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Justice Committee Comataidh a' Cheartais

Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020



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Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice, and functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.



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



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Introduction

1. At its meeting on 1 September 2020, the Justice Committee ("the Committee") considered the following draft Statutory instrument:
 - [The Advice and Assistance \(Assistance by Way of Representation\) \(Scotland\) Amendment Regulations 2020 \[draft\]](#)
2. The instrument was laid before the Scottish Parliament on 25 June 2020 and referred to the Justice Committee. The instrument is subject to the affirmative procedure. The Committee is required to report to the Parliament on the instrument by 7 September 2020.
3. The instrument is to be made in exercise of the powers conferred by section 9 of the Legal Aid (Scotland) Act 1986.ⁱ
4. 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.

ⁱ 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).

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 Minister for Community Safety lodged motion S5M-22554 proposing that the Committee recommends approval of the instrument.
7. At its meeting on 1 September 2020, the Committee took evidence on the instrument from Ash Denham MSP, Minister for Community Safety ('the Minister'), Kieran Burke, Bill Team Lead, Access to Justice and Jo-anne Tinto, Solicitor, Scottish Government Legal Directorate. The Minister outlined the purpose of the instrument to the Committee, as set out previously.
8. In her opening statement, the Minister explained that the regulations will amend the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to provide that assistance by way of representation (ABWOR) can be made available without means testing in respect of persons seeking to appeal a decision of the Scottish ministers to refuse an application to disregard a conviction for an historical sexual offence.
9. The Historical Sexual Offences (Pardons and Disregards) (Scotland) Act was passed by the Scottish Parliament on 6 June 2018 ("the 2018 Act"). The purpose of the Act is to pardon persons who were convicted of certain historical sexual offences and to provide a process for convictions for those offences to be disregarded. The information about such convictions that is held in records will no longer show up in a disclosure check. Relevant historical sexual offences relate to consensual sexual activity between men, which was once criminalised but is no longer illegal.
10. A disregard is sought, in the first instance, by way of an application to Scottish ministers. In the event that an application is rejected, there is the opportunity of review, which is provided by an appeal to the sheriff court. When an applicant wants to be represented in court for such an appeal, the regulations provide that non-means-tested ABWOR is available, subject to the Scottish Legal Aid Board being satisfied that the case has merit. That will help to ensure that it is as straightforward as possible to apply for, and to be granted, legal representation in such cases, while, at the same time, mitigating against cases that are without sufficient merit proceeding on the basis of being wholly publicly funded.
11. In response to questions from Members, the Minister advised that the 2018 Act requires the Scottish Government to introduce the measure and that there have been no problems with the process yet. To date, eight applications have been made and six of them have been approved. One did not progress as it was found that there were no longer any records of conviction, and one case is still pending. The Minister explained that it is anticipated that the provision will be very little used, given how many applications have been processed so far.
12. There being no further questions from Members, the Minister moved the motion in her name: S5M-22554—That the Justice Committee recommends that the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020 [draft] be approved.
13. The motion was agreed to without debate or division.

The Justice Committee recommends to the Parliament that it approve the Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2020 [draft].

