



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

19th Meeting, 2020 (Session 5)

Tuesday 1 September 2020

The Committee will meet at 10.00 am in a virtual meeting and be broadcast on [www.scottishparliament.tv](http://www.scottishparliament.tv).

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020 [draft] from—

Ash Denham, Minister for Community Safety, Kieran Burke, Bill Team Lead, Access to Justice, and Jo-anne Tinto, Solicitor, Scottish Government Legal Directorate, Scottish Government.
3. **Subordinate legislation:** Ash Denham (Minister for Community Safety) to move—

S5M-22554—That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020 [draft] be approved.
4. **Defamation and Malicious Publications (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

Duncan Hamilton, Advocate, Faculty of Advocates;

John Paul Sheridan, Law Society of Scotland;

and then from—

Dr Stephen Bogle, and Dr Bobby Lindsay, University of Glasgow.
5. **Defamation and Malicious Publications (Scotland) Bill (in private):** The Committee will review the evidence heard earlier in the meeting.

6. **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**

Note by the Clerk

J/S5/20/19/1

**Agenda item 4**

Note by the Clerk

J/S5/20/19/2

PRIVATE PAPER

J/S5/20/19/3 (P)

**Agenda item 5**

PRIVATE PAPER

J/S5/20/19/4 (P)

**Agenda item 6**

PRIVATE PAPER

J/S5/20/19/5 (P)

## Justice Committee

19th Meeting, 2019 (Session 5), Tuesday 1 September 2020

### Subordinate legislation

#### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following affirmative instrument:
  - [The Advice and Assistance \(Assistance by Way of Representation\) \(Scotland\) Amendment Regulations 2020 \[draft\]](#)

#### Introduction

2. The instrument is to be made in exercise of the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986<sup>1</sup>.
3. The purpose of the instrument is to allow Assistance By Way of Representation (ABWOR) to be made available, without means-testing, in respect of persons seeking to appeal a decision to refuse a disregard under the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018.
4. 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

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 12 August 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

6. The Justice Committee is required to report to the Parliament on the instrument by 7 September 2020. The Minister for Community Safety has lodged motion S5M-22554 proposing that the Committee recommends approval of the instrument. The Minister is due to attend the meeting on 1 September to answer any questions on the instrument and to move the motion for approval.
7. It is for the Committee to decide whether or not to agree to the motion, and then to report to the Parliament by 7 September. Thereafter, the Parliament will be invited to approve the instrument.
8. **The Committee is asked to delegate to the Convener authority to approve the report on the instrument for publication.**

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<sup>1</sup> 1986 c.47. Section 9 of the 1986 Act was amended by the Access to Justice Act 1999 section 32 and Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3). The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

## POLICY NOTE

### THE ADVICE AND ASSISTANCE (ASSISTANCE BY WAY OF REPRESENTATION) (SCOTLAND) AMENDMENT REGULATIONS 2020

#### SSI 2020 No.

The above instrument is to be made in exercise of the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986<sup>(2)</sup>. The instrument is subject to the affirmative procedure.

#### Background

Until relatively recently, the criminal law in Scotland discriminated against same-sex sexual activity between men. The law did this in two ways - by specifically criminalising activity that would be legal if opposite-sex partners engaged in the same activity; and by the use of more general laws that were not discriminatory in and of themselves, but could be used to discriminate against same-sex sexual activity. In other words, adult consensual sexual activity was criminalised where it occurred between men.

The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 ("the Act") was passed by the Scottish Parliament on 6th June 2018 and received Royal Assent on 11th July 2018.

Section 1 of the Act states that the purpose is to formally acknowledge the wrongfulness and discriminatory effect of past convictions for certain historical sexual offences which criminalised same-sex sexual activity between men that would now be legal. The Act provides for two distinct but linked procedures by:

- pardoning those convicted of criminal offences (as set out in section 2 of the Act) for engaging in same-sex sexual activity which is now legal; and
- enabling a person with such a conviction to apply (as set out in section 5 of the Act) to have those specific offences disregarded so that information about that offence held in records, generally maintained by Police Scotland, does not show up in a disclosure check.

Where a disregard application is successful, the effect of this is set out in section 9 of the Act. Where a disregard application is refused, the applicant has a right of appeal to the Sheriff Court under section 8 of the Act.

#### Policy Objectives

Where an applicant wishes to be legally represented in an appeal under section 8 of the Act, current civil legal aid provision may be available subject to the standard eligibility requirements. These require that the applicant passes a financial eligibility

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<sup>(2)</sup> 1986 c.47. Section 9 of the 1986 Act was amended by the Access to Justice Act 1999 section 32 and Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3). The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

assessment, along with demonstrating that their case has merit and that there are grounds for commencing the appeal. As a result, under the current provision, some individuals who wish to challenge the refusal to grant an application for disregard in terms of section 5 of the Act would not be eligible for publicly funded legal assistance to assist them do this.

As part of addressing the wrongfulness and discriminatory effect of past convictions through the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018, the Scottish Government wishes to make it as simple and straightforward as possible for individuals to challenge a refusal to grant a disregard and publicly funded legal assistance will be made available for this purpose.

The aim of this instrument is therefore to allow Assistance By Way of Representation (ABWOR) to be made available, without means testing, in respect of persons seeking to appeal a decision to refuse a disregard. The removal of the need to have regard to financial eligibility is to facilitate greater access to ABWOR for these cases.

This will be possible if a leave to appeal has been granted by a sheriff and subject to the prior approval of the Scottish Legal Aid Board (SLAB) that it is in the interests of justice and that it is reasonable for the application to be granted. The application of these tests will help to facilitate that public funding, without means testing, be appropriately directed to circumstances where there is a stateable case that has prospects of success.

## **Consultation**

The representative body for solicitors in Scotland is the Law Society of Scotland (the LSS) and the representative body for advocates in Scotland is the Faculty of Advocates (the FoA). The LSS, the FoA and SLAB have been consulted on these draft regulations.

## **Impact Assessments**

An Equality Impact Assessment and Business Regulatory Impact Assessment have been completed on the draft SSI. There are no equality impact issues or business impact issues. A Child Rights and Wellbeing Impact Assessment was not required and as such, a Child Rights and Wellbeing Impact Assessment Declaration is also attached.

## **Financial Effects**

A Business and Regulatory Impact Assessment has been completed on the draft SSI.

The cost to the Scottish Legal Aid Fund as a result of this policy will be negligible. Those who previously may not have qualified for civil legal aid for a similar type of appeal process, or may have had to pay a contribution in order to receive civil legal aid, will, as a result of these Regulations, be entitled to non-means tested ABWOR for appeals under the Act where they also meet the approval of the Board in respect of the merits test. The estimated cost of ABWOR for an appeal in similar proceedings is £862.

It is expected that the majority of applications to the Scottish Ministers under the Act will be granted, with only a minimal number being refused and potentially leading to an

appeal. The estimated number of appeal cases under the Act in the first 5 years is expected to be minimal; and unlikely to exceed 10 cases. This is based on figures from England and Wales where a similar scheme is already in operation; and on the comparative size of the Scottish population to that in England & Wales.

Scottish Government  
Justice Directorate  
23 June 2020

**Justice Committee**

**19th Meeting, 2020 (Session 5), Tuesday, 1 September 2020**

**Defamation and Malicious Publications (Scotland) Bill**

**Paper from the Clerk**

**Introduction**

1. The Defamation and Malicious Publications (Scotland) Bill (“the Bill”) was introduced by the Cabinet Secretary for Justice on 2 December 2019. The Bill and accompanying documents can be accessed [here](#).

2. The purpose of the Bill is to clarify and strengthen the statutory underpinning of defamation in Scots law. The Bill seeks to do this by placing certain key elements of Scots common law on defamation on a statutory basis. The Bill will also replace and restate, in one place, elements of the existing statutory provisions in Scots law.

3. According to the policy memorandum which accompanies the Bill, the overarching policy objective of the Bill is “to modernise and simplify the law of defamation (and the related action of malicious publication) in Scotland in order to:

- strike a more appropriate balance between freedom of expression and the protection of individual reputation; and
- clarify the law and improve its accessibility.

**Approach to Stage 1 consideration**

4. Following the hiatus to parliamentary business caused by the COVID-19 pandemic, the Justice Committee recommenced taking oral evidence on the Bill from witnesses on Tuesday 25 August.

5. It is expected Stage 1 scrutiny of the Bill will to continue throughout September and October, and the Committee would report to the Parliament on the general principles before the end of October 2020.

**Oral evidence**

6. At its meeting on 1 September, the Committee will continue taking oral evidence on the Bill by hearing from two panels of witnesses. They are—

- Andrew Alexander of the Law Society of Scotland, and Duncan Hamilton of the Faculty of Advocates, and
- Dr Stephen Bogle and Dr Bobby Lindsay of the University of Glasgow.

7. This evidence session will take place remotely, with Members and witnesses appearing via live video conferencing. Members of the public can watch the evidence session live on the Scottish Parliament TV website from 10:00 am on Tuesday 1 September: <https://www.scottishparliament.tv/>

8. Following this evidence session, the Committee will consider the evidence received as part of the Stage 1 scrutiny of the Bill.

### **Written evidence**

9. Written submission on the Bill have been received from the witnesses-

- [Law Society of Scotland submission](#);
- [Faculty of Advocates submission](#);
- [Dr Bogle and Dr Lindsay joint submission](#).

10. Other written submissions received by the Committee in response to its call for views on the Bill are [available on the Committee's webpage](#).

11. A [SPICe briefing](#) setting out the key issues in the Bill is also available online.

**Justice Clerks**  
**27 August 2020**