POLICY NOTE

THE ADVICE AND ASSISTANCE (ASSISTANCE BY WAY OF REPRESENTATION) (SCOTLAND) AMENDMENT (NO. 3) REGULATIONS 2015

SSI 2015/xxx

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

Policy Objectives

The aim of this instrument is to make assistance by way of representation (ABWOR) available for applications under the Double Jeopardy (Scotland) Act 2011 without a financial eligibility test and without a contribution being due from the person receiving ABWOR.

Regulation 3(t) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 currently makes ABWOR available for proceedings relating to these applications, namely under sections 2(2), 3(3)(b), 4(3)(b), 11(3) and 12(3) of the 2011 Act. This is subject to a financial eligibility test.

The Scottish Government has become aware of a case in which the Lord Advocate has made such an application (the third to be made to the High Court under the 2011 Act). The hearing is due to be heard over the summer.

Information received from the Scottish Legal Aid Board is that previous application proceedings, in which the subject of the application qualified for ABWOR, have cost the Legal Aid Fund in the region of £100,000 each. As such, it is unlikely that even those who fail the present statutory financial eligibility test would be very unlikely to be able to afford the high costs of legal representation associated with these proceedings. There is therefore a pressing need to make ABWOR available without reference to the financial eligibility test in order to secure access to justice.

This instrument therefore amends regulation 9 of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to include proceedings relating to double jeopardy applications in the proceedings listed there. ABWOR is available for these proceedings without reference to the financial limits under section 8 of the Legal Aid (Scotland) Act 1986, and without a contribution being due in terms of section 11(2) of that Act.

Consultation

There has been limited time for consultation due to the speed with which changes need to be made so that ABWOR can be available for the case which is expected to be heard this summer. The Scottish Legal Aid Board was consulted in drafting the provisions. The Law Society of Scotland and the Faculty of Advocates were notified that the draft instrument would be laid and of its policy objectives.

Impact Assessments

An equality impact assessment has not been completed on the draft SSI due to the tight timescales for instructing, drafting and laying. The policy is expected to benefit those who are subject to double jeopardy application proceedings in that it will make ABWOR available in all cases. Solicitors and counsel will therefore also have certainty that publicly-funded legal assistance will be available for them to be paid for this work.

Financial Effects

Due to the change to regulations being required very quickly, no BRIA has been completed for this instrument. The instrument is expected to have only a minimal effect on the Scottish Government, local government or on business due to the very small number of cases involved. Where there is a case in which the subject of the double jeopardy application would previously not have qualified for ABWOR, it could reasonably be expected to cost the Legal Aid Fund around £100,000.

Scottish Government
Justice Directorate

11th June 2015