



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

29th Meeting, 2015 (Session 4)

Tuesday 27 October 2015

The Committee will meet at 10.15 am in the Mary Fairfax Somerville Room (CR2).

1. **Decisions on taking business in private:** The Committee will decide whether to take items 7, 8 and 9 in private.
2. **Subordinate legislation:** The Committee will take evidence on the Criminal Justice and Licensing (Scotland) Act 2010 (Supplementary Provision) Order 2015 [draft] from—

Michael Matheson, Cabinet Secretary for Justice, Philip Lamont, Criminal Justice Division, and Lauri Mitchell, Directorate for Legal Services, Scottish Government.

3. **Subordinate legislation:** Michael Matheson (Cabinet Secretary for Justice) to move—

S4M-14395—That the Justice Committee recommends that the Criminal Justice and Licensing (Scotland) Act 2010 (Supplementary Provision) Order 2015 [draft] be approved.

4. **Subordinate legislation:** The Committee will take evidence on the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [draft] from—

Michael Matheson, Cabinet Secretary for Justice, Nicola Wisdahl, Civil Law and Legal System Division, and Alastair Smith, Directorate for Legal Services, Scottish Government.

5. **Subordinate legislation:** Michael Matheson (Cabinet Secretary for Justice) to move—

S4M-14396—That the Justice Committee recommends that the International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [draft] be approved.

6. **Subordinate legislation:** The Committee will consider the following negative instruments—
  - Discontinuance of Legalised Police Cells (Scotland) Rules 2015 (SSI 2015/324);
  - Police Pension Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/325);
  - Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/337).
7. **Community Justice (Scotland) Bill:** The Committee will consider the themes emerging from the evidence received in order to inform the drafting of its Stage 1 report.
8. **Abusive Behaviour and Sexual Harm (Scotland) Bill:** The Committee will consider its approach to the scrutiny of the Bill at Stage 1.
9. **Work programme:** The Committee will consider its work programme.

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The papers for this meeting are as follows—

**Agenda items 2 and 3**

Paper by the clerk

J/S4/15/29/1

[Criminal Justice and Licensing \(Scotland\) Act 2010 \(Supplementary Provision\) Order 2015](#)

**Agenda items 4 and 5**

Paper by the clerk

J/S4/15/29/2

[International Organisations \(Immunities and Privileges\) \(Scotland\) Amendment Order 2015](#)

**Agenda item 6**

Paper by the clerk

J/S4/15/29/3

[Discontinuance of Legalised Police Cells \(Scotland\) Rules 2015 \(SSI 2015/324\)](#)

[Police Pension Scheme \(Scotland\) Amendment Regulations 2015 \(SSI 2015/325\)](#)

[Legal Aid \(Miscellaneous Amendments\) \(Scotland\) Regulations 2015 \(SSI 2015/337\)](#)

**Agenda item 7**

Private paper

J/S4/15/29/4 (P)

[Community Justice \(Scotland\) Bill, accompanying documents and SPICe briefing](#)

[Written submissions received on the Bill](#)

**Agenda item 8**

Private paper

J/S4/15/29/5 (P)

[Abusive Behaviour and Sexual Harm \(Scotland\) Bill and accompanying documents](#)

**Agenda item 9**

Private paper

J/S4/15/29/6 (P)

**Justice Committee**

**29<sup>th</sup> Meeting, 2015 (Session 4), Tuesday 27 October 2015**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following affirmative instrument:

**CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010  
(SUPPLEMENTARY PROVISION) ORDER 2015 [DRAFT]**

**Introduction**

2. This instrument is made under the powers conferred by section 204 of the Criminal Justice and Licensing (Scotland) Act 2010(a) and all other enabling powers.
3. The instrument makes a supplementary amendment to schedule 1 to the 2010 Act requiring the Scottish Courts and Tribunals Service to pay expenses and remuneration to members of the Scottish Sentencing Council. Expenses and remuneration to be paid, if any, will be determined by the Scottish Ministers for lay members, and the Lord Justice General for judicial and legal members.
4. The instrument comes into force on 28 November 2015.
5. Further details on the purpose of the instrument can be found in the policy note (see below) to this paper and an electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/sdsi/2015/9780111029480>

**Delegated Powers and Law Reform Committee consideration**

6. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 29 September 2015 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**

7. The Justice Committee is required to report to the Parliament on the instrument by 12 November 2015.
8. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Minister for Community Safety and Legal Affairs has lodged motion S4M-14395 proposing that the Committee recommends approval of the instrument. The Cabinet Secretary for Justice is due to attend the meeting on 27 October to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to this motion, and then to report to the Parliament by 12 November 2015. Thereafter, the Parliament will be invited to approve the instrument.

9. **The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.**

**Policy Note: Criminal Justice and Licensing (Scotland) Act 2010 (Supplementary Provision) Order 2015 [Draft]**

1. The above instrument was made in exercise of the powers conferred by section 204 of the Criminal Justice and Licensing (Scotland) Act (“the 2010 Act”). The instrument is subject to affirmative procedure.

**Policy Objectives**

2. This instrument provides that a member of the Scottish Sentencing Council is entitled to such expenses and remuneration as may be determined by the Lord Justice General, for judicial and legal members, and the Scottish Ministers, for lay members. Payment of any remuneration or expenses to which a member is entitled, is to be made by the Scottish Courts and Tribunals Service (SCTS). Different remuneration or expenses may be determined for members of different descriptions.

3. The SCTS is an independent body corporate which provides administrative support to Scottish Courts and to the judiciary of those courts, including the High Court of Justiciary, Court of Session, sheriff courts and justice of the peace courts. It also provides support to the Office of the Public Guardian, the Accountant of Court and the Scottish Sentencing Council (the Council).

4. It is considered appropriate that the SCTS pay expenses and remuneration to members of the Council as they will provide administrative support to the Council by virtue of the Scottish Courts and Tribunal Service (Administrative Support) (Specified Persons) Order 2015, made under section 62 of the Judiciary and Courts (Scotland) Act 2008 . The level of expenses and remuneration will be set by the Lord Justice General, for judicial and legal members, and by Scottish Ministers, for lay members. This reflects their respective responsibility for appointments to the Council.

**Impact Assessments**

5. Equality Impact Assessment (EQIA) is a tool to assist in considering how policy may impact, either positively or negatively, on different sectors of the population in different ways.

6. We have considered the impact of policy on particular groups of people (their age, race, gender, sexual orientation, religion or belief or whether disabled or not). We are not aware of any evidence that any of the equality strands will be affected by these regulations.

Criminal Justice Division  
September 2015

## Justice Committee

29<sup>th</sup> Meeting, 2015 (Session 4), Tuesday 27 October 2015

### Subordinate legislation

#### Note by the clerk

#### Purpose

1. This paper invites the Committee to consider the following affirmative instrument:

**INTERNATIONAL ORGANISATIONS (IMMUNITIES AND PRIVILEGES)  
(SCOTLAND) AMENDMENT ORDER 2015 [DRAFT]**

#### Introduction

2. This instrument is made under the powers conferred by section 1(2) of the International Organisations Act 1968<sup>(1)</sup> and all other enabling powers.

3. This instrument amends the International Organisations (Immunities and Privileges) (Scotland) Order 2009 to confer legal privileges and immunities on the Asian Infrastructure Investment Bank, and on persons associated with the Bank, so far as this is within the devolved competence of the Scottish Parliament. A related Order is subject to consideration by the UK Parliament as it relates to reserved matters. The Policy Note explains that this is being done to help secure compliance by the UK with its international obligations and to enable the Bank to operate effectively.

4. Further details on the purpose of the instrument can be found in the policy note (see below) to this paper and an electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/sdsi/2015/9780111029299/contents>

#### Consultation

5. According to the policy note, the instrument has been prepared in consultation with the Foreign and Commonwealth Office and other relevant United Kingdom Government Departments.

#### Delegated Powers and Law Reform Committee consideration

6. The Delegated Powers and Law Reform Committee considered this instrument at its meeting on 22 September 2015 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

7. The Justice Committee is required to report to the Parliament on the instrument by 2 November 2015.

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<sup>(1)</sup> 1968 c.48. Section 1 was amended by the International Organisations Act 1981 (c.9) and S.I. 2005/3542.

8. The instrument is subject to affirmative procedure (Rule 10.6 of Standing Orders). The Minister for Community Safety and Legal Affairs has lodged motion S4M-14396 proposing that the Committee recommends approval of the instrument. The Cabinet Secretary for Justice is due to attend the meeting on 27 October to answer any questions on the instrument, and then, under a separate agenda item, to speak to and move the motion for approval. It is for the Committee to decide whether or not to agree to this motion, and then to report to the Parliament by 2 November 2015. Thereafter, the Parliament will be invited to approve the instrument.

**9. The Committee will be asked to delegate to the Convener authority to approve the report on the instrument for publication.**

**Policy Note: International Organisations (Immunities and Privileges) (Scotland) Amendment Order 2015 [draft]**

The instrument is proposed to be made by Her Majesty in Council in exercise of the powers conferred by section 1(2) of the International Organisations Act 1968. The instrument is subject to affirmative resolution procedure.

**Policy Objectives**

The purpose of the instrument is to confer legal privileges and immunities on the Asian Infrastructure Investment Bank (the Bank), and on persons associated with the Bank, so far as this is within devolved competence of the Scottish Parliament.

The privileges and immunities conferred by the instrument in respect of devolved matters reflect those that have been conferred, or are in the course of being conferred, in relation to the Bank by a related order that is subject to consideration by the UK Parliament as it relates to reserved matters.

This is being done in order to help secure compliance by the United Kingdom with its international obligations and to enable the Bank to operate effectively.

**Effect of Order**

This Order will confer privileges and immunities on the Bank. The Order will afford the Bank immunity from suit and legal process. Where the Bank operates in the UK, the Bank's property and assets are immune from seizure and judgment. There can be no search or confiscation (etc.) of the Bank's property. The Bank's premises are inviolable, as that term is understood in the 1961 Convention Articles. These Articles are part of the Vienna Convention on Diplomatic Relations, and have the force of law in the UK by their incorporation in domestic law: Schedule 1 of the Diplomatic Privileges Act 1964.

Section 1 of the International Organisations Act 1968 empowers Her Majesty to make Orders in Council to confer legal personality and/or privileges and immunities on certain international organisations, representatives to those organisations, staff members and experts on missions.

Under the Scotland Act 1998, international relations (including relations with international organisations) is reserved to the Westminster Parliament. However, in terms of paragraph 7(2) of Part I of Schedule 5 to the Scotland Act 1998, observing

and implementing international obligations is not reserved. The effect of section 118(4) of the Scotland Act is that a power to make an Order in Council in a pre-commencement enactment (i.e. an Act preceding the Scotland Act) which is exercisable within devolved competence must be approved by a resolution of the Scottish Parliament rather than the UK Parliament.

Consequently, Orders in Council made by Her Majesty under section 1 of the 1968 Act, so far as they are within devolved competence, are subject to approval by the Scottish Parliament.

### **Consultation**

The instrument has been prepared in consultation with the Foreign and Commonwealth Office and other relevant United Kingdom Government Departments.

### **Impact Assessments**

No equality impact assessment has been completed as there is no effect on people other than those to whom the UK Government has afforded privileges and immunities.

### **Financial Effects**

The Cabinet Secretary for Justice confirms that no BRIA is necessary as no financial effects on the Scottish Government, local government or on business are foreseen.

Scottish Government  
Justice Directorate  
September 2015

**Justice Committee**

**29<sup>th</sup> Meeting, 2015 (Session 4), Tuesday 27 October 2015**

**Subordinate legislation**

**Note by the clerk**

**Purpose**

1. This paper invites the Committee to consider the following negative instruments:
  - Discontinuance of Legalised Police Cells (Scotland) Rules 2015 (SSI 2015/324) *[see page 2]*;
  - Police Pension Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/325) *[see page 3]*;
  - Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/337) *[see page 4]*;
2. Further details on the procedure for negative instruments are set out in Annexe B attached to this paper.

## **DISCONTINUANCE OF LEGALISED POLICE CELLS (SCOTLAND) RULES 2015 (SSI 2015/324)**

### **Introduction**

3. The instrument is made under sections 14 and 39 of the Prisons (Scotland) Act 1989 and all other enabling powers. The instrument formally discontinues the legalised police cells (LPCs) in Dunoon, Oban, Lochmaddy, Campbeltown and Thurso, which in effect means they can no longer be used as legal prisons for the detention of prisoners before, during or after trial. The instrument follows a recommendation from HM Chief Inspector of Prisons for Scotland that these LPCs be discontinued as a result of their lack of use for prison custodies. The instrument came into force on 8 October 2015.

4. Further details on the purpose of the instrument can be found in the policy note (see page 2). An electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/ssi/2015/324/contents/made>

### **Consultation**

5. The policy note states that there has been consultation with Police Authorities, who in turn consulted with stakeholders which included local Sheriff and Procurator Fiscal Services.

### **Delegated Powers and Law Reform Committee consideration**

6. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 15 September 2015 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**

7. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 2 November 2015.

### **Policy Note: Discontinuance of Legalised Police Cells (Scotland) Rules 2015 (SSI 2015/324)**

1. The above instrument formally discontinues the Legalised Police Cells (LPCs) at Dunoon, Oban, Lochmaddy and Thurso and Campbeltown.

2. These rules revoke rules made under the Prisons (Scotland) Act 1877 which declared police cells in Dunoon, Oban, Lochmaddy and Thurso to be legal prisons for the detention of prisoners and a rule made under sections 14 and 39 of the Prisons (Scotland) Act 1989 which declared police cells in Campbeltown to be legal prisons for the detention of prisoners.

3. The instrument is subject to negative resolution procedure, and comes into force on 8 October 2015. The discontinuance rules are the formal legal act required to reflect that the aforementioned LPCs Cells will cease to operate.

### **Policy Objective**

4. Her Majesty's Chief Inspector of Prisons for Scotland (HMCIPS) has a duty to inspect LPCs and to report on the conditions and treatment of prisoners under section 7 of the 1989 Act. In a report published in December 2011, HMCIPS recommended that the LPCs in Lochmaddy, Thurso, Campbeltown, Oban and Dunoon be discontinued. The discontinuance of 5 of the 9 LPCs was recommended largely or solely as a result of their lack of use for prison custodies.

### **Impact Assessment**

5. Equality and Human Rights Impact Assessment was carried out and no potential for unlawful discrimination or adverse impact or breach of human rights articles has been identified.

### **Consultation**

6. There has been consultation with Police Authorities, who in turn consulted with stakeholders which included local Sheriff and Procurator Fiscal Services.

### **Financial Effect**

7. The Cabinet Secretary for Justice confirms that no Business and Regulatory Impact Assessment is necessary as the instrument has no financial effects on the Scottish Government, local government or on business.

## **POLICE PENSION SCHEME (SCOTLAND) AMENDMENT REGULATIONS 2015 (SSI 2015/325)**

### **Introduction**

8. The instrument is made under section 1(1) and (2)(g) of, and paragraph 7(b) of Schedule 2 to the Public Service Pensions Act 2013 and all other enabling powers. It comes into force on 1 November 2015. The purpose of the instrument is to amend the Police Pension Scheme (Scotland) Regulations 2015 to correct errors and omissions in that instrument. The Regulations have retrospective effect as from 1 April 2015 (the date on which the Regulations being amended came into force). A Policy Note was not produced for this instrument.

9. An electronic copy of the instrument is available at:  
<http://www.legislation.gov.uk/ssi/2015/325/contents/made>

### **Delegated Powers and Law Reform Committee consideration**

10. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 22 September 2015 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**

11. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 2 November 2015.

## LEGAL AID (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2015 (SSI 2015/337)

### Introduction

12. The instrument is made under sections 33(2), (3) and (3A) and 36(2)(c) of the Legal Aid (Scotland) Act 1986<sup>(1)</sup> and all other enabling powers. It came into force on 22 September 2015.

13. The purpose of the instrument is to adapt the framework and arrangements in existing regulations to accommodate changes to criminal proceedings in the Sheriff Appeal Court, all-Scotland sheriff courts for specified civil proceedings, and judicial review by:

- making available criminal legal aid in criminal appeals to the Sheriff Appeal Court, and for appeals and references from that court to the High Court of Justiciary;
- setting fees for representation at bail appeals;
- ensuring fees for counsel are available for new judicial review processes and in respect of appeal or referral from the Sheriff Appeal Court to the High Court; and
- applying detailed fees to work done by solicitors in all-Scotland sheriff courts.

14. Following concerns raised by the Committee and the withdrawal of the draft affirmative instrument (Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 [draft]), this instrument does not require a solicitor to seek prior approval from the Scottish Legal Aid Board before instructing counsel. It also makes provision for solicitor advocates to be paid criminal legal aid counsel rates in the Sheriff Appeal Court. These measures allow legal professionals to do the same work as they do now for the same fees as in the High Court, while agreement is reached on an alternative bespoke structure for the Sheriff Appeal Court.

15. Further details on the purpose of the instrument can be found in the policy note (see page 5). An electronic copy of the instrument is available at:

<http://www.legislation.gov.uk/ssi/2015/337/contents/made>

### Delegated Powers and Law Reform Committee consideration

16. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 29 September 2015 and agreed to draw it to the attention of the Parliament for failure to comply with the requirement to leave a minimum of 28 days between the laying and the coming into force of the Regulations. The Scottish Government confirmed to the DPLR Committee that the reason for this failure to comply with the 28-day rule was to ensure that legal aid provision was in place on the day that the new Sheriff Appeal Court became operational.

17. The relevant extract from the DPLR Committee's report on the instrument is reproduced on page 7 of this paper.

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<sup>(1)</sup> 1986 c.47; section 33(2) was amended by the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), section 67. Section 33(3A) was inserted by the Crime and Punishment (Scotland) Act 1997 (c.48), section 51. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (c.46), section 53.

## Justice Committee consideration

18. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 19 November 2015.

### **Policy Note: Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/337)**

The above instrument is to be made in exercise of the powers conferred by sections 33(2), (3) and (3A) and 36(2)(c) of the Legal Aid (Scotland) Act 1986. The instrument is subject to negative procedure.

### **Policy Objectives**

Provisions in the Courts Reform (Scotland) Act 2014 are being implemented in September 2015, relating to: criminal proceedings in the Sheriff Appeal Court, all-Scotland sheriff courts for specified civil proceedings, and judicial review. The policy objective of this instrument is to adapt the framework and arrangements in existing regulations to accommodate these changes by:

- making available criminal legal aid in criminal appeals to the Sheriff Appeal Court, and for appeals and references from that court to the High Court of Justiciary;
- setting fees for representation at bail appeals;
- ensuring fees for counsel are available for new judicial review processes and in respect of appeal or referral from the Sheriff Appeal Court to the High Court; and
- applying detailed fees to work done by solicitors in all-Scotland sheriff courts.

Following concerns raised by the Justice Committee, this instrument does not require a solicitor to seek prior approval from the Scottish Legal Aid Board before instructing counsel. It also makes provision for solicitor advocates to be paid criminal legal aid counsel rates in the Sheriff Appeal Court. These measures allow legal professionals to do the same work as they do now for the same fees as in the High Court, while agreement is reached on an alternative bespoke structure for the Sheriff Appeal Court.

#### *Criminal appeals to the Sheriff Appeal Court*

Regulation 4 makes appeals to the Sheriff Appeal Court against conviction, sentence, other disposal or acquittal distinct proceedings for the purposes of criminal legal aid. This means that these appeals will require a separate grant of legal assistance.

Solicitors will be paid detailed fees as set out in Part 1 of Schedule 1 to the Criminal Legal Aid (Scotland) Fees Regulations 1989 (“the Fees Regulations”) for criminal appeals to the Sheriff Appeal Court. These are the same rates as are paid for criminal appeals to the High Court. Regulation 3(4) allows these fees to be paid.

Where counsel represent a client in the Sheriff Appeal Court, they will be paid at the same rates as if the proceedings were taking place in the High Court. Regulation 3(5)(a)(i) amends the notes on the operation of Schedule 2 to the Fees Regulations to make this clear. Regulation 3(2) amends the Fees Regulations’ definition of “solicitor advocate” to allow solicitor advocates to be paid on the same basis as counsel in respect of proceedings in the Sheriff Appeal Court.

Regulation 3(3) ensures that, where there is a dispute between the Scottish Legal Aid Board and a solicitor or counsel as to the amount of fees or outlays allowable for criminal proceedings in the Sheriff Appeal Court, the matter will be referred to the Auditor of the Court of Session.

### *Bail appeals*

Bail appeals are not distinct proceedings for the purposes of criminal legal aid and therefore do not require a separate grant of legal assistance. Under the provisions of the Courts Reform (Scotland) Act 2014, they may take place in either the High Court or the Sheriff Appeal Court depending on the circumstances. This means that solicitors may represent clients in bail appeal proceedings before the Sheriff Appeal Court.

Regulation 5(3) makes a fee for representation at each hearing or continued hearing of a bail appeal available to a solicitor where counsel is not employed, in addition to the existing fee for non-advocacy work in relation to a bail appeal. Regulation 3(5)(b) and (d) aligns fees for junior and senior counsel with this structure by making the fee they are currently paid for representation at a bail appeal hearing available at any continued hearing. Solicitor advocates can also access this fee by virtue of regulation 3(2).

### *Appeals and referrals to the High Court from the Sheriff Appeal Court*

The Sheriff Appeal Court may refer points of law to the High Court for consideration during the course of proceedings. These will not require a separate grant of legal assistance. Further, decisions of the Sheriff Appeal Court can be appealed to the High Court. Regulation 4 means that such appeals will require a separate grant of legal assistance.

Regulation 3(5)(c) and (e) make fees within a range available for junior counsel and senior counsel in both appeals and referrals to the High Court from the Sheriff Appeal Court. Solicitor advocates can also access this fee by virtue of regulation 3(2). As with existing fees in a range for hearings, regulation 3(5)(a)(ii) ensures that counsel seeking a higher fee within the range must justify this by establishing that either an unusually high level of preparation was required or that novelty of the issues of law, unusually complex issues of fact, or issues of considerable legal significance had a significant effect on the conduct of the case.

### *Fees for counsel (civil)*

New procedures for judicial review are being introduced by section 89 of the Courts Reform (Scotland) Act 2014. Regulation 2(2)(a) makes the junior counsel fee for a motion for first orders under the current system available for an oral hearing at permission stage or procedural hearing under the new procedure. It also makes the junior counsel fee for a first or second hearing under the current system available for a substantive hearing under the new procedure.

Regulation 2(2)(b) and (3) sets “catch-all” fees for representation at hearings by counsel in ordinary actions and in proceedings in the sheriff court respectively. These are intended to make sure a fee is payable to counsel for any new procedural hearings they are involved in as procedures continue to develop.

*All-Scotland courts*

Section 41 of the Courts Reform (Scotland) Act 2014 allows Scottish Ministers to allow a specified sheriff court to deal with specified types of civil proceedings for the whole of Scotland. This is being used to create a specialist personal injury court, which will use new procedures. The existing block fees will not be appropriate to the new procedure so regulation 2(4) makes detailed fees payable in those cases. As any new all-Scotland sheriff court could reasonably be expected to develop new procedures, regulation 2(4) also makes detailed fees payable for proceedings in any future all-Scotland sheriff court.

**Financial Effects**

Publicly-funded legal assistance will clearly be available for new courts and procedures, and fees will be available to solicitors and counsel doing that work. The shifting of work into the new courts means that there is a group of cases that currently require representation by counsel, which will no longer necessarily require counsel to be instructed. However, solicitors do not need to seek prior approval from the Scottish Legal Aid Board before instructing counsel in the Sheriff Appeal Court. The Scottish Legal Aid Board estimates that the transfer of cases to the new personal injury court will reduce expenditure from the Legal Aid Fund by around £1.2 million per year.

Scottish Government  
Justice Directorate  
17 September 2015

***Extract from the Delegated Powers and Law Reform Committee 54<sup>th</sup> Report 2015*****LEGAL AID (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2015 (SSI 2015/337) (Justice Committee)**

1. This instrument amends existing legal aid rules to accommodate various changes to the Scottish courts system, introduced by the Courts Reform (Scotland) Act 2014 (“the 2014 Act”), which came into force on 22 September 2015.
2. The instrument is subject to the negative procedure and came into force on 22 September 2015.
3. This instrument fails to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument was laid before the Parliament on 17 September and came into force on 22 September. The requirement to leave a minimum of 28 days between laying and coming into force has therefore not been complied with.
4. The Scottish Government has provided a letter to the Presiding Officer, to explain the failure to comply with the “28 day rule”. The correspondence is reproduced at Annexe A. The Scottish Government explains that the amendments to legal aid provision are required to be in force as at 22 September 2015, when various provisions of the Courts Reform (Scotland) Act 2014 come into force. The amendments seek to ensure that legal aid provision will operate effectively in respect of, amongst other things, the new Sheriff Appeal Court established by that Act.

5. In terms of the late laying of this instrument, the Committee notes that the Scottish Government had proposed to make amendments to existing legal aid provision via an affirmative instrument, which was laid before the Parliament in draft on 9 June and was considered by the Committee at its meeting on 23 June. That draft instrument was withdrawn on 17 September following concerns raised by the Justice Committee at its meetings on 8 and 15 September. The instrument before the Committee was laid before the Parliament on 17 September, and makes substantially the same amendments as those proposed in the earlier draft affirmative instrument, but with specific changes to those proposed amendments which seek to address concerns raised by the Justice Committee.

**6. The Committee draws the instrument to the Parliament's attention on reporting ground (j), as there has been a failure to observe the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The instrument was laid before the Parliament on 17 September and came into force on 22 September. The requirement to leave a minimum of 28 days between laying and coming into force has therefore not been complied with.**

**7. The Committee accepts the Scottish Government's explanation as to why the amendments to legal aid provision made by the instrument require to be in force as at 22 September, when various provisions of the Courts Reform (Scotland) Act 2014 come into force.**

**Legal Aid (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/337)****Breach of laying requirements: letter to the Presiding Officer**

The Legal Aid (Miscellaneous Amendments) (Scotland) Regulations, SSI 2015/337 (“the present Regulations”) were made by the Scottish Ministers under sections 33(2), (3) and (3A) and 36(2)(c) of the Legal Aid (Scotland) Act 1986 today. They are being laid before the Scottish Parliament today, 17 September 2015, and come into force on 22 September 2015.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) has not been complied with. To meet the requirements of section 31(3) of that Act, this letter explains why.

A number of provisions of the Courts Reform (Scotland) Act 2014 (asp 18) (“the 2014 Act”) will come into force on 22 September 2015 (by virtue of the Courts Reform (Scotland) Act 2014 (Commencement No. 3, Transitional and Saving Provisions) Order (S.S.I. 2015/247)). These include section 89, which introduces a new permission stage for judicial review and section 118, which transfers jurisdiction in summary criminal appeals and certain bail appeals from the High Court to the Sheriff Appeal Court.

These changes necessitate changes in legal aid provision. The Scottish Government had proposed to make such changes via an instrument which included provision under section 9 of the Legal Aid (Scotland) Act 1986 (and which was therefore subject to affirmative procedure by virtue of section 37(1) of that Act). This instrument, the draft Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Scotland) Regulations 2015 (“the draft Regulations”), was considered by the Justice Committee on 8 and 15 September.

Concern was voiced that the draft Regulations failed to ensure access to justice in the Sheriff Appeal Court, on the basis (among other things) that they would require the prior approval of the Scottish Legal Aid Board (“SLAB”) for counsel to be employed in that court, and that solicitor advocates would be paid for appeals to the Sheriff Appeal Court at the same rate as other solicitors rather than at the rate which they presently receive for conducting equivalent appeals in the High Court. At the meeting on 15 September, the Committee voted not to recommend that the draft Regulations be approved. I wrote to the Chamber Clerk today to inform the Parliament of the Scottish Government’s intention to withdraw the draft Regulations.

Making no specific provision about the Sheriff Appeal Court would leave significant uncertainty in how legal aid would operate in the new court

The present Regulations therefore make provision in the same terms as the previous Regulations subject to three differences(1) they do not require the Scottish Legal Aid Board’s approval for the employment of counsel in the Sheriff Appeal Court; (2) they provide for solicitor advocates to be paid for work in that court on the same basis as counsel; and (3) they omit the draft Regulations’ amendment to the Advice and

Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 (the inclusion of which would have required the present Regulations to be subject to the affirmative procedure).

Changes (1) and (2) address concerns raised by the Justice Committee in its consideration of the earlier draft Regulations. In order to introduce appropriate legal aid provision which meets these concerns and which coincides with the commencement of the relevant provisions of the 2014 Act on 22 September and ensure that the Court can operate properly it has been necessary to lay the present Regulations in breach of the requirement in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

The Minister is writing separately to the Justice Committee to explain the course of action that has been taken.

**ANNEXE B****Negative instruments: procedure**

Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).

Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.

If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.

Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. In other cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

**Guidance on subordinate legislation**

Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee’s web page at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/64215.aspx>