POLICY NOTE

THE LEGAL AID AND ADVICE AND ASSISTANCE (MISCELLANEOUS AMENDMENT) (SCOTLAND) (NO. 2) REGULATIONS 2024

SSI 2024/216

The above instrument was made in exercise of the powers conferred by sections 12(3), 17(2B), 33(2) and (3)(a), (b) and (f), 36(1) and (2)(a) and 42 of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

Purpose of the instrument.

This instrument amends existing legal aid regulations to provide that any (i) human trafficking or exploitation victim payment, (ii) Miscarriage of Justice Compensation Payment, (iii) compensation payment made in relation to the Grenfell Tower Fire, (iv) Infected Blood Compensation Scheme payment and (v) payment of Carer's Allowance is to be disregarded by the Scottish Legal Aid Board (SLAB) when calculating financial eligibility for civil or children's legal aid or advice and assistance. Certain of these payments are also excluded from 'clawback' to the Scottish Legal Aid Fund.

This instrument also makes provision to introduce counsel fees for written submissions when these are required by the court.

UN Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 Compatibility

The Scottish Ministers have made the following statement regarding children's rights.

In accordance with section 23(2) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, the Scottish Ministers certify that, in their view, The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2024 is compatible with the UNCRC requirements as defined by section 1(2) of the Act.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Policy Objectives

Disregards of certain payments in relation to legal aid schemes

This instrument amends existing regulations to provide that any payment of a kind listed above is to be disregarded when SLAB is calculating a person's disposable capital and income for the purposes of assessing their financial eligibility for civil or children's legal aid

or advice and assistance. The regulations relating to civil legal aid and advice and assistance are also amended to the effect that any such payments are excluded from bearing fees and outlays when forming part of any recovered or preserved property in proceedings.

(i) Human trafficking or exploitation victim payment.
Section 9 of the Human Trafficking and Exploitation (Scotland) Act 2015 confers powers and duties on the Scottish Ministers to provide certain types of support for victims of human trafficking. Section 10 of that Act provides a regulation making power enabling Ministers to make provision for similar support for victims of the offences under section 4 of the 2015 Act, in respect of slavery, servitude and forced or compulsory labour. Such provision is now set out in the Human Trafficking and Exploitation (Scotland) Act 2015 (Support for Victims) Regulations 2018. [Any payments made by way of support provided under a Modern Slavery Victim Care Contract, the Home Office contract to provide care to adult victims of modern slavery in England and Wales, are also caught by the provision made in this instrument.]

(ii) Miscarriage of Justice Compensation Payment
Individuals in Scotland can apply for compensation if they've been wrongfully convicted of or charged with a crime. There are two compensation schemes for miscarriages of justice – a statutory scheme and an ex gratia scheme. Further details are available at: https://www.mygov.scot/compensation-miscarriage-justice. Similar schemes operate in the rest of the UK, and are also caught by the provision made in this instrument.

(iii) Grenfell Tower payment
Recent civil and criminal cases have resulted in compensation payments being made to firefighters, bereaved family members, survivors and residents affected by the Grenfell Tower fire of June 2017. Provision is made in the instrument in respect of any payment made to a person by way of compensation, damages or legal expenses in connection with the fire.

(iv) Infected Blood Compensation Scheme payment
Section 49 of the Victims and Prisoners Act 2024 provides that the Secretary of State or the Minister for the Cabinet Office must establish a scheme, known as the Infected Blood Compensation Scheme, for making payments to persons eligible under that section of the Act. The first set of regulations to establish the Scheme and give the Infected Blood Compensation Authority the powers to pay compensation will come into force on 23 August 2024. Further details are available at: https://www.gov.uk/government/collections/infected-blood-compensation-scheme.

(v) Carer's Allowance
Carer's Allowance is a UK Government non-contributory benefit that provides a weekly payment to individuals who spend at least 35 hours a week caring for someone, currently set at £81.90. To be eligible for Carer's Allowance, the carer, the person they care for and the type of care they provide must meet certain criteria, in accordance with section 70 of the Social Security Contributions and Benefits Act 1992.

Counsel fees for written submissions

This instrument also makes provision to introduce counsel fees for written submissions in criminal cases, where these are required by the court. There is currently no fee for counsel for drafting written submissions at the request of the court in most types of criminal appeal,

though the Sheriff Appeal Court and High Court now routinely order such submissions in appeal hearings. The lodging of submissions in advance is seen as an efficiency measure that allow the courts to fix shorter more focussed hearings.

Summary

This instrument provides that each of the following is to be disregarded in the assessment of a person's financial eligibility for civil or children's legal aid and advice and assistance:

- any human trafficking or exploitation victim payment,
- any miscarriage of justice compensation payment,
- Any Grenfell Tower fire compensation payment,
- any Infected Blood Compensation Scheme payment,
- any Carer's Allowance payment.

Such payments are also excluded from bearing fees and outlays when forming part of any recovered or preserved property in civil legal aid and advice and assistance proceedings.

Provision is made for counsel fees in criminal appeal cases for drafting written submissions where these are required by the court.

Consultation

No formal consultation has been conducted on these regulations, but the content is the result of extensive engagement with representatives of the Scottish Legal Aid Board. Draft regulations have been shared with the Scottish Legal Aid Board, the Faculty of Advocates and Law Society of Scotland.

Impact Assessments

The following impact assessments were considered:

Child Rights & Wellbeing Impact Assessment – no negative impacts on children and young people.

Equality Impact Assessment – no negative impacts on groups with protected characteristics.

Business & Regulatory Impact Assessment – additional spend to the legal aid fund identified.

Fairer Scotland Duty – not required.

Strategic Environmental Assessment – not required.

Data Protection Impact assessment – not required.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached.

SLAB have estimated that the impact of the counsel fees on the legal aid fund will be a maximum of £25k per annum. The impact of the disregards is assessed to have minimal impact.

Scottish Government
Justice Directorate
26 August 2024