



The Scottish Parliament
Pàrlamaid na h-Alba

Published 18 December 2017
SP Paper 249
22nd Report, 2017 (Session 5)

Justice Committee Comataidh a' Cheartais

Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish
Parliament website at:
[http://www.parliament.scot/abouttheparliament/
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Scrutiny of the draft instrument	2
Delegated Powers and Law Reform Committee consideration	2
Justice Committee consideration	2
Recommendations	7
Annex A - Written submissions	8

Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



justicecommittee@parliament.scot



0131 348 5047

Committee Membership



Convener
Margaret Mitchell
Scottish Conservative
and Unionist Party



Deputy Convener
Rona Mackay
Scottish National Party



George Adam
Scottish National Party



Maurice Corry
Scottish Conservative
and Unionist Party



Mary Fee
Scottish Labour



John Finnie
Scottish Green Party



Mairi Gougeon
Scottish National Party



Liam Kerr
Scottish Conservative
and Unionist Party



Fulton MacGregor
Scottish National Party



Ben Macpherson
Scottish National Party



Liam McArthur
Scottish Liberal
Democrats

Introduction

1. At its meeting on 12 December 2017, the Committee considered the following draft instrument:

[Criminal Legal Assistance \(Miscellaneous Amendments\) \(Scotland\) Regulations 2017 \[draft\]](#)

2. The instrument was laid before Parliament on 9 November 2017 and referred to the Justice Committee as lead committee. The instrument is subject to the affirmative procedure.
3. The instrument is made under sections 8A(1), 9, 31(9), 33(2), (3) and 3A, 36(1), (2)(a), (d) and (e) and 41A of the Legal Aid (Scotland) Act 1986 (the 1986 Act) and all other enabling powers.
4. The purpose of these Regulations is to ensure criminal legal assistance is available when Part 1 of the Criminal Justice (Scotland) Act 2016 (the 2016 Act) commences on 25 January 2018. Of relevance to these Regulations are the provisions in Part 1 of the 2016 Act which:
 - provide a person reasonably suspected of committing an offence with the right to have a solicitor present during police interview;
 - provide that a person in custody has the right to consult with a solicitor at any time;
 - introduce a new procedure, known as investigative liberation, which allows a person being held in custody to be released from custody on any condition which is necessary and proportionate for the purpose of ensuring the proper conduct of the investigation. A person subject to investigative liberty can apply to a sheriff for review of the conditions;
 - provide for the release of a person in custody if they sign an undertaking to appear at a specified court at a specified time and comply with conditions imposed. A person may apply to a sheriff to have these conditions reviewed;
 - introduce post-charge questioning where an application to the court can be made to question a person after they have been charged with an offence.

Scrutiny of the draft instrument

Delegated Powers and Law Reform Committee consideration

5. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on 28 November 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.ⁱ

Justice Committee consideration

Written evidence received

6. The Committee received written submissions from the Minister for Community Safety and Legal Affairs, as well as Dunfermline District Society of Solicitors, the Edinburgh Bar Association, the Law Society of Scotland, the Scottish Legal Aid Board, the Society of Solicitors and Procurators of Stirling, and the Society of Solicitors in the Supreme Court (see Annex A).
7. In her written submission, the Minister states:
 - ” The implementation of the Criminal Justice (Scotland) Act 2016 provided the ideal opportunity for us to work with stakeholders to review the police station duty scheme, identify and introduce changes to streamline the system and investigate the restructure of the fee system.
8. The written submission sets out that an initial offer around fees was made to the Law Society of Scotland at meetings on the 8 and 14 of March 2017. The Law Society responded with counter proposals on 21 March 2017. The Minister states that these were "carefully considered" following which the Scottish Government agreed to:
 - ”
 - Amend the times when an anti-social hours premium would be applied
 - Apply the anti-social premium to travel time
 - Apply the anti-social premium to telephone calls
 - Increase the block fee levels from the original proposal
9. The written submission goes on to note that the current spend on police station advice is in the region of £300k. It suggests that the introduction of block fees which are higher than the current time and line rates, simplification of the system to claim for police station advice and the new processes in the 2016 Act which will be covered by legal aid will equate to an investment of £3.1m per annum. The Minister states that the cost of the Law Society's proposals would be around £4.3 million "which is simply not affordable at this time of severe financial pressures".

ⁱ [Minutes of the Delegated Powers and Law Reform Committee, 28 November 2017](#)

10. The written submission from the Scottish Legal Aid Board highlighted the potential benefits of the Regulations, including reducing bureaucracy and an increase in the fees paid to solicitors for police station work. It also suggested that no significant concerns had been raised during extensive consultation on the proposed Regulations. Finally, it suggested that if the Regulations were not passed, police station advice could only be provided following a means test. It also emphasised that no provision would be in place for the court aspects of the new arrangements in the 2016 Act such as review of investigative liberation.
11. In its submission, the Law Society of Scotland recognises that the changes introduced by the 2016 Act will "provide significantly more effective protection for suspects' human rights in Scotland". However, it also notes that these changes will result in an increase in the number of persons being entitled to legal advice. The Law Society's submission states that the Financial Memorandum for the Bill that became the 2016 Act estimated that an additional 163,360 people would be eligible to access legal aid. The Law Society argues that the effect on their members' working practices will be "significant". This includes potential implications for solicitors with childcare or carer responsibilities who may have problems in being able to attend a police station out of hours. The Law Society expresses concern that no Equality Impact Assessment has been carried out for the Regulations.
12. In relation to the fee levels proposed in the Regulations, the Law Society states that the rate of remuneration for solicitors providing police service advice should be set at a higher rate. It also argues that payment for travel should be at the full time rate, as opposed to half time rate. In conclusion, the Law Society states:

” Overall, we believe that the level of free proposed for police station advice in the Regulations risks the effective operation of the changes being made in the 2016 Act ... Remuneration for solicitors must take account of the requirements of the changing landscape and providing the effective professional service that the public expects and demands.
13. Similar concerns about the proposed fee levels were expressed in other written submissions received by the Committee. For example, the Society of Solicitors in the Supreme Courts of Scotland stated:

” There must remain some concern as to whether practitioners will in general be happy to accept an increase of 33% for unsocial hours work, when 50% would generally be regarded as the minimum increase in fees for work of this nature.
14. The Society of Solicitors and Procurators of Stirling stated that the remuneration levels provided for in the Regulations are not sufficient "to allow for the effective and practical protection of the rights of suspects".
15. Written submissions also suggested that the Regulations could reduce the number of solicitors willing to participate in the provision of police station advice. The Edinburgh Bar Association, for example, stated that it considered that the provisions in the 2016 Act would "inevitably lead to an increase in the workload of solicitors at a time when rates of pay are at an historic low and in circumstances where the dearth of solicitors which that situation has brought about ... has already substantially increased the workload of those who have remained". It suggested that the Association had not been informed by the Scottish Government about the imminent introduction of these statutory provisions. The Association concluded that

it is now "wholly unable to recommend to its members that they participate in the provision of police station advice".

16. The Dunfermline District Society of Solicitors similarly stated that it was the "unanimous view" of those present at its recent Faculty meeting that "if the Regulations are laid in the present form then no firm will participate in the Police Duty Scheme". It went on to suggest that the changes in the 2016 Act, coupled with a draft code of conduct drawn up by the Scottish Legal Aid Board, will require firms to provide a member of staff to be on call at all times. It argued that this could lead to duty of care implications if an employer asks an employee to be on call after working a full day.
17. Further, the Dunfermline District Society of Solicitors raised concerns about the equality impact of the proposals. It suggested that significant restrictions, such as remaining within easy travelling distance or being unable to commit to childcare or caring responsibilities, will be placed on those on call with no remuneration being provided. It argued:
 - ” The effect if the lack of remuneration for those being placed on call is that no provisions can be made by them to fund childcare nor to provide care for ill or infirm dependents ... Concerns have been raised that firms in the future will be drawn to recruiting only those who do not have children, are unlikely to have children and who do not have any caring responsibilities.
18. The Society of Solicitors in the Supreme Courts of Scotland expressed similar concerns:
 - ” As the Society has previously observed, compliance with these requirements by those also conducting court work will unquestionably be onerous. This is particularly the case where solicitors have child care responsibilities or responsibilities to family members that are elderly or disabled.

Evidence session with the Minister for Community Safety and Legal Affairs

19. The Justice Committee considered the instrument at its meeting on 12 December 2017, where it took evidence from Annabelle Ewing, Minister for Community Safety and Legal Affairs, and her officials - Stephen Tidy, Police Division, and Aileen Grimmer, Civil Law and Legal System Division.
20. The Minister told the Committee that the Regulations would ensure that legal aid continues to be available following commencement of Part 1 of the 2016 Act. She noted that there had been "significant stakeholder engagement" on the regulations and that the Scottish Government had listened to the concerns of the Law Society. Further, eight stakeholder events were held across Scotland to seek the views of the wider profession, and 50 local faculties and practices were consulted on the draft regulations. She went on to say:
 - ” The Scottish Government has moved its position considerably on the amount to be paid for police station advice fees, but we could not, given budgetary constraints, meet every request of the Law Society. The Scottish Government remains committed to maintaining legal aid for those who need it most. We believe that this is a good offer to the profession.ⁱⁱ

21. Concerns were raised by the Committee about the impact on solicitors of being required to travel long distances, due to the transfer of a prisoner from one custody centre to another. Stephen Tidy from the Police Division of the Scottish Government replied that long-distance travel "would be an exception" and that suspects would normally be "interviewed at the closest custody facility."ⁱⁱⁱ
22. The Committee also raised a number of concerns about the Regulations that had been highlighted in the written submissions received. For example, the Committee questioned whether the Regulations would result in solicitors no longer participating in the provision of police station advice. The Committee suggested this could exacerbate existing difficulties in finding solicitors to attend police stations.
23. The Minister responded to these concerns, stating that:

” We have not received any mass intimations of withdrawal from the duty scheme. I am very happy to keep the Committee apprised of any developments in that regard ... We hope that solicitors will feel that it is a good deal, as I do, because it deals with a lot of the issues that have been raised. It also provides a simplified process for solicitors claiming their fee, which is important ... We hope that this new package, by addressing the level of fees, the simplified procedure, the application of an antisocial hours premium to travel and the wider definition of antisocial hours, will make the scheme a more attractive option for the solicitor profession.^{iv}
24. The Minister also told the Committee that the Scottish Legal Aid Board would seek to make alternative arrangements if solicitors were to withdraw from the duty scheme. However, the Committee raised concerns that the Regulations could not only lead to solicitors dropping out of the scheme, but could also deter solicitors to enter into the scheme in the first place. The Minister reiterated that there had been broad stakeholder consultation on the proposals and that she had no evidence to suggest that they would lead to a mass decline in solicitors participating in the duty scheme.^v The Minister undertook to provide the Committee with further details on the number of solicitors who are currently signed up to the duty scheme and how many, when asked to attend a police station, state they are unavailable.^{vi}
25. The Committee also raised concerns that the submission from the Edinburgh Bar Association suggested that it had not been informed of the commencement of the provisions in Part 1 of the 2016 Act. Stephen Tidy responded that stakeholder events had been held with the legal profession on the provisions and an offer had been made to deliver a presentation to the Edinburgh Bar Association, which was not taken up.^{vii}
26. The Committee asked the Minister what consideration had been given to the potential for sex and equality discrimination as a result of the Regulations, as firms

ii Official Report, *Justice Committee*, 12 December 2017, cols. 3-4.

iii Official Report, *Justice Committee*, 12 December 2017, cols. 4-5.

iv Official Report, *Justice Committee*, 12 December 2017, cols. 9-10.

v Official Report, *Justice Committee*, 12 December 2017 col. 14.

vi Official Report, *Justice Committee*, 12 December 2017 col. 17.

vii Official Report, *Justice Committee*, 12 December 2017 cols. 10-11.

may be drawn to recruiting solicitors who do not have children or caring responsibilities. The Minister emphasised that there was no mandatory obligation to participate in the duty scheme. She went on to say:

” The duty system at police stations is such that it will inevitably involve hours that make it difficult for people to plan their lives, but it is recognised that duty solicitors can make themselves unavailable.^{viii}

27. As to why no full equality impact assessment had been undertaken, the Minister told the Committee:

” There is no full equality impact assessment. A screening was done that identified no groups with protected characteristics as being affected and therefore the process did not mean proceeding with a full EqIA.^{ix}

28. The Committee also sought clarification from the Minister on the potential consequences should the Regulations not be passed. The Committee were told that, while existing arrangements for the provision of police station advice would remain, solicitors would not benefit from the proposed simplification of fee arrangements and increases to the antisocial hours fee level and block fees. The Minister also suggested that there would be issues regarding the assessment of financial eligibility.

29. Finally, the Minister emphasised that the new provisions in the 2016 Act relating to, for example, reviews of investigative liberation were not covered by existing arrangements.^x During the debate on the instrument, the Minister noted that the provisions in the 2016 Act will enhance the rights of individuals held at police stations and said she was "keen to ensure that nothing happens that would put those enhanced rights in jeopardy".^{xi}

viii Official Report, *Justice Committee*, 12 December 2017 col. 12.

ix Official Report, *Justice Committee*, 12 December 2017, col. 13.

x Official Report, *Justice Committee*, 12 December 2017, col. 15.

xi Official Report, *Justice Committee*, 12 December, 2017, col.20.

Recommendations

30. After the conclusion of the evidence session on the instrument, the Minister moved the motion in her own name: S5M-09233—That the Justice Committee recommends that the Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017 [draft] be approved.
31. After debate, the motion was agreed to (by division: For 8, Against 3, Abstentions 0).^{xii}
32. The Justice Committee recommends to the Parliament that it approve the draft instrument. A majority of the Committee are satisfied with the proposals in the Regulations, and note the Minister's evidence that they represent a good deal for solicitors within the current budgetary constraints.
33. However, a minority of the Committee consider that further scrutiny of the proposals is required in light of the concerns expressed in the written evidence to the Committee.

^{xii} Margaret Mitchell MSP, Maurice Corry MSP and Liam Kerr MSP voted against the motion.

Annex A - Written submissions

Written submissions received from:

Minister for Community Safety and Legal Affairs

Dunfermline District Society of Solicitors

Edinburgh Bar Association

Law Society of Scotland

Scottish Legal Aid Board

Society of Solicitors and Procurators of Stirling

Society of Solicitors in the Supreme Court

