



The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

24th Meeting, 2017 (Session 5)

Tuesday 27 June 2017

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 6 and 7 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 [draft] from—

Michael Matheson, Cabinet Secretary for Justice, Denise Swanson, Head of Access to Justice Unit, Kevin Philpott, Criminal Justice Division, and Greig Walker, Solicitor, Directorate for Legal Services, Scottish Government.

3. **Subordinate legislation:** Michael Matheson (Cabinet Secretary for Justice) to move—

S5M-06068—That the Justice Committee recommends that the Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 [draft] be approved.

4. **Domestic Abuse (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Michael Matheson, Cabinet Secretary for Justice, Philip Lamont, Bill Team, Patrick Down, Bill Team, and Louise Miller, Directorate for Legal Services, Scottish Government.

5. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting on 22 June 2017.
6. **Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill:** The Committee will consider its approach to the scrutiny of the Bill at Stage 1.

7. **Work programme:** The Committee will consider its work programme.

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The papers for this meeting are as follows—

Agenda items 2 and 3

Paper by the clerk - Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 J/S5/17/24/1

Agenda item 4

Paper by the clerk - Domestic Abuse (Scotland) Bill J/S5/17/24/2

Private paper - Domestic Abuse (Scotland) Bill J/S5/17/24/3 (P)

[Domestic Abuse \(Scotland\) Bill and associated documents](#)

[Written submissions received on the Bill](#)

Agenda item 5

Paper by the clerk - Justice Sub-Committee on Policing J/S5/17/24/4

Agenda item 6

Private paper - Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Bill J/S5/17/24/5 (P)

[Offensive Behaviour at Football and Threatening Communications \(Repeal\) \(Scotland\) Bill and accompanying documents](#)

[Offensive Behaviour at Football and Threatening Communications \(Scotland\) Act 2012](#)

Agenda item 7

Private paper - work programme J/S5/17/24/6 (P)

Justice Committee

24th Meeting, 2017 (Session 5), Tuesday 27 June 2017

Subordinate legislation

Note by the clerk

Purpose

1. This paper invites the Committee to consider the following affirmative instrument:
 - [Advice and Assistance \(Proceedings for Recovery of Documents\) \(Scotland\) Regulations 2017 \[draft\]](#)

Introduction

2. This instrument is made under sections 9, 33(2)(b) and (3) and 41A of the Legal Aid (Scotland) Act 1986.
3. The Regulations make provision for the availability of publicly funded legal assistance for proceedings relating to an application for an order for recovery of medical or sensitive documents in connection with criminal proceedings. The availability of legal assistance for such proceedings will be non-means tested. The Regulations put on a statutory footing interim legal aid arrangements, which have been in place since 1 March 2016.
4. Further details on the purpose of the Regulations can be found in the policy note attached at **Annexe A**.

Justice Committee consideration

5. The Justice Committee is required to report to the Parliament on the instrument by 13 September 2017. The Minister for Community Safety and Legal Affairs has lodged motion S5M-06068 proposing that the Committee recommends approval of the instrument. The Cabinet Secretary for Justice is due to attend the meeting on 27 June to answer any questions on the instrument and to move the motion for approval.
6. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 13 September 2017. Thereafter, the Parliament will be invited to approve the instrument.
7. **The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

Delegated Powers and Law Reform Committee consideration

8. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 20 June 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Policy Note

Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 [draft]

Background

The accused in a domestic abuse trial sought medical records relating to the principal witness ('the complainer'). An application was made by the complainer's solicitor to the Scottish Legal Aid Board ('the Board') for legal aid to oppose recovery of the medical records. The Board advised that the Legal Aid (Scotland) Act 1986 ('the 1986 Act'), and regulations made under the 1986 Act, did not make provision for legal aid for a complainer in these circumstances and legal aid was not therefore available. The Board directed the complainer's solicitor to apply to Scottish Ministers for a determination.

In May 2015, the Scottish Ministers received a request from the complainer's solicitor for a determination under section 4(2)(c) of the 1986 Act that assistance be made available to allow the complainer to be legally represented in the hearing on the recovery of her medical records.

After carefully reviewing the application, the Scottish Ministers refused the request for a determination as it was considered that the decision making process in these types of cases enables the views of complainers to be taken into account sufficiently and for their interests to be protected for the purposes of the European Convention on Human Rights (ECHR), including article 8, without the need for them to participate and be represented at the hearing to determine the matter.

The decision of Scottish Ministers to refuse the determination request was the subject of judicial review. Lord Glennie concluded ⁽¹⁾:

- that intimation to the complainer and the provision of an opportunity to be heard before an order for recovery of her medical records is made is required if there is not to be a breach of the complainer's Article 8 rights (right to respect for private and family life),
- as the complainer has a right to be heard, it must follow that she is entitled to legal representation,
- that the decision of the Scottish Ministers refusing the determination should be reduced, as it was based on an error of law on right to be heard and represented, leaving the Scottish Ministers to make a new decision on a correct legal basis.

A determination was issued to allow the complainer to receive legal aid in her case, coming into force on 1 March 2016.

On the same date a general determination ('the general determination') came into force for any persons seeking to oppose the recovery of medical or other sensitive documents in criminal proceedings. There have only been 7 applications to the Board for this type of legal advice and all have been granted. As there have been no issues

⁽¹⁾ F v Scottish Ministers [2016] CSOH 27

with the operation of the determination, the regulations seek to mirror the effect of the determination.

The Cabinet Secretary for Justice confirmed to Parliament on 1 March 2016 that interim legal aid arrangements had been put in place in response to the ruling and that these would be formalised in due course. The intention to put this provision on a statutory footing was also outlined in the Programme for Government. This outlined that a sustainable arrangement to protect the interests of individuals whose sensitive records are requested in criminal court proceedings, building on arrangements already in place.

Policy Objectives

The purpose of the regulations is make provision for the availability of public funded assistance by way of representation (ABWOR), without reference to the financial limits under section 8 of the 1986 Act and without the need to pay client's contributions under section 11(2) of that Act, for proceedings relating to an application for an order for recovery of medical or sensitive documents in connection with criminal proceedings.

Effect of Regulations

Regulation 5 amends the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to add recovery proceedings to those proceedings for which ABWOR is available. Recovery proceedings are defined in paragraph (2) and follow the same formulation as paragraph 2 of the general determination with one difference. They move from the court intimating the application to the client to a more passive approach that the application for recovery of documents has been intimated to the client. This is to avoid having the court involved at this stage unnecessarily and tying down the process for such applications.

ABWOR will be available without reference to the financial limits under section 8 of the 1986 Act (availability of advice and assistance) and section 11(2) of that Act (client's contributions). This mirrors paragraph 7 of the general determination which provides that assistance under the general determination is available without reference to the financial limits in sections 8 and 11(2) of the 1986 Act.

Before approving ABWOR for recovery proceedings, the Board must be satisfied that legal representation is required to allow the person to participate effectively in the proceedings. In determining effective participation, the following factors have to be taken into consideration:

- (a) the complexity of the case, including the existence and difficulty of any points of law in issue;
- (b) the nature of legal issues involved;
- (c) the ability of the person to consider and challenge any document or information in the hearings or proceedings without the assistance of a solicitor; and
- (d) the ability of the person to present his or her views in an effective manner without the assistance of a solicitor.

Paragraph 6 of the general determination contains the same requirement for pre-approval by the Board and employs the same threshold test.

The amendments made by regulation 5 apply to applications made for ABWOR made on or after the day on which these regulations come into force.

Regulation 4 amends the Advice and Assistance (Scotland) Regulations 1996 (“the 1996 Regulations”). Schedule 3 to the 1996 Regulations contains the tables of fees allowable to solicitors with different rates for criminal and civil matters and children’s matters arising out of hearings and proceedings under the Children’s Hearings (Scotland) Act 2011. ABWOR and advice and assistance for recovery proceedings will be treated as a criminal matter. Paragraph 5(b) of the general determination provides for financial assistance to be paid out as criminal proceedings. This reflects Lord Glennie’s judgement, in *F v Scottish Ministers*, that recovery proceedings are criminal proceedings.

The amendments made by regulation 4 apply to applications for ABWOR and advice and assistance made on or after the day on which these regulations come into force.

Regulation 3 excludes recovery proceedings from the scope of criminal legal assistance for the purposes of section 25A of the Legal Aid (Scotland) Act 1986 (‘the 1986 Act’). Section 25A limits the provision of criminal legal assistance to solicitors on the Criminal Legal Assistance Register. The effect of Regulation 3 will be to allow work to be carried out by solicitors who are registered with the Board to undertake civil and/or criminal work. This flexibility will allow the full range of solicitors to provide advice and representation to those involved in recovery proceedings. The requirement for non-criminal work solicitors to be able to apply to do the work under the ABWOR provisions is a significant part of the policy objective and there is recognition that solicitors dealing with, for example, domestic violence, partner abuse etc should be able to undertake this particular work.

Consultation

There was a targeted consultation to ensure the Regulations met the original policy intent. Comments about the original policy intent would not be considered as this was set out in the opinion of the Court in *F v the Scottish Ministers*, as whose implementation in statute these Regulations are intended. Draft provisions were shared with the Scottish Legal Aid Board, the Faculty of Advocates, the Law Society of Scotland, the Crown Office and Procurator Fiscal Service (COPFS), Scottish Courts and Tribunal Service (SCTS), Rape Crisis Scotland, Scottish Women’s Aid and Victim Support Scotland.

Nonetheless, respondents were supportive of the policy aim to provide non-means tested legal assistance for these proceedings.

The Law Society of Scotland did not provide comments on the draft Regulations.

The Faculty of Advocates noted concerns regarding privacy of documents. This was addressed through separate correspondence and does not affect the content of these regulations.

The SCTS expressed concern about the regulations prescribing that the court must intimate the application, as this could tie down the process for such applications to

come before the court and for the court to consider intimation. As such, the regulations only require that the application is intimated to the client without further specification.

COPFS sought clarification that proceedings initiated by them would also be covered by legal assistance. Confirmation was given that this was correct.

Rape Crisis Scotland, supported by Scottish Women's Aid, raised concerns with the reference to Article 8 rights, the use of the effective participation test and provision for appeals. These issues were addressed through separate correspondence and do not affect the content of these regulations.

Impact Assessments

An [equality impact assessment](#) has been completed on the draft SSI. There are no equality impact issues.

Financial Effects

A [Business and Regulatory Impact Assessment](#) (BRIA) has been completed. The impact of this policy on business will depend on the number of people (including complainers) seeking to make representations about the recovery of medical or other sensitive documents.

One of the difficulties in considering cost is there are some wide potential fluctuations in anticipated costs, due to the work ranging from very simple to the quite involved.

Justice Committee
24th Meeting, 2017 (Session 5), Tuesday 27 June 2017
Domestic Abuse (Scotland) Bill
Note by the clerk

Introduction

1. The Scottish Government introduced the Domestic Abuse (Scotland) Bill¹ in the Scottish Parliament on 17 March 2017. The Parliamentary Bureau designated the Justice Committee as lead committee for Stage 1 scrutiny on 28 March 2017.
2. The Committee agreed its overall approach to scrutiny of the Bill at Stage 1 at its meeting on 28 March 2017 and issued a call for evidence. Responses received and accepted as evidence are published on the Committee's Bill [webpage](#).

Justice Committee consideration

3. At its meeting on 9 May 2017, the Committee took evidence from Scottish Government officials assisting Ministers in taking the Bill through the Parliament (the "Bill team").
4. On 16 May, the Committee took private testimony from victims of domestic abuse. Anonymised notes of these meetings can be accessed from the webpage.
5. At its 30 May meeting, the Committee took evidence from a panel of legal experts; academics and practitioners.
6. At its 6 June meeting, the Committee heard about the practical aspects of prosecuting and enforcing the proposed new offence, and other aspects of the Bill, from the Crown Office and Procurator Fiscal Service, and the Scottish Police Federation.
7. At its 13 June meeting, the Committee heard from representatives of Scottish Women's Aid and Shakti Women's Aid, and then from representatives of Abused Men in Scotland, Action on Elder Abuse Scotland, and Victim Support Scotland.
8. At the 20 June meeting, the Committee heard first from witnesses from Barnardos, Children 1st, LGBT Youth Scotland and the office of the Children's Commissioner, hearing about the Bill's impact on children and young people affected by domestic abuse. It then heard from Social Work Scotland and Sacro, hearing the perspective of those working with both victims and offenders.
9. On 27 June, the Committee will hear concluding evidence from the Cabinet Secretary for Justice, the Minister in charge of the Bill.
10. The Committee will report to Parliament on the general principles of the Bill in early autumn.
11. The Official Reports of all Stage 1 meetings will be posted on [this webpage](#) as they become available.

¹ <http://www.parliament.scot/parliamentarybusiness/Bills/103883.aspx>

Justice Committee

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Feedback from the Justice Sub-Committee on Policing

Note by the clerk

1. The Justice Sub-Committee on Policing met on 22 June when it took evidence from Derek Penman, Her Majesty's Chief Inspector of Constabulary in Scotland, on his report on the openness and transparency of the Scottish Police Authority.
2. The Sub-Committee heard that whilst there had been some improvements in Scottish Police Authority Board operations and relationships, the Chief Inspector had made a number of recommendations for improving the governance of the SPA.
3. Some of the key recommendations include: training for the Chair, Chief Executive and Board members to ensure that they understand their roles and the legislation and guidance that informs these roles; public meetings should be accompanied by published meeting papers in advance, without an embargo, to enable proper public scrutiny and engagement; and the SPA should, as a matter of urgency, review its internal executive structures.
4. Mr Penman told the Sub-Committee that the SPA needs to be effective and be seen to be effective and that he will be reviewing implementation of his recommendations.
5. The Sub-Committee will next meet on 14 September 2017.