
SCOTTISH STATUTORY INSTRUMENTS

2010 No. 462

LEGAL AID AND ADVICE

**The Advice and Assistance (Scotland)
Amendment Regulations 2010**

Made - - - - 17th December 2010
*Laid before the Scottish
Parliament* - - - - 21st December 2010
Coming into force - - 31st January 2011

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 36(1) and (2)(e) and 42 of the Legal Aid (Scotland) Act 1986⁽¹⁾ and all other powers enabling them to do so.

Citation and commencement

1. These Regulations may be cited as the Advice and Assistance (Scotland) Amendment Regulations 2010 and come into force on 31st January 2011.

Application

2.—(1) Regulations 4 and 6 apply only in relation to advice and assistance made available on or after 31st January 2011.

(2) Regulation 5 applies only in relation to applications for advice and assistance made on or after 31st January 2011.

Amendment of the Advice and Assistance (Scotland) Regulations 1996

3. The Advice and Assistance (Scotland) Regulations 1996⁽²⁾ are amended as follows.

4. After regulation 21 insert—

(1) 1986 c.47. 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).
(2) S.I. 1996/2447; amended by S.I. 1997/726, 1998/724, S.S.I. 2000/181, 2002/495, 2003/163 and 421, 2004/262 and 492, 2005/171 and 339, 2006/233, 2007/60, 2008/240, S.I. 2008/1879, S.S.I. 2009/59 and 2010/57 and 166.

“Right of Board to withhold payment or recover sums paid out of the Fund in relation to non-criminal matters

22.—(1) Paragraph (3) applies where the Board finds that the provision of advice and assistance (other than advice and assistance in relation to criminal matters)—

- (a) was not (wholly or partly) in accordance with the relevant rules applying by virtue of the Legal Aid (Scotland) Act 1986; or
- (b) was otherwise unjustified in the circumstances of the case (including by reason of inadequate assessment or verification of any relevant factor).

(2) In considering whether or not the provision of advice and assistance was in accordance with the relevant rules, the Board may have regard to any guidance it has issued in relation to the application of those rules.

(3) The Board may—

- (a) withhold (wholly) payment from the Fund in respect of the advice and assistance provided; or
- (b) if such payment has been made, fully recover it.”.

5. In Schedule 2 (assessment of disposable capital and disposable income)—

- (a) omit paragraph 2;
- (b) in paragraph 2A(1) omit “in relation to a criminal matter”; and
- (c) after paragraph 4 insert—

“**4A.**—(1) Subject to sub-paragraph (3), if the person concerned is a child the resources of any person who owes an obligation of aliment to the child under section 1(1)(c) or (d) of the Family Law (Scotland) Act 1985⁽³⁾ are to be treated as part of the child’s own resources.

(2) In sub-paragraph (1), “child” has the meaning given in section 1(5) of the Family Law (Scotland) Act 1985.

(3) Sub-paragraph (1) applies only—

- (i) in respect of advice and assistance in relation to non-criminal matters; and
- (ii) if its application in the particular circumstances would not be unjust or inequitable.”.

Revocations

6. Regulation 3 of the Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 1) (Scotland) Regulations 2010⁽⁴⁾ is revoked.

St Andrew’s House,
Edinburgh
17th December 2010

KENNY MACASKILL
A member of the Scottish Executive

⁽³⁾ 1985 c. 37.

⁽⁴⁾ S.S.I. 2010/166.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Advice and Assistance (Scotland) Regulations 1996 (“the 1996 Regulations”) and consequentially revoke regulation 3 of the Civil Legal Aid (Transfer of Tribunal Functions) (No. 1) (Scotland) Regulations 2010 (“the 2010 Regulations”).

Regulation 4 inserts a new regulation 22 into the 1996 Regulations to allow payments to be recovered or withheld where the Scottish Legal Aid Board finds that a solicitor who has provided advice and assistance in relation to a non-criminal matter has not correctly applied the relevant tests for eligibility. Provision to similar effect in the context of civil matters was previously made by regulation 3 of the 2010 Regulations (and is made in relation to summary criminal matters by regulation 6 of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 (S.S.I. 2008/240)). Regulation 3 of the 2010 Regulations was, however, restricted in its application to assistance by way of representation (which is a type of advice and assistance) in relation to proceedings before the First-tier Tribunal or the Upper Tribunal. As regulation 22 applies to advice and assistance in relation to all civil matters regulation 3 of the 2010 Regulations is no longer required and is therefore revoked by regulation 6. Regulations 4 and 6 apply only in relation to advice and assistance which was made available on or after 31st January 2011.

Regulation 5 amends Schedule 2 to the 1996 Regulations. That Schedule sets out how solicitors are to go about determining their clients’ disposable income and disposable capital for the purpose of assessing clients’ eligibility to be given advice and assistance. Schedule 2 to the 1996 Regulations was amended by the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 to require solicitors (where necessary and practicable) to obtain financial or other documentation and to take such other reasonable steps as are necessary for the purpose of ascertaining their clients’ capital and income before granting advice and assistance (including assistance by way of representation) in relation to criminal matters. Paragraphs (a) and (b) of regulation 5 extend those requirements to advice and assistance in relation of non-criminal matters. Paragraph (c) of regulation 5 makes provision to require the resources of any person who owes an obligation of aliment to a child to be taken into account when assessing the child’s financial eligibility for advice and assistance in relation to non-criminal matters. The requirement is not to apply where its application would produce an unjust or inequitable result in the circumstances. The amendments made by regulation 5 apply only to applications for advice and assistance made on or after 31st January 2011.