

# **CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) ACT 2022**

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## **EXPLANATORY NOTES**

### **THE ACT: OVERVIEW**

#### **Part 3: Public Service Reform**

##### **Legal Aid and Advice and Assistance**

###### ***Section 35: Claim for interim payment of fees and outlays***

129. This section makes provision for and about the making of interim payments in cases where legal fees and outlays are due to be paid out of the Legal Aid Fund (“the Fund”) under the terms of the Legal Aid (Scotland) Act 1986. The section introduces a more flexible process for making interim payments in place of the temporary adjustments to existing rules which were provided for in paragraphs 21 to 23 of schedule 4 of the Coronavirus (Scotland) Act 2020.
130. Subsection (2)(a) modifies the existing duty to make payments out of the Fund so as to take account of the introduction of interim payments. Subsection (2)(b) similarly modifies the obligation for certain payments to be paid into the Fund: it requires any sums due by way of reimbursement of interim payments to be paid into the Fund.
131. Subsection (3)(a) modifies the provision that is made in section 33 of the 1986 Act about the ability to set fixed payments for work undertaken. As a general rule, because of the nature of a fixed payment, a solicitor who undertakes work for which a fixed payment is due will not be entitled to other payments from the Fund for that work. However, new subsection (3BA) ensures that this rule does not prevent the payment of an interim payment.
132. Subsection (3)(c) provides that any sum paid by way of interim payment is to be deducted from the final amount paid (so as to avoid double payment).
133. Subsection (4) inserts two new sections into the 1986 Act: new section 33ZB and new section 33ZC.
134. New section 33ZB provides for interim payments. It provides as follows—
  - A claim for such a payment can be made by a solicitor who is providing advice and assistance or legal aid and by an advocate who is providing legal aid.
  - A claim must include a declaration that the sum being sought does not exceed the total sum the person expects to be paid from the Fund for their work.
  - Where a claim for an interim payment is made, it must be granted, unless the Legal Aid Board considers that the sum sought is likely to exceed the total sum it would expect to pay the person for their work.

*These notes relate to the Coronavirus (Recovery and Reform) (Scotland)  
Act 2022 (asp 8) which received Royal Assent on 10 August 2022*

- In assessing the total sum that is expected to be paid for the person's work, the fact that the interim payment being sought will, if paid, in due course be deducted from the total sum (to avoid double payment) is not to be taken into consideration. However, any previously claimed interim payment would be deducted for the purposes of assessing the total sum that is expected to be paid for the work. The assessment is essentially looking at how much more the Legal Aid Board expects to pay the person than has already been paid.
135. New section 33ZC provides for the repayment of interim payments which prove to have been overpayments. This applies where the solicitor or counsel in question subsequently stops providing legal aid or advice and assistance to the person concerned (whether that is because the matter in relation to which it was being provided is at an end, the lawyer has withdrawn from acting, or for any other reason), and the total sum actually due to the solicitor or counsel is less than the total sum which was assumed would be due at the time of applying for the interim payment. The section provides as follows—
- The solicitor or counsel in question is required to pay the Legal Aid Board a sum equal to the amount by which the interim payment exceeds the total sum that is due for the work.
  - For these purposes, the total sum that is due for the work is assessed without reference to the fact that interim payments have already been made: the comparison is between the total amount that would have been due had no interim payments been made, and the amount that was paid out as interim payments.
  - Where the interim payment was, at the solicitor's request, paid to their firm rather than being paid to them personally, the firm is jointly and severally liable for the repayment due by that solicitor.
  - Where a firm is jointly and severally liable for a repayment and a separate sum is due to be paid to that firm, the Legal Aid Board is entitled to offset all or part of the repayment that is due to the Board.
  - The recovery mechanisms provided for by the section are in addition to, and do not limit, the use of any other recovery mechanisms that are available under the general law (for example, under the law of unjustified enrichment).
136. Subsection (5) revokes regulation 11 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989. That regulation also allowed for interim claims for payment to be made pending the completion of legal proceedings. The new scheme for interim payments means regulation 11 is no longer required.