POLICY NOTE

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

SSI 2020 No. 296

The above instrument is to be made in exercise of the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986[(1)]. 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 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

(**1**) 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).

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 the 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 and are attached. 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 and is attached.

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