



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

16th Meeting, 2020 (Session 5)

Tuesday 23 June 2020

The Committee will meet at 9.00 am in a virtual meeting and be broadcast on www.scottishparliament.tv.

1. **Subordinate legislation:** The Committee will take evidence on the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 [draft] from—

Ash Denham, Minister for Community Safety, Kieran Burke, Bill Team Lead, Access to Justice, and Martin Brown, Solicitor, Scottish Government Legal Directorate, Scottish Government.

2. **Subordinate legislation:** Ash Denham (Minister for Community Safety) to move—

S5M-21964—That the Justice Committee recommends that the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 [draft] be approved.

3. **Subordinate legislation:** The Committee will consider the following negative instrument—

The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2020 (SS1 2020/175)

4. **Children (Scotland) Bill:** The Committee will consider the Bill at Stage 2 (Day 1).

5. **Work programme (in private):** The Committee will consider its work programme.

J/S5/20/16/A

Stephen Imrie
Clerk to the Justice Committee
Room T2.60
The Scottish Parliament
Edinburgh
Tel: 0131 348 5195
Email: justiceCommittee@parliament.scot

The papers for this meeting are as follows—

Agenda items 1 & 2

Paper by the Clerk

J/S5/20/16/1

Agenda item 3

Paper by the Clerk

J/S5/20/16/2

Agenda item 5

PRIVATE PAPER

J/S5/20/16/3 (P)

[Click to watch Scottish Parliament TV](#)

Justice Committee

16th Meeting, 2020 (Session 5), Tuesday 23 June 2020

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

- [The Legal Aid and Advice and Assistance \(Miscellaneous Amendments\) \(Coronavirus\) \(Scotland\) Regulations 2020](#)

Introduction

2. The instrument was made in exercise of the powers conferred by sections 9, 12(3), 33(2), (3) and (3A), and 36(1), (2)(a) and (g) of the Legal Aid (Scotland) Act 1986 and is subject to affirmative procedure.

5. The instrument makes provision for temporary amendments to regulations during the emergency period that will: facilitate interim payments of legal aid fees, support adherence to travel restrictions and social distancing guidance, and support access to justice for appeals against special restrictions or requirements.

8. Further details on the purpose of the instrument can be found in the policy note attached in the **Annex**.

DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION

9. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 16 June 2020 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

JUSTICE COMMITTEE CONSIDERATION

10. The Justice Committee is required to report to the Parliament on the instrument by 28 August 2020. The Minister for Community Safety has lodged motion S5M-21964 proposing that the Committee recommends approval of the instruments. The Minister for Community Safety is due to attend the meeting on 23 June to answer any questions on the instrument and to move the motion for approval.

11. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament. Thereafter, the Parliament will be invited to approve the instrument. Clerks understand the Parliamentary Bureau will consider this instrument at its meeting on Tuesday 23 June and, subject to the report the Committee makes to the Parliament, the Parliament is likely to consider the instrument on Wednesday 24 June.

12. The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.

POLICY NOTE**THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENTS) (CORONAVIRUS) (SCOTLAND) REGULATIONS 2020****SSI 2020/XXX**

The above instrument was made in exercise of the powers conferred by sections 9, 12(3), 33(2), (3) and (3A), and 36(1), (2)(a) and (g) of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

This instrument makes provision for temporary amendments to regulations during the emergency period that will: facilitate interim payments of legal aid fees, support adherence to travel restrictions and social distancing guidance, and support access to justice for appeals against special restrictions or requirements.

Policy Objectives

The Scottish Government recognises the important role of legal aid providers in supporting their clients and the justice system in Scotland, and also recognises the financial difficulties and changing work practices faced by these providers as a consequence of the Coronavirus pandemic.

To support legal aid providers, this instrument makes provisions that will be effective during the emergency period to facilitate cash-flow by way of interim payments, and to support adherence to guidance issued by the Scottish Government in connection with reduced travel and social distancing requirements, by facilitating delegation to duty solicitors.

The Coronavirus (Scotland) Act 2020 introduced temporary changes to the Legal Aid (Scotland) Act 1986 to enable legal aid providers greater access to interim payment of fees from the Legal Aid Fund. This instrument removes residual regulatory prohibitions against the interim payment of fees. It also makes express provision for such payment in advice and assistance cases where it may be possible for expenses to be obtained or for property to be recovered or preserved, and provides that the requirement that payment for legal fees come from any such expenses or property first does not apply to claims for interim payment.

The Scottish Government wants to support adherence to its guidance on reduced travel and social distancing requirements. To assist legal aid providers, this instrument will facilitate greater use of duty solicitor arrangements by removal of a regulatory barrier to delegation and removal of payment of a half fee when a matter is delegated.

To support access to justice during the emergency period, the instrument provides that non-means tested ABWOR (Assistance by Way of Representation) be available to individuals with a right of appeal to a sheriff or summary sheriff against special restrictions or requirements imposed further to COVID-19 legislation. ABWOR is granted by a solicitor, not the Scottish Legal Aid Board, and is more appropriate in

these circumstances. This will align policy with other areas, namely mental health law, whereby civil restrictions on a person's liberty can be challenged with access to legal support funded by non-means tested ABWOR.

Consultation

The instrument has prepared in consultation with the Scottish Legal Aid Board. Draft regulations were shared with the main representative bodies of the legal profession: the Law Society of Scotland and the Faculty of Advocates. No public consultation has taken place.

Impact Assessments

Consideration was given to the need to complete an Equality Impact Assessment and a Children's Rights and Wellbeing Impact Assessment. It was determined that there are no equality or children's impact issues.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that it will facilitate access to payment for work already completed. This will support business continuity for legal aid providers, protecting the current provision and securing it for the future.

Scottish Government
Justice Directorate

June 2020



Margaret Mitchell MSP
Convener
Justice Committee
Scottish Parliament

18 June 2020

BY EMAIL

Dear Convener,

Legal Aid and Advice & Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/draft)

We are writing to you regarding the above legal aid regulations, which were considered by the Delegated Powers and Law Reform Committee on 16 June, and which we understand will be considered by the Justice Committee at its meeting on 23 June.

The Scottish Government, supported by the Scottish Legal Aid Board, has looked to introduce several measures to ensure the sustainability of the legal aid sector in the wake of the current Covid-19 crisis, including the provision of interim payments for cases that have been delayed as a result. These regulations will provide further support, in allowing for interim payment to be made in situations where there would otherwise be the prospect of preservation or recovery of property by the applicant.

Under the current framework, where the applicant is likely to benefit financially from the outcome of their legal assistance, interim payment is not available as the costs of that assistance are met from the individual rather than the Legal Aid Fund. These regulations would permit interim feeing, which we believe helpful, particularly as the delays and potential backlog to civil cases mean that the successful outcome of these may take significantly longer than otherwise. The regulations do state that interim payments can be recouped from either the individual or the legal aid provider, and we think important that the Scottish Legal Aid Board takes appropriate steps to ensure payment from the individual before recourse to the solicitor involved.

The regulations also make provision to change the feeing arrangements for duty solicitor work for criminal cases. Currently, the legal aid fee due is halved where a duty solicitor makes an initial plea of not guilty on the instruction of another solicitor, and that solicitor later tenders a plea of guilty prior to trial. The regulations will instead provide the full fee for this work and we support this measure. With duty schemes operating in all criminal courts currently proceeding, we believe that this measure will avoid unnecessary travel and more efficient administration of justice.

We also support other measures in the regulations, including the extension of legal aid provision to appeals against a special restriction or requirement imposed by virtue of the Coronavirus Act 2020.



These provisions will assist in supporting practitioners to ensure access to justice. Our members have been doing so, as key workers under challenging conditions through the crisis, representing at police stations, prisons and courts where required, adapting to new ways of working and providing legal help to people across Scotland at this time of urgent need. Measures to improve the ability to claim interim payments certainly help, though we believe that the financial impact of the current crisis has been severe.

As your committee will know from its current scrutiny around delays to court proceedings and the backlog of cases to follow as the lockdown eases, there are very significant challenges for the administration of justice in the period ahead. We anticipate that, similar to the effect of the economic downturn a decade ago, there will be significant demand for legal help at a stage that there are capacity constraints on courts in managing this effectively. We were already concerned around the level of fees for legal aid, where before the 3% increase to fees agreed by the Scottish Government last year, most fees had either been cut or remained static for a decade (and some for longer than this). The number of practitioners offering legal aid as a service had also declined over the last decade, by around 25% for criminal legal aid and 16% for civil legal aid. The current crisis has made these concerns more acute.

We have asked the Minister for Community Safety to consider urgent steps to be able to support this sector, including review of fees and grant-funding options to allow practitioners to adapt to the new ways of working required. Without this assistance, we do not believe that the sector can remain viable as we progress through the current challenges.

We hope that this information assists the committee in its scrutiny of the regulations, and would be very happy to provide any additional information that would help.

Yours sincerely,

Ian Moir and Patricia Thom
Conveners
Legal Aid Committee

Justice Committee

16th Meeting, 2020 (Session 5), Tuesday 23 June 2020

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following negative instrument:
 - [The Prisons and Young Offenders Institutions \(Coronavirus\) \(Scotland\) Amendment Rules 2020](#) [see page 3];
2. The instrument was laid before the Parliament on 15 June 2020 and came into force on the same day **thereby breaching the requirement that at least 28 days should elapse between the laying of an instrument that is subject to the negative procedure and the coming into force of that instrument.**
3. The Scottish Prison Service states this is due to the need to implement a change to the Prison Rules quickly in order to properly equip prison Governors with the means to provide those in their care with the ability maintain contact with their family and friends both during the coronavirus outbreak and beyond. These new forms of communication require specific provision in the Prison Rules to ensure that SPS can properly and legally regulate their use so as to protect prisoners, their family and friends and those who work in the prison.
4. If the Committee agrees to report to the Parliament on the instrument, it is required to do so by 31 August 2020.
5. The Committee may report its views on the instrument if it wishes (for example, indicating it is content with the instrument, or commenting on its views on the reasons for the breach of the 28-day rule, or recommending the instrument be revoked etc). Procedure for dealing negative instruments are set out in paragraphs 7 to 12 below.

Delegated Powers and Law Reform Committee Consideration

6. The Delegated Powers and Law Reform Committee will consider the instrument at its meeting on 23 June 2020.

Procedure for negative instruments

7. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

8. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
9. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
10. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
11. Each negative instrument appears on the Justice Committee's 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 the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
12. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

13. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>

Recommendation

14. **The Committee is invited to consider the instrument.**

POLICY NOTE

**THE PRISONS AND YOUNG OFFENDERS INSTITUTIONS (CORONAVIRUS)
(SCOTLAND) AMENDMENT RULES 2020**

SSI 2020/175

1. The Prisons and Young Offenders Institutions (Scotland) (Coronavirus) Amendment Rules 2020 (“the Amendment Rules”) were made in the exercise of the powers conferred by section 39 of the Prisons (Scotland) Act 1989. These Rules amend The Prisons and Young Offenders Institutions (Scotland) Rules 2011 (“the Prison Rules”) and they are subject to negative procedure.

Policy Objective

2. The Prison Rules set out provisions relating to the regulation and management of Prisons and Young Offenders Institutions and various matters concerning those who are required to be detained in these institutions (such as their classification, treatment, discipline, employment and control).
3. The Amendment Rules are designed to support the Scottish Prison Service’ (SPS) continuing response to the exceptional pressures facing prisons during the current Coronavirus outbreak.
4. The Amendment Rules provide for the introduction of virtual visits, authorised personal communication devices and in-cell telephony and will enable those in our care to maintain contact with family and friends during times when actual physical visits to an establishment are not possible and, guided by public health advice, are likely to be more challenging to facilitate in future.
5. Families and social networks are a significant motivating and stabilising factor on those in our care. Providing them with the ability to maintain those relationships is seen as a key factor in enabling SPS to maintain operational stability during this challenging time, and helps us to maintain the safe and humane operation of prisons in Scotland. These changes are also designed to help SPS reduce the risks of the virus spreading within prisons and to protect the health of those living and working in our prisons.
6. Whilst the Amendment Rules have been designed to enable those in the care of SPS to maintain contact with family and friends, we have also included a number of safeguards in the Amendment Rules and their associated directions to protect victims and witnesses.
7. There are also some technical amendments being made to Rule 2 (Interpretation), Rule 7 (Availability of Rules, Directions etc.), Rule 46 (Prisoners Personal Property) and Rule 60 (Restriction on Communications) to take account of the introduction of virtual visits, authorised personal communication devices and in-cell telephony.

Impact Assessments

8. No impact assessments have been completed because of the nature of the current emergency situation and the need to make and lay the instrument urgently. Scottish Ministers will however keep the changes made by the Amendment Rules under review.

Consultation

9. There has been consultation with operational managers and policy colleagues within the Scottish Prison Service, Scottish Government, TUS colleagues and those in the care of SPS. SPS also advised HM Inspectorate of Prisons for Scotland and the Scottish Human Rights Commission of the intention to take forward these changes.

Financial Implications

10. There are costs associated with the Amendment Rules, in regards to the purchase of equipment and services required to support prisoners access to virtual visits, prisoner mobile telephony and in-cell telephony.

**SCOTTISH PRISON SERVICE
JUNE 2020**