



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

22nd Meeting, 2018 (Session 5)

Tuesday 11 September 2018

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

1. **Declaration of interests:** Fulton MacGregor and Shona Robison will be invited to declare any relevant interests.
2. **Decisions on taking business in private:** The Committee will decide whether to take items 5, 6 and 7 in private.
3. **The impact of Brexit on the civil and criminal justice systems and policing in Scotland:** The Committee will take evidence from—
  - Humza Yousaf, Cabinet Secretary for Justice, Linda Hamilton, Deputy Director, Defence, Security and Cyber Resilience Division, and Gavin Henderson, Deputy Director, Civil Law and Legal System Division, Scottish Government;
  - Rt Hon James Wolffe QC, Lord Advocate, and Helen Nisbet, Head of International Co-operation, Crown Office and Procurator Fiscal Service.
4. **Subordinate legislation:** The Committee will consider the following negative instruments—
  - Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018 (SSI 2018/193);
  - Sheriff Court Fees Amendment Order 2018 (SSI 2018/194).
5. **Draft Budget Scrutiny 2019-20:** The Committee will consider its approach to the scrutiny of the Scottish Government's Draft Budget 2019-20.
6. **Alternative dispute resolution:** The Committee will consider a draft report.
7. **Professional legal education:** The Committee will consider a draft report.

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The papers for this meeting are as follows—

**Agenda item 3**

Private paper - Brexit

J/S5/18/22/1 (P)

**Agenda item 4**

Paper by the clerk - SSIs

J/S5/18/22/2

**Agenda item 5**

Private paper - Draft Budget Scrutiny 2019-20

J/S5/18/22/3 (P)

**Agenda item 6**

Private paper - Alternative Dispute Resolution

J/S5/18/22/4 (P)

**Agenda item 7**

Private paper - Professional Legal Education

J/S5/18/22/5 (P)

**Justice Committee**

**22<sup>nd</sup> Meeting, 2018 (Session 5), Tuesday 11 September 2018**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instruments:
  - [Legal Aid \(Employment of Solicitors\) \(Scotland\) Amendment Regulations 2018 \(SSI 2018/193\)](#) [see page 3];
  - [Sheriff Court Fees Amendment Order 2018 \(SSI 2018/194\)](#) [see page 5];
2. If the Committee agrees to report to the Parliament on either of the instruments it is required to do so by 24 September 2018.

**Procedure for negative instruments**

3. 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).
4. 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.
5. 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.
6. 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.

7. 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**

8. 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**

9. **The Committee is invited to consider the instruments.**

## **LEGAL AID (EMPLOYMENT OF SOLICITORS) (SCOTLAND) AMENDMENT REGULATIONS 2018 (SSI 2018/193)**

### **Introduction**

10. The instrument is made under sections 26(1) and 27(1) of the Legal Aid (Scotland) Act 1986<sup>(1)</sup>. The Regulations amend the Legal Aid (Employment of Solicitors) (Scotland) Regulations 2001. Regulation 2 replaces the requirement that solicitors must be employed by the Scottish Legal Aid Board (“the Board”) for the purpose of providing services for, or in connection with, any organisation but only where the Board has received a written request from the organisation for the services of a solicitor and the Board is satisfied that the services of a solicitor would enhance the services offered by that organisation. Instead the Board may employ solicitors for the purpose of giving advice and assistance, acting for persons receiving legal aid or assisting a local organisation concerned with the giving of advice or guidance.

11. Further details on the purpose of the instrument can be found in the policy note (see below).

12. The instrument comes into force on 27 September 2018.

### **DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

13. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 26 June 2018 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**

14. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 24 September 2018.

### **Policy Note: Legal Aid (Employment of Solicitors) (Scotland) Amendment Regulations 2018 (SSI 2018/193)**

#### **Policy Objectives**

1. The policy objective of this instrument is to change the regulatory footing to reflect the remit for the Civil Legal Assistance Office (CLAO), which is that the CLAO will undertake direct casework where a client presents to the CLAO with an issue that is within their core areas (all within the range of social welfare law) without need for onward referral first. A referral service will still be available where CLAO cannot provide a service.
2. The Legal Aid (Employment of Solicitors)(Scotland) Regulations 2001 authorises the Scottish Legal Aid Board (SLAB) to employ solicitors in accordance with sections 26 to 28 of the Legal Aid (Scotland) act 1986 (the 1986 Act) on such terms and conditions as it may consider appropriate. There is, however, a further provision by virtue of regulation 3 to the effect that there is

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<sup>(1)</sup> 1986 c. 47. Section 26 (1) was amended by the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), section 9(6). The functions of the Secretary of State for Scotland were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c46).

an underlying dependency of SLAB having received a written request from a local organisation for the services of an employed solicitor, and that SLAB was satisfied that the services of the local organisation would be enhanced thereby. That dependency no longer fits the policy objective and its removal is sought.

3. The regulation change would reflect the fact that CLAO is often best placed to provide advice and representation on that issue, and it would provide a good quality and cost effective service. Separately there may continue to be engagement with local organisations where appropriate, but that need not underpin all work. The change sought is that SLAB may employ solicitors for the purpose of:
  - a) giving advice and assistance to which Part II of the 1986 Act applies,
  - b) acting for persons receiving legal aid, or
  - c) providing any such services as are mentioned in section 26(2) of the 1986 Act for or in connection with any organisation.

### Consultation

4. A consultation took place in relation to these regulations between the 5<sup>th</sup> and 30<sup>th</sup> of March 2018 to ensure the Regulations met the original policy intent. Stakeholders included various legal institutions such as the Law Society of Scotland, the Faculty of Advocates, the Society of Solicitor Advocates and the Society of Solicitors in the Supreme Courts. Various third sector and public sector organisations such as Citizen Advice Scotland, Victim Support Scotland, Clan Childlaw, the Scottish Refugee Council, Scottish Women's Aid, the Legal Services Agency, the Scottish Children's Reporters Administration and Shelter Scotland were also consulted.
5. Only one response was received, from the Law Society of Scotland, who advised they were content with the policy intent.

### Impact Assessments

6. An [Equality Impact Assessment](#) (EQIA) has been completed. There are no equality impact issues.

### Financial Effects

7. A [Business and Regulatory Impact Assessment](#) (BRIA) has been completed. The impact of this policy on business is predicted to be neutral as it is a minor technical change to the operation of the CLAO, no additional costs are expected as a result to SLAB. The CLAO take into account existing provision when developing core areas of expertise. For example, the Edinburgh office does not provide family law as there is adequate private practice provision of family law in the area.

## **SHERIFF COURT FEES AMENDMENT ORDER 2018 (SSI 2018/194)**

### **Introduction**

15. The instrument is made under by section 107(1) and (2) of the Courts Reform (Scotland) Act 2014. The Order amends the Sheriff Court Fees Order 2018 which makes provision for the fees payable in the sheriff court, to the sheriff clerk or the auditor of court, as appropriate.

16. Further details on the purpose of the instrument can be found in the policy note (see below).

17. The instrument comes into force on 28 September 2018.

### **DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

18. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 19 June 2018 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit. The DPLR Committee welcomed the Scottish Government taking the opportunity to revoke an article from the Sheriff Court Fees Order 2018 which the Committee had reported under the general reporting ground when scrutinising that Order.

### **JUSTICE COMMITTEE CONSIDERATION**

19. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 24 September 2018.

### **Policy Note: Sheriff Court Fees Amendment Order 2018 (SSI 2018/194)**

1. Court fees and fees for services offered by the High Court of Justiciary, the Court of Session, Sheriff Appeal Court, sheriff courts including the Sheriff Personal Injury Court, justice of the peace courts and the Office of the Public Guardian (OPG) ensure that those who make use of the courts or the OPG meet or contribute towards the associated costs to the public purse where they can afford so to do.
2. The Scottish Government made a package of instruments<sup>2</sup> amending court fees for financial years 2018/19 to 2020/21 which came into effect on 25 April 2018. Regrettably an error has come to light in the Sheriff Court Fees Order 2018 and this Order seeks to rectify the situation by amending that earlier instrument.
3. The Scottish Government is committed to ensuring a well-targeted system of fee exemptions exist. This means that those who require support will not incur any courts fees. The instruments, in force since April, enhanced the system of exemptions including by removing the court fee for certain civil interdicts

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<sup>2</sup> The Court of Session etc. Fees Order 2018, the High Court of Justiciary Fees Order 2018, the Sheriff Appeal Court Fees Order 2018, the Sheriff Court Fees Order 2018, the Justice of the Peace Court Fees (Scotland) Order 2018 and the Adults with Incapacity (Public Guardian's Fees) (Scotland) Regulations 2018.

commonly used by those who have suffered domestic abuse. Fuller details are set out in the Policy Note for the Sheriff Court Fees Order<sup>3</sup>.

4. Policy, and the practice reflected in the Sheriff Court Fees Order 2015 and previous court fees instruments, is that court fee exemptions do not apply to commissary business, which is the process for examining and taking inventory of estate following a death. They also do not apply to petitions for removal of disqualification from driving. This is because access to justice issues do not apply in respect of these cases in the same way as they arise in other court actions that are disputes between two parties. Accordingly, fees exemptions in the High Court of Justiciary Fees Order 2018 and in the Justice of the Peace Court Fees (Scotland) Order 2018 do not apply to petitions for removal of disqualification from driving. Additionally, in respect of commissary business there is no court fee for estates valued at under £50,000 so by definition anyone liable to a court fee is dealing with an estate of some value.
5. Unfortunately the Sheriff Court Fees Order 2018, in extending the court fee exemptions with the aim of enhancing access to justice for potentially vulnerable court users, inadvertently applied exemptions to the special classes of business referred to paragraph 5. This is against policy and previous practice and causes some financial and administrative consequences for Scottish Courts and Tribunals Service (SCTS).
6. Additionally, a redundant provision was identified by the Delegated Powers and Legal Reform Committee in their consideration of the Sheriff Court Fees Order 2018 and the opportunity is taken to remove it.

### **Consultation**

7. A public consultation on these proposals was conducted on the original fees proposals. This amending order has been discussed with SCTS and the Lord President's Private Office.

### **Financial effects**

8. The financial effects of the error are hard to quantify. There are a large number of commissary cases dealt with by SCTS each year. Court fee exemptions also have a fairly wide coverage. There will undoubtedly be people who therefore gain an exemption for the commissary fee that was unintended. It is therefore prudent to bring forward a rectifying instrument as quickly as possible. Additionally it is administratively difficult for SCTS staff to deal with a class of cases that does not accord with previous practice, training and operating procedures.

### **Impact Assessments**

9. No impact assessments were conducted.

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<sup>3</sup> [http://www.legislation.gov.uk/ssi/2018/81/pdfs/ssipn\\_20180081\\_en.pdf](http://www.legislation.gov.uk/ssi/2018/81/pdfs/ssipn_20180081_en.pdf)