistance.

Section 20 – contributions for criminal legal aid

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative procedure

Provision

18. Section 20 of the Bill inserts section 25AD into the 1986 Act. Section 25AD(1) sets out the order of priority in which a solicitor can claim payment of his/her fees and outlays incurred in providing criminal legal aid. In accordance with the section, the funder of last resort in any case is the legal aid fund. This section mirrors section 12 of the 1986 Act, which applies to advice and assistance. Regulations may be made under section 25AD(1) to alter the order of priority. Regulations may also be made under section 33ZA(1) (referred to below) which would affect the way in which a solicitor is paid for the criminal legal aid provided.

Reason for taking this power

19. The regulation-making power in section 25AD(1) mirrors section 12 of the 1986 Act. The power is required to adapt the order of priority in subsection (1) to any change in circumstances. For example, the order of priority might need to be changed if the provisions in section 25AC(4) about who collects the contribution are changed in the future (using the powers under section 33ZA(1)).

Choice of procedure

20. The Scottish Government considers that negative procedure is appropriate. The regulation-making power in section 25AD(1) is about the order of priority in which a solicitor gets paid. It does not alter a person's eligibility for criminal legal aid, or whether or how a contribution is due for that legal aid. As a result, the Scottish Government's view is that the power does not merit the same degree of scrutiny as powers to alter those provisions would. In addition, section 12, which section 25AD mirrors, contains a similar regulation-making power which is subject to negative procedure. As a result, the choice of negative procedure in this case is consistent with the existing approach of the 1986 Act.

Section 22 – Regulations about contributions for criminal legal assistance

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: affirmative procedure

Provision

21. Section 22 of the Bill inserts section 33ZA into the 1986 Act. Section 33ZA(1) provides the Scottish Ministers with the power to make regulations about the amount, determination and collection of contributions in respect of all types of criminal legal assistance. The power in section 33ZA(1) would be used when specifying the amount payable by way of contribution and the maximum amount payable by a person, both in accordance with sections 11A(2) and 25AC(3). It is expected that this power will be used in regulations to set out a sliding scale of contributions based on the person's financial circumstances, which would indicate the amount of

contribution due by a person whose financial circumstances falls within certain bands. Such regulations are also expected to specify the maximum contribution payable.

22. Particular ways in which subsection (1) may be exercised are indicated in subsections (2) and (3). These are that regulations may make provision about: a lower contribution being payable where the person or his/her dependents would suffer undue hardship; how to determine the contributions due where the same person is receiving criminal legal assistance in respect of two or more distinct proceedings; whether the Board or the solicitor is to determine or collect contributions (thereby altering the arrangements set out in sections 11A(3) and 25AC(4)), specify how contributions to be dealt with where a case changes procedure whilst proceedings are still live; and for contributions to be payable by instalments. Subsection (3) provides that the power in subsection (1) can make different provisions for different cases or class of case.

Reason for taking this power

23. The power in section 33ZA(1) is needed in order to specify in greater detail than is appropriate in primary legislation how the system of determining and collecting contributions for ABWOR in criminal matters and criminal legal aid will work in practice. The approach – of leaving to regulations much of the detailed operation – is consistent with the approach throughout the 1986 Act.

24. The provisions of subsection (2) are specific illustrations of the power in subsection (1) and do not prevent the exercise of the power in subsection (1) other than in relation to the particular illustrations given in subsection (2). The provision in subsection (3) is required to allow, so far as possible, for regulations to cover a wide variety of situations in which contributions may be due or collectable.

25. In addition to regulations under this section, it is expected that detailed guidance will be provided by the Board to practitioners, as is currently the case in respect of advice and assistance and criminal legal aid.

Choice of procedure

26. The Scottish Government recognises that the detail about the new contributions regime for criminal legal assistance will require thorough parliamentary scrutiny. The affirmative procedure is therefore considered appropriate. This choice of procedure is consistent with the approach taken throughout the 1986 Act in relation to powers which modify the criteria for contributions under advice and assistance and civil legal aid. The necessary amendment to section 37 of the 1986 Act, which prescribes the parliamentary procedure, is made in section 23(10) of the Bill.

27. The powers in section 33ZA as regards whether it is the Board or the solicitor who collects the contribution may affect how the solicitor is paid for the work provided. In comparison to the negative procedure which will apply to the exercise of powers under section 25AD (in section 20 of the Bill) about priority of payment of the solicitor, this power is subject to affirmative procedure. Affirmative procedure is considered appropriate as the power affects which person/body has the obligation to collect and not just how payment is made.

Section 23 – Consequential modifications

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Affirmative procedure**

Provision

28. Section 23(4) amends section 8A of the 1986 Act to enable provision to be made by regulations to allow ABWOR to be available to a person without reference to the eligibility test in section 9A(2). Section 8A concerns the automatic availability of criminal advice and assistance. It was introduced following the Supreme Court’s ruling in *Cadder v HMA* in 2010. As currently operated section 8A allows the automatic provision of advice and assistance to people detained under section 15A of the Criminal Procedure (Scotland) Act 1995.

29. Section 23(5) of the Bill amends section 9(2)(de) of the 1986 Act by inserting reference to the new section 11A(2). Section 9(2)(de) currently provides that regulations may prescribe when section 11(2) of the 1986 Act will not apply to ABWOR. Section 11(2) is about contributions which are due for advice and assistance (including ABWOR). The effect of the amendment to section 9(2)(de) is to allow regulations to also prescribe when section 11A(2), which is about contributions for ABWOR in criminal matters, should not apply.

30. Section 23(9) amends the existing regulation-making power in section 36(2)(b) of the 1986 Act. The current power allows Scottish Ministers to substitute different amounts for those specified in various sections of the 1986 Act, all of which concern eligibility, or contributions, for legal assistance. The amendments made by section 2(8) allow Scottish Ministers to similarly vary the amounts specified in the new provisions (in sections 11A and 25AC). In addition, in relation to the existing provisions (in so far as they relate to criminal matters) and the new provisions, the amendments allow Scottish Ministers to specify different amounts for different cases or classes of case.

Reason for taking this power

31. In relation to the amendment to the power in section 8A of the 1986 Act, it is not currently intended to use the power to make criminal ABWOR automatically available. However, the Scottish Government feels it is prudent to have this power, should it be felt in the future that ABWOR should be automatically available in certain circumstances in criminal matters.

32. The amendment to section 9(2)(de) allows Scottish Ministers to disapply the requirement to pay a contribution in proceedings in which criminal ABWOR is available. The amendment to section 9(2)(de) in respect of section 11A(1) mirrors the existing power in the same provision in respect of section 11(2) of the 1986 Act. There is no particular intention at this stage to use this power in the near future. However, taking the power is considered necessary to allow Ministers the flexibility to adapt the criminal legal assistance regime to changing circumstances over time without the need for primary legislation. Practical reasons may, for example, emerge once the contributions regime established by the Bill is in operation which lead Scottish Ministers to conclude that contributions should not be due in certain proceedings.

33. The reason for taking the powers in section 36(2)(b), as amended by section 23(8) of the Bill, is to give the Scottish Ministers greater flexibility to adjust the criminal legal assistance regime, including contributions, as necessary over time without the need to resort to primary legislation to make each adjustment. The need for adjustment might arise at short notice or be so minor in nature as to not justify primary legislation. At present, the power in section 36(2)(b) is exercised at regular intervals to alter the amounts specified for eligibility and contributions for legal assistance, because of the changing wider economic situation. The flexibility that the amendments provides will allow the Scottish Ministers to tailor even more, in relation to different classes of case, the eligibility and contribution requirements of the 1986 Act in respect of criminal matters.

Choice of procedure

34. Section 8A is already subject to affirmative procedure, and the new power inserted into it by section 23(4) of the Bill will be too. As the availability of criminal ABWOR is a significant part of the legal aid regime, the Scottish Government considers it should be open to thorough parliamentary scrutiny.

35. Section 9(2)(de) is already subject to affirmative procedure, and the new power inserted into it will be too. The Scottish Government recognises that extending or altering eligibility for criminal legal assistance requires thorough parliamentary scrutiny. This is consistent with the approach taken throughout Part II of the 1986 Act, and specifically in section 9, in relation to powers which modify the eligibility criteria in relation to advice and assistance.

36. The power in section 36(2)(b) is currently, and once amended by section 23(8) of the Bill will be, subject to affirmative procedure. Alterations to the amounts which prescribe who may be eligible for criminal legal assistance or who may be liable to pay a contribution are significant factors in the overall legal aid regime and require the thorough scrutiny of Parliament. Affirmative procedure is, in the Scottish Government's view, appropriate.

Section 24 – Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Order making power

Parliamentary procedure: Affirmative procedure

Provision

37. The provision empowers the Scottish Ministers to make such supplementary, incidental, consequential, transitional, transitory or saving provisions by order as they think necessary or expedient for the purposes of, in connection with or under the Bill.

Reasons for taking this power

38. As regards the criminal legal assistance part of this Bill, the legal aid legislative regime is highly complex. The Scottish Government takes the view that a power to make supplementary, incidental, consequential provision, and to make different provision for different cases, is required to ensure that all necessary amendments are made to any legislation affected by changes to the regime, such as are made by this Bill. The Bill's provisions on criminal legal assistance,

whilst few in number, make detailed technical changes to the primary legislation. In many cases, the primary legislation has been used to make a wide range of subordinate legislation, or fits into the complex interaction of primary and secondary legislation which is the legal aid regime.

39. This power is necessary to allow amendment to this body of legislation to give proper effect to the provisions of the Bill, and to deal with any unintended consequences of the provisions. The power may be particularly key where an unintended consequence affects a person's access to legal representation in a criminal matter. Scottish Ministers are mindful that lack of access or a delay in accessing representation may affect the timely conduct and possibly the outcome of a case. Different provision is required for different cases to cater for the situation where provisions may be required for one type of criminal legal assistance, and not for other types.

40. The transitional, transitory and savings powers in section 24(1) of the Bill are necessary, in respect of the criminal legal assistance provisions of the Bill, to provide for the changeover from the current system of eligibility for criminal ABWOR and the contributions due for it, to the new eligibility test for criminal ABWOR (in section 9A), the new basis upon which contributions are due for it (in section 11A) and the new contributions for criminal legal aid (in sections 25AC and 25AD) which might not be linked to commencement depending upon the way in which the new system is brought in or where a need for transitional and savings provisions is identified after commencement. Transitional, transitory and savings provisions might also be needed as a consequence of the exercise of supplemental and incidental powers, for example in relation to legal aid.

Choice of procedure

41. Orders of the type under section 24(1) are in general made subject to negative resolution procedure but an exception is made where the order adds to, replaces or omits any part of the text of an Act. In that case, affirmative resolution procedure applies. This approach on procedure is in line with the approach taken in other Bills and there are not considered to be any reasons for a different approach in this case.

Section 25 – Commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order making power
Parliamentary procedure: Laid, no procedure

Provision

42. Section 25 of the Bill provides for commencement of the Bill. Part 3 of the Bill comes into force on the day after Royal Assent. The Scottish Ministers have the power under subsection (2) to appoint by order other days on which the other provisions of the Bill come into force, and such an order may make transitional, transitory or saving provision by virtue of subsection (3).

Reason for taking this power

43. The power of Scottish Ministers to appoint the days when provisions (other than in Part 3) of the Bill come into force allows the Scottish Ministers to commence such provisions as can be implemented with less preparatory work before those provisions which will require more work. As Parts 1 and 2 of the Bill – the Scottish Civil Justice Council and criminal legal assistance – are quite independent of each other, separate plans for commencement will be appropriate. Within Parts 1 and 2 some provisions will require considerable implementation planning and the ability to prescribe the days when provisions will commence is appropriate. Transitional, transitory and savings provisions are likely to be required in association with the commencement of the Scottish Civil Justice Council in connection with the changeover of work between the existing rules Councils and the new Council. Transitory, transitory and savings provisions are also likely to be required in respect of the criminal legal assistance provisions of the Bill, to provide for the changeover from the current system

Choice of procedure

44. The power of Scottish Ministers to appoint the days for commencement of provisions of the Bill is subject to no procedure. A commencement order will be laid in the Scottish Parliament once made. This is in accordance with the current practice as regards commencement orders for other primary legislation.

*This document relates to the Scottish Civil Justice Council and Criminal Legal Assistance Bill
(SP Bill 13) as introduced in the Scottish Parliament on 2 May 2012*

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