



# Legal Aid (Scotland) Act 1986

## 1986 CHAPTER 47

### PART VI

#### MISCELLANEOUS

##### *Proceedings in relation to children*

#### [<sup>F1</sup>29] **Legal aid in respect of certain proceedings relating to children.**

- (1) This section applies to legal aid in connection with—
  - (a) proceedings before the sheriff (including, without prejudice to that generality, proceedings on an appeal to the sheriff principal from a decision of the sheriff) in respect of any matter arising under Chapter 2 or 3 of Part II of the Children (Scotland) Act 1995 (in this section referred to as “the 1995 Act”); or
  - (b) an appeal to the Court of Session in connection with such proceedings.
- (2) Subject to subsections (3) to (5) below, legal aid to which this section applies shall be available to a child and any relevant person in relation to him in connection with—
  - (a) proceedings before the sheriff on an application for a child protection order or child assessment order, or for the variation or recall of such an order;
  - (b) an appeal to the sheriff under section 51 of the 1995 Act against—
    - (i) a decision of a children’s hearing to grant a warrant such as is mentioned in subsection (5)(a) of that subsection; or
    - (ii) any other decision of a children’s hearing;
  - (c) an application—
    - (i) by virtue of section 65(7) or (9) of the 1995 Act for a finding as to whether the grounds for a referral are established; or
    - (ii) under section 85 of the 1995 Act for a review of such a finding;
  - (d) an appeal to the sheriff principal or to Court of Session under section 51 of the 1995 Act.
- (3) Legal aid shall be available under subsection (2)(b)(i) above on an application made to the sheriff without inquiry into the resources of the child or the relevant person.

*Status: Point in time view as at 01/05/2011.*

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- (4) Legal aid shall be available under subsection (2)(a),(b)(ii) or (c) above on an application made to the sheriff if the sheriff is satisfied—
- (a) that it is in the interests of the child that legal aid be made available; and
  - (b) after consideration of the financial circumstances of the child and any relevant person in relation to him that the expenses of the case cannot be met without undue hardship to the child or to any relevant person in relation to him or the dependants of any of them.
- (5) Legal aid shall be available under subsection (2)(d) above on an application made to the Board if it is satisfied—
- (a) after consideration of the financial circumstances of the child and any relevant person in relation to him that the expenses of the appeal cannot be met without undue hardship to the child or to any relevant person in relation to him or the dependants of any of them; and
  - (b) that the child, or as the case may be the relevant person has substantial grounds for making or responding to the appeal and it is reasonable, in the particular circumstances of the case, that legal aid should be made available accordingly.
- [ Legal aid made available to a person under subsection (2)(d) above or subsection (9)<sup>F2</sup>(5A) below may be subject to such conditions as the Board considers expedient; and such conditions may be imposed at any time.]
- (6) The Board may require a person receiving legal aid under subsection (2)(d) above or subsection (9) below to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for him to continue to receive such legal aid.
- [ The Board shall establish a procedure under which any person whose application for<sup>F3</sup>(6A) legal aid under subsection (2)(d) above or subsection (9) below has been refused may apply to the Board for a review of his application.
- (6B) The Board shall establish a procedure under which any person receiving legal aid under subsection (2)(d) above or subsection (9) below which is subject to conditions by virtue of subsection (5A) may apply to the Board for a review of any such condition.]
- (7) Subject to subsection (8) below, legal aid to which this section applies shall be available in connection with proceedings before the sheriff on an application for an exclusion order (or for the variation or recall of such an order) to—
- (a) a child;
  - (b) a relevant person in relation to a child;
  - (c) a person who is a named person, or will be such a person if the application is granted;
  - (d) a spouse or partner of a person mentioned in paragraph (c) above; and
  - (e) a person who is an appropriate person, or will be such a person if the application is granted.
- (8) Legal aid shall be available under subsection (7) above on an application to the sheriff if the sheriff is satisfied after consideration of the financial circumstances of the applicant and, where the applicant is a child, of any relevant person or appropriate person in relation to him that the expenses of the case cannot be met without undue hardship to the applicant or any dependant of the applicant.

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- (9) Legal aid shall be available in connection with any appeal from a decision of the sheriff on an application for an exclusion order or for the variation or recall of such an order to any of the persons mentioned in paragraphs (a) to (e) of subsection (7) above on an application to the Board if it is satisfied—
- (a) after consideration of the financial circumstances of the applicant and, where the applicant is a child, of any relevant person or appropriate person in relation to him, that the expenses of the appeal cannot be met without undue hardship to the applicant or any dependant of the applicant; and
  - (b) that the applicant has substantial grounds for making or responding to the appeal and that it is reasonable, in the particular circumstances of the case, that legal aid should be made available accordingly.
- (10) Where in connection with any proceedings—
- (a) the sheriff has been satisfied as is mentioned in subsection (4)(b) or subsection (8) above; or
  - (b) the Board has been satisfied as is mentioned in subsection (5)(a) or subsection (9)(a) above,
- and has made legal aid available to any person, it shall not be necessary for the sheriff or, as the case may be, the Board to be so satisfied in respect of an application for legal aid by such a person in connection with any subsequent proceedings arising from such proceedings.
- (11) Legal aid to which this section applies shall consist of representation by a solicitor and, where appropriate, by counsel in any proceedings (including any appeal) mentioned in subsection (1) above and shall include all such assistance as is usually given by solicitor or counsel in the steps preliminary or incidental to such proceedings.
- (12) In this section—
- (a) “child” and “relevant person” have the meanings given by section 93(2)(b) of the 1995 Act;
  - (b) “child protection order”, “child assessment order” and “exclusion order” have the meanings given by section 93(1) of that Act;
  - (c) “named person” and “appropriate person” have the meanings given by section 76 of that Act; and
  - (d) “partner” shall be construed in accordance with section 79(4) of that Act.]

#### Textual Amendments

- F1** S. 29 substituted (1.4.1997) by 1995 c. 36, s.92 (with ss. 90, 103(1)); S.I. 1996/3201, art. 3(7)
- F2** S. 29(5A) inserted (25.11.2010) by Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), ss. 72(5), 82(2) (with s. 77); S.S.I. 2010/376, art. 2
- F3** S. 29(6A)(6B) inserted (25.11.2010) by Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), ss. 72(6), 82(2) (with s. 77); S.S.I. 2010/376, art. 2

#### Modifications etc. (not altering text)

- C1** S. 29(5)(9) excluded (1.4.1997) by S.I. 1997/690, reg. 8(1)

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## Contempt of court

### 30 Legal aid in contempt proceedings.

- (1) Where a person is liable to be dealt with for contempt of court during the course of or in connection with any proceedings, legal aid shall be available to him on an application being made to the court if it is satisfied—
- (a) after consideration of the person's financial circumstances that the expenses of the proceedings for contempt of court cannot be met without undue hardship to him or his dependants; and
  - (b) that in all the circumstances of the case it is in the interests of justice that legal aid should be made available to him.
- (2) In making legal aid available under subsection (1) above, the court may order in any case that the legal aid shall consist of representation by counsel only or, in a court where solicitors have a right of audience, by a solicitor only; and, notwithstanding section 31 of this Act, the court may assign for the purpose any counsel or solicitor who is within the precincts of the court at the time when the order is made.
- (3) [<sup>F4</sup>Subsections (2)(a) and (c), (2A) to (4) and (6) of] section 25 of this Act shall apply in relation to legal aid in connection with an appeal against a decision of a court in proceedings for contempt of court as [<sup>F5</sup>they apply] in relation to legal aid in connection with an appeal against conviction, sentence [<sup>F6</sup>, other disposal] or acquittal in criminal proceedings, and in such application—
- [<sup>F7</sup>(za) in subsection (2a) of that section, the reference to the High Court shall include a reference to the Court of Session;]
- (a) for the reference in subsection (4) of that section to criminal legal aid having been made available under section 23 [<sup>F8</sup>, 23A] or 24 of this Act there shall be substituted a reference to legal aid having been made available under subsection (1) above; and
  - (b) in subsection [<sup>F9</sup>(6)] of that section the reference to the *nobile officium* of the High Court of Justiciary shall include a reference to the *nobile officium* of the Court of Session.
- (4) Subject to subsection (2) above legal aid made available under this section shall consist of representation by a solicitor and [<sup>F10</sup>, where appropriate,] by counsel and shall include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to proceedings for contempt of court or, in the case of legal aid made available under subsection (3) above, any appeal in connection with such proceedings.

#### Textual Amendments

- F4** Words in s. 30(3) inserted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 63(9)(a)**
- F5** Words in s. 30(3) substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 63(9)(b)**
- F6** Words in s. 30(3) expressed to be substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 63(9)(c)**
- F7** S. 30(3)(za) inserted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 63(9)(d)**
- F8** Word in s. 30(3)(a) inserted (25.11.2010) by **Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), ss. 64(7), 82(2)** (with s. 77); **S.I. 2010/376, art. 2**
- F9** Word in s. 30(3)(b) substituted (1.4.1996) by 1995 c. 40, ss. 5, 7(2), **Sch. 4 para. 63(9)(e)**
- F10** Words in s. 30(4) substituted (30.9.1991) by **Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c. 40, SIF 76:2), s. 74(1), Sch. 8 para. 36(12); S.I. 1991/2151, art. 3, Sch.**

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**Commencement Information**

**II** S. 30 wholly in force at 01.07.1992 see s. 46(2) and S.I. 1992/1226.

*Solicitors and counsel*

**31 Solicitors and counsel.**

- (1) [<sup>F11</sup>Subject to subsection (1A) below,] a person to whom legal aid or advice and assistance is made available may select—
- (a) the solicitor to advise or act for him; and
  - (b) if the case requires counsel, [<sup>F12</sup>or a solicitor holding rights of audience by virtue of section 25A (rights of audience) of the Solicitor (Scotland) Act 1980, his counsel or such a solicitor],
- and he shall be entitled to make the selection himself.

[<sup>F13</sup>(1A) Subsection (1) above is subject to—

- (a) section 25A(3) of this Act;
- (b) section 30(2) of this Act;
- (c) regulations made under section 28A(6) of this Act;
- (d) regulations made under section 33A(4) of this Act; [<sup>F14</sup> . . .
- (e) regulations made under subsection (9) below [<sup>F15</sup>; and
- (f) [<sup>F16</sup>sections 92(2), (2B)(b), (2D) and (2E) [<sup>F17</sup>, 150A(4)(b), (6) and (7)] and] 288D of the Criminal Procedure (Scotland) Act 1995 (c.46)]

[<sup>F18</sup>and does not apply where the person is being provided with criminal legal assistance by a solicitor employed by the Board under section 26 and 27 of this Act]]

- (2) Nothing in subsection (1) above shall prejudice any right of a solicitor or advocate to refuse or give up a case or to entrust it to another solicitor or advocate.
- (3) The [<sup>F19</sup>Board] may decide to exclude any advocate or solicitor either from being selected under subsection (1) above, or from giving advice and assistance to or from acting for a person to whom legal aid is made available on the ground that there is good reason for excluding him arising out of—
- (a) his conduct when acting or selected to act for persons to whom legal aid or advice and assistance is made available;
  - (b) his professional conduct generally;
  - (c) in the case of a member of a firm of solicitors or a director of an incorporated practice, such conduct on the part of any person who is for the time being a member of the firm or a director of the practice.
- (4) The [<sup>F20</sup>Board] may decide to exclude a solicitor or advocate under subsection (3) above in respect of any specified period or without limit of time.
- (5) A solicitor or advocate who is aggrieved by a decision of the [<sup>F21</sup>Board] under subsection (3) above may appeal against his exclusion or the period of such exclusion to the Court of Session; and the court in determining such an appeal may make such order as it thinks fit.

[<sup>F22</sup>(6) . . . . .

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- (7) Except in so far as expressly provided under this Act, the fact that the services of counsel or a solicitor are given by way of legal aid or advice and assistance shall not affect the relationship between or the respective rights in that connection of counsel, solicitor and client.
- (8) The Board may arrange that, in such circumstances as it may specify, a solicitor shall be available for the purposes of providing legal aid or advice and assistance.
- (9) Where a solicitor is available as is mentioned in subsection (8) above, the Secretary of State may, by regulations made under this section, provide that—
- (a) subsection (1) above shall not apply; and
  - (b) <sup>F23</sup>Subject to subsection (11) below, legal aid or, as the case may be, advice and assistance shall be provided only by the solicitor so made available.
- <sup>F24</sup>(10) . . . . .
- <sup>F25</sup>(11) Nothing in subsection (9)(b) above shall enable the Secretary of State to make regulations authorising the granting of legal aid only to solicitors holding rights of audience under section 25A (rights of audience) of the Solicitors (Scotland) Act 1980.]

#### Textual Amendments

- F11** Words in s. 31(1) substituted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(8)(a)**; S.I. 1997/2323, **art. 6(2)**
- F12** Words in s. 31(1) substituted (30.9.1991) by Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c. 40, SIF 76:2), s. 74(1), Sch. 8 para. 36(13); S.I. 1991/2151, art. 3, **Sch.**
- F13** S. 31(1A) inserted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(8)(b)**; S.I. 1997/2323, **art. 6(2)**
- F14** Word preceding s.31(1A)(e) repealed (1.11.2002) by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9), s. 2(3)(a); S.S.I. 2002/443, **art. 3**
- F15** S. 31(1A)(f) and preceding word inserted (1.11.2002) by Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9), s. 2(3)(b); S.S.I. 2002/443, **art. 3** (with transitional provisions in art. 4(1)(2))
- F16** Words in s. 31(1A)(f) substituted (1.2.2005) by Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5), **ss. 10(8)**, 27(1); S.S.I. 2004/405, **art. 2(1)**, Sch. 1 (with arts. 3-5)
- F17** Words in s. 31(1A)(f) inserted (10.12.2007) by Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6), ss. 80, 84(1), **Sch. para. 5(b)**; S.S.I. 2007/479, **art. 3(1)**, Sch. (as amended by S.S.I. 2007/527)
- F18** Words in s. 31(1A) added (6.7.2001) by 2001 asp 7, **ss. 9(8)**, 15(3)
- F19** Word in s. 31(3) substituted (1.5.2011) by Legal Services (Scotland) Act 2010 (asp 16), **ss. 140(a)**, 150(2); S.S.I. 2011/180, art. 4(b) (with art. 8)
- F20** Word in s. 31(4) substituted (1.5.2011) by Legal Services (Scotland) Act 2010 (asp 16), **ss. 140(a)**, 150(2); S.S.I. 2011/180, art. 4(b) (with art. 8)
- F21** Word in s. 31(5) substituted (1.5.2011) by Legal Services (Scotland) Act 2010 (asp 16), **ss. 140(a)**, 150(2); S.S.I. 2011/180, art. 4(b) (with art. 8)
- F22** S. 31(6) repealed (1.5.2011) by Legal Services (Scotland) Act 2010 (asp 16), **ss. 140(b)**, 150(2); S.S.I. 2011/180, art. 4(b) (with art. 8)
- F23** Words in s. 31(9)(b) inserted (30.9.1991) by Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 (c. 40, SIF 76:2), s. 74(1), Sch. 8 para. 36(14); S.I. 1991/2151, art. 3, **Sch.**
- F24** S. 31(10) repealed (1.5.2011) by Legal Services (Scotland) Act 2010 (asp 16), **ss. 140(b)**, 150(2); S.S.I. 2011/180, art. 4(b) (with art. 8)
- F25** S. 31(11) inserted (30.9.1991) by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40, SIF 76:2) s. 74(1), Sch. 8 para. 36(15); S.I. 1991/2151, art. 3, **Sch.**

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#### **Modifications etc. (not altering text)**

**C2** S. 31(1) excluded (6.2.2002) by [S.S.I. 2001/464](#), [reg. 2\(a\)](#)

### **32 Restriction on payment and employment of solicitor or counsel.**

Where legal aid is available to a person in connection with any proceedings (whether legal aid is available in connection with all or only part of the proceedings)—

- (a) the solicitor or counsel providing legal aid shall not take any payment in respect of any advice given or anything done in connection with such proceedings during any period when legal aid was so available except for such payment as may be made, in accordance with this Act . . . <sup>F26</sup>; and
- (b) except as is mentioned in section 31(2) of this Act, no solicitor or counsel other than the solicitor or counsel referred to in paragraph (a) above shall advise or act for him in connection with the proceedings.

#### **Textual Amendments**

**F26** Words repealed by [Legal Aid Act 1988 \(c. 34, SIF 77:1\)](#), [ss. 44, 45\(2\)](#), [Sch. 4 Pt. I para. 4](#), [Sch. 6](#)

### **33 Fees and outlays of solicitors and counsel.**

(1) [<sup>F27</sup>Subject to subsections (3A) and (3B) below,] any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with section 4(2)(a) of this Act in respect of any fees or outlays properly incurred by him in so acting.

[<sup>F28</sup>(1A) A registered organisation shall be paid out of the Fund in accordance with section 4(2) (a) of this Act in respect of any fees or outlays properly incurred by it in respect of the advisers it approves providing advice and assistance under this Act.]

(2) The Secretary of State may, by regulations made under this section, make such provision as seems to him appropriate in respect of the fees and outlays of solicitors and counsel [<sup>F29</sup>and, in respect of advice and assistance as mentioned in paragraph (b) of this subsection, advisers]—

- (a) acting in any proceedings for a person to whom legal aid has been made available; or
- (b) providing advice and assistance in accordance with Part II of this Act.

(3) Without prejudice to the generality of subsection (2) above, regulations made under this section may—

- (a) prescribe the work in respect of which fees may be charged;
- (b) prescribe rates or scales of payment of fees and outlays allowable and the conditions under which such fees and outlays may be allowed;
- (c) provide for the assessment and taxation of fees and outlays, and for the review of any such assessment or taxation, either by the Secretary of State or by any other person;
- (d) prescribe general principles to be applied in connection with any such assessment, taxation or review;
- (e) prescribe forms to be used for the purposes of any regulations made under this section; and

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(f) make different provision for different cases.

[<sup>F30</sup>(3A) The Secretary of State may by regulations under this section prescribe fixed payments to be made to a solicitor in respect of—

- (a) his professional services in providing criminal legal assistance; and
- (b) such outlays as may be so prescribed.

[ Regulations amending or replacing regulations made under subsection (3A) above  
<sup>F31</sup>(3AA) may, for the purpose specified in subsection (3AB) below, make provision as to fixed payments in relation to criminal legal assistance provided in relation to proceedings commenced before and continuing as at the date of the making or coming into force of the amendment or replacement of the regulations.

(3AB) The purpose referred to in subsection (3AA) above is that of ensuring that persons to whom fixed payment criminal legal assistance is being provided are not, by reason of the amount of the fixed payments payable in respect of that criminal legal assistance under the regulations as they have effect immediately before the coming into force of the amendment or replacement of the regulations, deprived of the right to a fair trial.

(3AC) In subsection (3AB) above “fixed payment criminal legal assistance” and “fixed payments” have respectively the meanings given by subsection (3E) below;]

(3B) A solicitor who provides any criminal legal assistance in respect of which a fixed payment has been prescribed in regulations made under subsection (3A) above shall not be entitled to any other payment out of the Fund in respect of the professional services and outlays mentioned in that subsection, but shall be entitled to reimbursement of any other outlays which he has properly incurred.]

[<sup>F32</sup>(3C) The Scottish Ministers may, however, for the purpose of enabling the Board to ensure that a person to whom fixed payment criminal legal assistance is provided is not, for the reason specified in subsection (3D) below, deprived of the right to a fair trial, by regulations under this subsection, provide that—

- (a) in such circumstances; and
- (b) under such conditions,

as may be prescribed by the regulations, a solicitor who provides such criminal legal assistance shall, instead of receiving fixed payments, be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above.

(3D) The reason referred to in subsection (3C) above is the amount of the fixed payments payable for the criminal legal assistance provided.

(3E) In subsection (3C) above—

“fixed payment criminal legal assistance” means criminal legal assistance in respect of which fixed payments are prescribed under subsection (3A) above;

“fixed payments” means fixed payments so prescribed.

(3F) Regulations made under subsection (3C) above shall provide that it is for the Board to determine whether any prescribed circumstances exist and whether any prescribed conditions are met.

(3G) Circumstances may be prescribed under subsection (3C)(a) above by reference to such factors as the Scottish Ministers think fit.



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- (3H) The conditions which may be prescribed under subsection (3C)(b) above include those which stipulate that a solicitor providing criminal legal assistance—
- (a) applies to the Board to exercise its power of determination under subsection (3F) above;
  - (b) does so in such manner and form as the Board may specify and at as early a stage in the provision of the criminal legal assistance as is reasonably practicable; and
  - (c) keeps proper records of all professional services provided by way of and outlays incurred in the provision of that criminal legal assistance, whether before or after the exercise of that power of determination.
- (3J) Regulations may be made under subsection (3C) above so as to relate to criminal legal assistance provided in relation to proceedings commenced before and continuing as at the date of coming into force of section 7 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp 7), and regulations so relating may disapply any condition which would otherwise apply under subsection (3C)(b) above.
- (3K) The Board shall establish a procedure under which any person—
- (a) whose solicitor’s application under subsection (3H) above has been refused; or
  - (b) on whose solicitor’s application under that subsection the Board has made a determination which is such that the solicitor will not be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above,
- may apply to the Board for review of that refusal or determination.]
- (4) In subsection (1) above the reference to acting for a person includes, in relation to a solicitor, a reference to acting for such a person on the instructions of another solicitor.
- (5) Where a person is in receipt of legal aid in connection with any proceedings, any expenses incurred in connection with the proceedings which would, if he were not in receipt of legal aid, be paid, in the first instance, by or on behalf of the solicitor acting for him, shall be so paid.

#### Textual Amendments

- F27** Words in s. 33(1) inserted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(9)**; S.I. 1997/2323, **art. 6(2)**
- F28** S. 33(1A) inserted (30.7.2007) by Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), **ss. 67(7)(a), 82(2)** (with s. 77); S.S.I. 2007/335, **art. 2(a)**
- F29** Words in s. 33(2) inserted (30.7.2007) by Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), **ss. 67(7)(b), 82(2)** (with s. 77); S.S.I. 2007/335, **art. 2(a)**
- F30** S. 33(3A)(3B) inserted (1.10.1997) by 1997 c. 48, s. 51; S.I. 1997/2323, art. 6, **Sch. 3**
- F31** S. 33(3AA)-(3AC) inserted (6.7.2001) by 2001 asp 7, **ss. 8, 15(3)**
- F32** S. 33(3C)-(3K) inserted (6.7.2001) by 2001 asp 7, **ss. 7, 15(3)**

*f<sup>F33</sup> Contracts for the provision of criminal legal assistance*

#### Textual Amendments

- F33** S. 33A and crossheading inserted (1.10.1997) by 1997 c. 48, s.52; S.I. 1997/2323, art. 6, **Sch.3**

*Status: Point in time view as at 01/05/2011.*

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**F34 33A Contracts for the provision of criminal legal assistance.**

- (1) The Secretary of State may by regulations made under this section empower the Board to enter into contracts with registered firms for the provision by registered solicitors connected with those firms of criminal legal assistance.
- (2) Regulations under this section may prescribe—
  - (a) the procedures to be followed by the Board in awarding any such contract; and
  - (b) subject to subsection (3) below, any terms and conditions which are to be included in any such contract.
- (3) Regulations under this section shall provide that any contract entered into by virtue of this section shall include a provision that, in the event of the termination of the contract, or a breach of it by the registered firm concerned, the Board may—
  - (a) withhold payments under the contract; and
  - (b) require the firm to secure the transfer of—
    - (i) any work currently being undertaken by any solicitor connected with them for any client by way of criminal legal assistance; and
    - (ii) notwithstanding any lien to which any such solicitor might otherwise be entitled, any documents connected with any such work, to a registered solicitor.
- (4) Regulations under this section may provide that where the Board has by virtue of this section entered into contracts with any registered firms for the provision of criminal legal assistance in any area, then, unless it seems to the Board to be inappropriate in a particular case, any person seeking such assistance in that area shall be required to instruct a registered solicitor connected with one of those firms.
- (5) Any money due to a firm under a contract made by virtue of this section shall be paid to the firm—
  - (a) firstly, out of any amount payable by the client in accordance with section 11(2) of this Act;
  - (b) secondly, in priority to all other debts, out of any expenses which by virtue of an order of a criminal court are payable to that client by any other person in respect of the matter in connection with which the criminal legal assistance was given; and
  - (c) thirdly, by the Board out of the Fund.
- (6) For the purposes of sections 32 and 33 of this Act, the money paid to a firm, as provided in subsection (5) above, in respect of a contract made by virtue of this section shall be taken to be a payment made in accordance with this Act, and no solicitor connected with such a firm shall be entitled to any other payment out of the Fund in respect of any work done by him by virtue of such a contract.]

**Textual Amendments**

**F34** S. 33A and crossheading inserted (1.10.1997) by 1997 c. 48, s.52; S.I. 1997/2323, art. 6, Sch.3

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## Information

### 34 Confidentiality of information.

- (1) Subject to subsection (2) below, no information furnished for the purposes of this Act to the Board or to any person acting on its behalf shall be disclosed—
- (a) in the case of such information furnished by, or by any person acting for, a person seeking or receiving legal aid or advice and assistance, without the consent of the person seeking or receiving legal aid or advice and assistance; or
  - (b) in the case of such information furnished otherwise than as mentioned in paragraph (a) above, without the consent of the person who furnished it,
- and any person who, in contravention of this subsection, discloses any information obtained by him when employed by, or acting on behalf of, the Board shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.
- (2) Subsection (1) above shall not apply to the disclosure of information—
- (a) for the purpose of the proper performance or facilitating the proper performance by the Secretary of State, the Board, any court or tribunal or by any other person or body of duties or functions under this Act;
  - [<sup>F35</sup>(aa) for the purpose of any determination or investigation by the Scottish Legal Complaints Commission under the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5) (“ the 2007 Act ”); ]
  - (b) for the purpose of investigating, prosecuting or determining any [<sup>F36</sup>conduct complaint, remitted by the Scottish Legal Complaints Commission under section 6(a) or 15(5)(a) of the 2007 Act]—
    - (i) against a solicitor, by the Law Society or the Scottish Solicitors’ Discipline Tribunal;
    - (ii) against an advocate, by the Faculty of Advocates;
  - (c) for the purpose of investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence;
  - [<sup>F37</sup>(d) for the purposes of any investigation by the Scottish Public Services Ombudsman under the Scottish Public Services Ombudsman Act 2002 (asp 11)];
  - [<sup>F38</sup>(e) for the purposes of an inquiry by the Scottish Commission for Human Rights under section 8 of the Scottish Commission for Human Rights Act 2006 (asp 16)] [<sup>F39</sup>;
  - (f) for the purposes of, or required by virtue of, section 50 of the Freedom of Information (Scotland) Act 2002 (asp 13)];
  - [<sup>F40</sup>(g) in pursuance of a requirement made under section 10(1) of the Adult Support and Protection (Scotland) Act 2007 (asp 10).]
- (3) For the purposes of this section, information furnished to any person in his capacity as counsel or a solicitor by or on behalf of a person seeking or receiving legal aid or advice and assistance is not information furnished to the Board or to a person acting on its behalf.

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#### Textual Amendments

- F35** S. 34(2)(aa) inserted (1.10.2008) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), ss. 81, 82(2), [Sch. 5 para. 2\(5\)\(a\)](#) (with s. 77); S.S.I. 2008/311, [art. 2\(i\)](#)
- F36** Words in s. 34(2)(b) substituted (1.10.2008) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), ss. 81, 82(2), [Sch. 5 para. 2\(5\)\(b\)](#) (with s. 77); S.S.I. 2008/311, [art. 2\(i\)](#)
- F37** S. 34(2)(d) inserted (23.10.2002) by [Scottish Public Services Ombudsman Act 2002 \(asp 11\)](#), s. 25(1), [Sch. 6 para. 9](#); S.S.I. 2002/467, [art. 2](#)
- F38** S. 34(2)(e) inserted (1.4.2008) by [Scottish Commission for Human Rights Act 2006 \(asp 16\)](#), ss. 10(5), 22(3) (with s. 22(2)); S.S.I. 2008/112, [art. 2](#)
- F39** S. 34(2)(f) inserted (1.10.2008) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), ss. 81, 82(2), [Sch. 5 para. 2\(5\)\(c\)](#) (with s. 77); S.S.I. 2008/311, [art. 2\(i\)](#)
- F40** S. 34(2)(g) inserted (29.10.2008) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), ss. 77(1), 79(3), [Sch. 1 para. 3\(a\)](#); S.S.I. 2008/314, [art. 2](#)

#### Modifications etc. (not altering text)

- C3** S. 34(2): disclosure powers extended (14.12.2001) by [2001 c. 24](#), ss. 17, 127(2)(a), [Sch. 4 Pt. 1 para. 26](#)
- C4** S. 34(2)(b) modified (13.2.2009) by [The Legal Profession and Legal Aid \(Scotland\) Act 2007 \(Transitional Provision\) Order 2009 \(S.S.I. 2009/17\)](#), [art. 2](#)

### 35 False information etc.

- (1) If any person seeking or receiving legal aid or advice and assistance—
- (a) wilfully fails to comply with any regulations as to the information to be furnished by him; or
  - (b) for the purpose of obtaining legal aid or advice and assistance knowingly makes any false statement or false representation,
- he shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale or to imprisonment for a term not exceeding 60 days or to both.
- (2) Notwithstanding [<sup>F41</sup>section 136 of the Criminal Procedure (Scotland) Act 1995], proceedings for an offence under subsection (1) above may be commenced at any time within 2 years from the date of the commission of the offence or within 6 months from the date when evidence sufficient in the opinion of the Lord Advocate to justify proceedings comes to his knowledge, whichever period is the shorter; and for the purposes of this subsection a certificate by the Lord Advocate as to the date on which such evidence came to his knowledge shall be conclusive evidence of that fact.

#### Textual Amendments

- F41** Words in s. 35(2) substituted (1.4.1996) by [1995 c. 40](#), ss. 5, 7(2), [Sch. 4 para. 63\(10\)](#)

### [<sup>F42</sup>35A Power of Board to require information.

- (1) The Board may, for the purpose of determining whether—
- (a) a solicitor or any employee of him or of his firm may be committing a criminal offence in connection with criminal legal assistance; or

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- (b) a solicitor may be seeking, in relation to criminal legal assistance, to recover from the Fund money to which he is not entitled, as, for example, by performing unnecessary work; or
  - (c) a registered firm or solicitor is or may not be complying with the code, require any solicitor or firm to produce such information and documents relating wholly or partly to the provision of criminal legal assistance as it may specify, at such time and place as it may specify.
- (2) If it appears to the Board that there is good reason to do so, it may authorise any of its officers to require any solicitor or firm to produce forthwith any such information or documents as are mentioned in subsection (1) above.
- (3) An officer of the Board acting under subsection (2) above shall, if requested to do so, produce evidence of his authorisation by the Board.
- (4) The power under this section to require production of information and documents includes power—
  - (a) to require any person, who is a present or past partner or employee of any such solicitor or firm and who appears to the Board or one of its officers to have any information or documents, to produce them;
  - (b) if any documents are produced—
    - (i) to take copies of them or extracts from them; and
    - (ii) to require the person producing them, or any other person who is a present or past partner or employee of the solicitor or firm in question, to provide an explanation of them;
  - (c) if any document or information is held other than in legible form, to require the production of a copy of it in legible form; and
  - (d) if documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.
- (5) Where any person claims a lien over any documents required to be produced under this section the production is without prejudice to the lien.
- (6) Any person who is required under this section to produce information or documents shall, notwithstanding any duty of confidentiality, comply with that requirement; and if he fails to comply he shall be guilty of an offence and liable—
  - (a) on conviction on indictment, to a fine; and
  - (b) on summary conviction, to a fine not exceeding the statutory maximum.
- (7) Where a person is charged with an offence under subsection (6) above in respect of a requirement to produce documents, it shall be a defence for him to prove that they were not in his possession or under his control and that it was not reasonably practicable for him to comply with the requirement.
- (8) No information or documents obtained by the Board by virtue of this section or section 35B of this Act shall be used by it or by any of its employees for any purpose other than the purposes mentioned in subsection (1) above.
- (9) Section 34 of this Act applies in relation to a contravention of subsection (8) above as it applies in relation to a contravention of subsection (1) of that section.]

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#### Textual Amendments

**F42** Ss. 35A-35C inserted (1.10.1997) by 1997 c. 48, s.53; S.I. 1997/2323, art. 6, Sch.3

### [<sup>F43</sup> 35A] Information about legal services

- (1) For the purpose mentioned in subsection (4)(a), each of the bodies mentioned in subsection (3)(a), (b) and (c) must provide the Board with such information as the Board may reasonably require.
- (2) For the purpose mentioned in subsection (4)(b)—
  - (a) each of the bodies mentioned in subsection (3)(a) and (b) must—
    - (i) inform the Board whenever it upholds a conduct complaint about a solicitor or (as the case may be) an advocate, and
    - (ii) give the Board a summary of the relevant facts,
  - (b) the body mentioned in subsection (3)(d) must—
    - (i) inform the Board whenever it upholds a services complaint about a solicitor or an advocate, and
    - (ii) give the Board a summary of the relevant facts.
- (3) The bodies are—
  - (a) the Law Society,
  - (b) the Faculty of Advocates,
  - (c) the Scottish Court Service,
  - (d) the Scottish Legal Complaints Commission.
- (4) The purposes are the Board's exercise of its functions under—
  - (a) section 1(2A),
  - (b) section 31(3).
- (5) In subsection (2), a reference to a services or a conduct complaint is to be construed in accordance with Part 1 of the Legal Profession and Legal Aid (Scotland) Act 2007.]

#### Textual Amendments

**F43** S. 35AA inserted (1.4.2011) by Legal Services (Scotland) Act 2010 (asp 16), ss. 142, 150(2); S.S.I. 2011/180, art. 3, sch.

### <sup>F44</sup>Power of entry

#### Textual Amendments

**F44** Ss. 35A-35C inserted (1.10.1997) by 1997 c. 48, s.53; S.I. 1997/2323, art. 6, Sch.3

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**F45 35B Power of Board to enter premises and investigate.**

- (1) Where a sheriff is satisfied, by evidence on oath given on behalf of the Board by a person authorised by the Board for that purpose, that there are reasonable grounds for believing that—
- (a) a solicitor or any employee of him or his firm may be committing a criminal offence in connection with criminal legal assistance; or
  - (b) a solicitor may be seeking, in relation to criminal legal assistance, to recover from the Fund money to which he is not entitled, as, for example, by performing unnecessary work; or
  - (c) a registered firm or solicitor may not be complying with the code; or
  - (d) there are on any premises documents the production of which has been required under section 35A of this Act and which have not been produced in accordance with that requirement,
- he may issue a warrant under this section to a person authorised for that purpose by the Board.
- (2) A person holding a warrant under this section may—
- (a) search the premises named in the warrant;
  - (b) take possession of any documents which appear to him to relate, wholly or partly, to any criminal legal assistance provided in or from those premises;
  - (c) take copies of any such documents;
  - (d) take any other steps which appear to him to be necessary for preserving those documents or preventing their destruction or interference with them; and
  - (e) require any person named in the warrant to provide an explanation of the documents or to state where they may be found.
- (3) The duty to produce documents and to provide explanations applies notwithstanding any duty of confidentiality, but where any person claims a lien over any documents the production is without prejudice to that lien.
- (4) A warrant under this section shall continue in force for the period of one month from the date when it is issued.
- (5) The Board may retain any documents which it has obtained under this section for—
- (a) a period of not more than 12 months; or
  - (b) where, within that period, proceedings to which the documents are relevant are commenced by the Board, the Law Society or a prosecutor, until the conclusion of those proceedings.
- (6) Any person who intentionally obstructs the execution of a warrant issued under this section or who fails without reasonable excuse to comply with any requirement imposed in accordance with subsection (2)(e) above shall be guilty of an offence, and liable—
- (a) on conviction on indictment, to a fine; and
  - (b) on summary conviction, to a fine not exceeding the statutory maximum.

**Textual Amendments**

**F45** Ss. 35A-35C inserted (1.10.1997) by 1997 c. 48, s.53; S.I. 1997/2323, art. 6, Sch.3

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### *F<sup>46</sup>Suspension of payments to solicitor*

#### **Textual Amendments**

**F46** Ss. 35A-35C inserted (1.10.1997) by 1997 c. 48, s.53; S.I. 1997/2323, art. 6, Sch.3

### **F<sup>47</sup>35C Suspension of payments to solicitor.**

- (1) Where it appears to the Board that any solicitor has, in connection with the provision of criminal legal assistance, acted in such a way as to justify action being taken against him by the Law Society or the Scottish Solicitors' Discipline Tribunal it shall refer the matter to either of those bodies so that they can consider whether to take action under section 31(3) of this Act.
- (2) Where it appears to the Board that any solicitor may have been guilty of a criminal offence it shall refer the matter to the police or the procurator fiscal, so that they can consider whether any criminal offence may have been committed.
- (3) Where the Board refers a matter to any of the bodies mentioned in subsections (1) or (2) above, it may disclose to that body any information or documents which it has obtained from the solicitor concerned under this Act.
- (4) Where the Board has referred a matter to any of the bodies mentioned in subsections (1) or (2) above it may—
  - (a) suspend the solicitor concerned from providing criminal legal assistance; and
  - (b) withhold payment of any fees due to him in respect of such work,
 pending the outcome of the investigation by the body or bodies to which the matter has been referred.
- (5) A solicitor who is suspended from providing criminal legal assistance under subsection (4)(a) above shall, in accordance with arrangements approved by the Board, transfer—
  - (a) any work currently being undertaken by him for any client by way of criminal legal assistance; and
  - (b) notwithstanding any lien to which he might otherwise be entitled, any documents connected with any such work,
 to a solicitor (or, where registration is in force, a registered solicitor).

#### **Textual Amendments**

**F47** Ss. 35A-35C inserted (1.10.1997) by 1997 c. 48, s.53; S.I. 1997/2323, art. 6, Sch.3

### *Regulations and rules of court*

## **36 Regulations.**

- (1) The Secretary of State may make such regulations under this section as appear to him necessary or desirable for giving effect to, or for preventing abuses of, this Act; and regulations made under this section may make different provision—
  - (a) in relation to legal aid and to advice and assistance respectively; and



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- (b) for different cases or classes of case.
- (2) Without prejudice to subsection (1) above or to any other provision of this Act authorising the making of regulations, regulations made under this section may—
- (a) make provision as to the exercise by the Board of its functions under this Act;
  - (b) substitute different amounts for any of the amounts specified in section 8, 10(2), 11(2), 15 and 17(2) of this Act [<sup>F48</sup>and the power to substitute different amounts for the amount specified in section 10(2) of this Act includes power to substitute different amounts in relation to different cases or classes of case];
  - (c) make provision as to the proceedings which are or are not to be treated as distinct proceedings for the purposes of legal aid, and as to the matters which are or are not to be treated as distinct matters for the purposes of advice and assistance;
- [<sup>F49</sup>(ca) make provision allowing the Board to determine—
- (i) the matters which, subject to subsection (2A), are or are not to be treated as distinct matters for the purposes of advice and assistance;
  - (ii) on a case by case basis, matters which may be treated as if they were distinct matters for the purposes of advice and assistance;]
  - (d) make provision as to the manner of making applications for legal aid or advice and assistance under this Act and the time when such applications may be made and disposed of;
  - (e) make provision as to the information to be furnished by a person seeking or receiving legal aid or advice and assistance;
  - (f) make provision as to the cases in which a person may be refused legal aid or advice and assistance by reason of his conduct when seeking or receiving legal aid or advice and assistance (whether in the same or in a different matter or proceedings);
  - (g) make provision in connection with the recovery of sums due to the Fund and making effective the priorities conferred by this Act on the payment of such sums out of awards of expenses or property recovered or preserved for a person receiving legal aid, including—
    - (i) provision in connection with the enforcement (by whatever means) for the benefit of the Fund of any award of expenses or any agreement as to expenses in favour of a person who has received legal aid; and
    - (ii) provision making a solicitor's right to payment out of the Fund dependent, in whole or in part, on his performing any duties imposed on him by regulations made for the purposes of this paragraph;
  - (h) modify any provision of this Act so far as appears to the Secretary of State necessary to meet any of the special circumstances mentioned in subsection (3) below.
- [<sup>F50</sup>(2A) Regulations made under this section which include provision as mentioned in subsection (2)(ca)(i) must include provision to the effect that—
- (a) any determination by the Board as to the matters which are or are not to be so treated as distinct matters may only be made after consultation with the Law Society;
  - (b) where a matter has been determined by the Board to be so treated as a distinct matter, the Board may not determine that the matter is no longer to be so treated unless the Scottish Ministers consent.]

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- (3) The special circumstances referred to in subsection (2)(h) above are where a person seeking or receiving legal aid or advice and assistance—
- (a) is not resident in Scotland;
  - (b) is concerned in a representative, fiduciary or official capacity;
  - [<sup>F51</sup>(bb) is [<sup>F52</sup>applying for an order under section 53(1), 57(1), 60(1), 62(1) or 63(1) of the Adults with Incapacity (Scotland) Act 2000 (asp 4) (in relation to himself or any other adult) or is otherwise] concerned as claiming or having an interest in the property, financial affairs or personal welfare of an adult under [<sup>F53</sup>that Act];]
  - (c) is concerned jointly with or has the same interest as other persons, whether receiving legal aid or advice and assistance or not;
  - (d) has available to him rights and facilities making it unnecessary for him to take advantage of the provisions of this Act, or has a reasonable expectation of receiving financial or other help from a body of which he is a member;
  - (e) seeks legal aid or advice and assistance in a matter of special urgency;
  - (f) begins to receive legal aid or advice and assistance after having consulted a solicitor in the ordinary way with respect to the same proceedings, or ceases to receive legal aid or advice and assistance before the proceedings in question are finally settled;
  - (g) has, while receiving legal aid or advice and assistance, any change of circumstances such that, had the changed circumstances subsisted at the time the application for legal aid or advice and assistance was made, the original disposal of the application would have been likely to have been affected.
- (4) Regulations made under this section may also modify this Act or any instrument having effect under this Act (including so much of any of those provisions as specifies a sum of money) for the purposes of its application—
- (a) in cases where such modification appears to the Secretary of State necessary for the purpose of fulfilling any obligation imposed on the United Kingdom or Her Majesty's government therein by any international agreement; or
  - (b) in relation to proceedings for securing the recognition or enforcement in Scotland of judgments given outside the United Kingdom for whose recognition or enforcement in the United Kingdom provision is made by any international agreement.

#### Textual Amendments

- F48** Words added by [Legal Aid Act 1988 \(c. 34, SIF 77:1\)](#), s. 44, **Sch. 4 Pt. 1 para. 6**
- F49** S. 36(2)(ca) inserted (8.2.2007) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), **ss. 76(2), 82(2)** (with s. 77); S.S.I. 2007/57, **art. 2(d)**
- F50** S. 36(2A) inserted (8.2.2007) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), **ss. 76(3), 82(2)** (with s. 77); S.S.I. 2007/57, **art. 2(d)**
- F51** S. 36(3)(bb) inserted (2.4.2001) by [2000 asp 4](#), ss. 88(2), **Sch. 5 para. 19**; S.S.I. 2001/81, art. 2, **Sch. 1**
- F52** Words in s. 36(3)(bb) inserted (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), **ss. 77(1), 79(3)**. {Sch. 1 para. 3(b)(i)}; S.S.I. 2007/334, **art. 2(b)**, Sch. 2
- F53** Words in s. 36(3)(bb) substituted (5.10.2007) by [Adult Support and Protection \(Scotland\) Act 2007 \(asp 10\)](#), **ss. 77(1), 79(3)**. {Sch. 1 para. 3(b)(ii)}; S.S.I. 2007/334, **art. 2(b)**, Sch. 2

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### 37 Parliamentary procedure.

- (1) Regulations under this Act shall be made by the Secretary of State by statutory instrument and, except as provided in subsection (2) below, shall be subject to annulment in pursuance of a resolution of either House of Parliament.
- (2) No regulations shall be made under section 7, [<sup>F54</sup>8A(1),] 9, 11(2), 13(4), 17(2), 21(2), 24(4) or 36(2)(b) of this Act unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.

<sup>F55</sup>(3) . . . .

#### Textual Amendments

- F54** Words in s. 37(2) inserted (30.10.2010) by **Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15), ss. 2(4), 9**
- F55** S. 37(3) repealed (1.7.1999) by **S.I. 1999/1820, arts. 1(2), 4, Sch. 2 Pt. I para. 86(4)**

### 38 Rules of court.

- (1) The court may by act of adjournal or, as the case may be, by act of sederunt—
  - (a) regulate the procedure of any court or tribunal in relation to legal aid, and in particular may make provision as to the cases in which and the extent to which a person receiving legal aid may be required to find caution, and the manner in which caution in such cases may be found;
  - (b) make provision as to the cases in which a person may be treated as having disentitled himself to a continuance of legal aid by his conduct in connection with his receipt of legal aid;
  - (c) make provision as to the apportionment of sums recovered or recoverable by virtue of any award of expenses made generally with respect to proceedings or matters which are to be treated as distinct by virtue of regulations made under section 36(2)(c) of this Act;
  - (d) make provision as to the proceedings which are or are not to be treated as having been instituted by the legally assisted person for the purposes of section 19(3)(b) of this Act;
  - (e) regulate the procedure to be followed in connection with an order under section 19 of this Act, in particular to enable the Board to be heard in connection with such an order.

[<sup>F56</sup>(1A) In subsection (1)(a) above, the reference to any court or tribunal shall be construed, except in relation to criminal proceedings, in accordance with section 13(6) of this Act.]

- (2) The court may by act of adjournal or, as the case may be, by act of sederunt restrict the fees to be paid to auditors of court, messengers-at-arms, sheriff officers and shorthand writers in any case where such fees are payable in the first instance by or on behalf of a person receiving legal aid to such proportion thereof as may be provided for the time being.
- (3) Before making rules of court regulating the procedure of any court or tribunal, the court shall, so far as practicable, consult any rules council or similar body by whom or on whose advice rules of procedure for the court or tribunal may, apart from this Act, be made or whose consent or concurrence is required to any such rules so made.

*Status: Point in time view as at 01/05/2011.*

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- (4) In this section “the court” means in relation to criminal proceedings, the High Court of Justiciary, and in relation to civil proceedings, the Court of Session.

#### Textual Amendments

**F56** S. 38(1A) inserted (6.7.2001) by 2001 asp 7, ss. 6(5), 15(3)

### *Rights of indemnity*

#### **39 Adaptation of rights to indemnity.**

- (1) This section shall have effect in relation to any right (however and whenever created or arising) which a person may have to be indemnified against expenses incurred by him in connection with any proceedings.
- (2) In determining in respect of any such right the reasonableness of any expenses, the possibility of avoiding them or part of them by taking advantage of the provisions of this Act shall be disregarded.
- (3) Where a person, having any such right to be indemnified against expenses, receives legal aid in connection with the proceedings, then the right shall enure also for the benefit of the Fund as if the expenses incurred by the Fund on his behalf in connection with the proceedings had been incurred by him.
- (4) Where—
  - (a) such a right to be indemnified against expenses arises by virtue of an agreement and is subject to any express provision conferring on those liable under the agreement any right with respect to the bringing or conduct of the proceedings; and
  - (b) those liable have been given a reasonable opportunity of exercising the right so conferred and have not availed themselves of that opportunity,
 the right to be indemnified shall be treated, for the purposes of subsection (3) above, as not being subject to that provision.

### *General*

#### **40 Finance.**

- (1) The Secretary of State shall pay to the Board out of moneys provided by Parliament—
  - (a) such sums as are required (after allowing for payments into the Fund under paragraphs (a) to (c) and (e) of section 4(3) of this Act) to meet payments out of the Fund under this Act; and
  - (b) such sums as he may, <sup>F57</sup> . . . determine are required for the other expenditure of the Board.
- (2) The Secretary of State may, <sup>F57</sup> . . .
  - (a) determine the manner in which and times at which the sums referred to in subsection (1)(a) above shall be paid to the Board; and
  - (b) impose conditions on the payment of the sums referred to in subsection (1) (b) above.

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- (3) The Secretary of State shall pay to the Law Society in accordance with paragraph 1(2)(b) of Schedule 4 to this Act out of moneys provided by Parliament the amount required to make up any deficit in the Legal Aid (Scotland) Fund.
- (4) Any payments received by the Secretary of State from the Law Society in accordance with paragraph 1(2)(a) of Schedule 4 to this Act shall be paid by him into the Consolidated Fund.

#### Textual Amendments

**F57** Words in s. 40(1)(b)(2) repealed (1.7.1999) by S.I. 1999/1820, arts. 1(2), 4, Sch. 2 Pt. I para. 86(5)

## 41 Interpretation.

In this Act, unless the context otherwise requires—

“advice and assistance” has the meaning given to it in section 6(1) of this Act;

[<sup>F58</sup>“adviser” has the meaning given to it in section 6(2) of this Act;

“adviser code” means the code of practice in relation to the register of advice organisations for the time being in force under Schedule 1A to this Act;]

“assistance by way of representation” has the meaning given to it in section 6(1) of this Act;

“the Board” has the meaning given to it in section 1(1) of this Act;

“civil legal aid” has the meaning given to it in section 13(2) of this Act;

[<sup>F59</sup>“the code” means the code of practice in relation to criminal legal assistance for the time being in force under section 25B of this Act;]

“criminal legal aid” has the meaning given to it in section 21(1) of this Act;

[<sup>F60</sup>“criminal legal assistance” means criminal legal aid and advice and assistance in relation to criminal matters;

“document” includes information recorded in any form;

“firm” includes an incorporated practice, a sole solicitor and a law centre;]

“the Fund” has the meaning given to it in section 4(1) of this Act;

“incorporated practice” has the same meaning as in the <sup>M1</sup>Solicitors’ (Scotland) Act 1980;

[<sup>F61</sup>“law centre” means a body—

(a) established for the purpose of providing legal services to the public generally as well as to individual members of the public; and

(b) which does not distribute any profits made either to its members or otherwise, but reinvests any such profits for the purposes of the law centre;]

“the Law Society” means the Law Society of Scotland;

“legal aid” means civil legal aid, criminal legal aid, or legal aid given in connection with proceedings for contempt of court or proceedings under [<sup>F62</sup>Chapter 2 or Chapter 3 of Part II of the Children (Scotland) Act 1995];

“person”

(a) <sup>F63</sup>does not include a body corporate or unincorporate, except where such body is acting in a representative, fiduciary or official capacity, so as to

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authorise legal aid or advice and assistance to be provided to such a body  
<sup>[F64]</sup>; and

(b) includes a person under the age of sixteen years.

<sup>[F65]</sup>“the Register” means the Register established and maintained under section 25A of this Act;

<sup>[F66]</sup>“the register of advice organisations” means the register established and maintained under section 12A of this Act;]

“registered firm” means a firm whose name appears on the Register;

<sup>[F67]</sup>“registered organisation” means an organisation whose name appears on the register of advice organisations;]

“registered solicitor” means a solicitor whose name appears on the Register;

“sole solicitor” means a solicitor practising under his own name or as a single solicitor under a firm name; and

“solicitor connected with a firm” includes a sole solicitor and a solicitor who is a partner, director or employee of a firm, and cognate expressions shall be construed accordingly.]]

#### Textual Amendments

- F58** S. 41: definitions of “adviser” and “adviser code” inserted (30.7.2007) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), **ss. 67(8)(a)**, 82(2) (with s. 77); S.S.I. 2007/335, **art. 2(a)**
- F59** Definition in s. 41 inserted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(10)(a)**; S.I. 1997/2323, **art. 6(2)**
- F60** Definitions in s. 41 inserted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(10)(b)**; S.I. 1997/2323, **art. 6(2)**
- F61** Definition in s. 41 inserted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(10)(c)**; S.I. 1997/2323, **art. 6(2)**
- F62** Words in s. 41 substituted (1.4.1997) by 1995 c. 36, s. 105(4), **Sch. 4 para. 40(a)** (with s. 103(1)); S.I. 1996/3201, **art. 3(7)**
- F63** S. 41: in the definition of “person” the existing words become para. (a) (1.11.1995) by virtue of 1995 c. 36, s. 105(4), **Sch. 4 para. 40(b)** (with s. 103(1)); S.I. 1995/2787, art. 3, **Sch.**
- F64** S. 41: in the definition of “person”, para. (b) and preceding word added (1.11.1995) by 1995 c. 36, s. 105(4), **Sch. 4 para. 40(b)** (with s. 103(1)); S.I. 1995/2787, art. 3, **Sch.**
- F65** Definitions in s. 41 inserted (1.10.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 12(10)(d)**; S.I. 1997/2323, **art. 6(2)**
- F66** S. 41: definition of “the register of advice organisations” inserted (30.7.2007) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), **ss. 67(8)(b)**, 82(2) (with s. 77); S.S.I. 2007/335, **art. 2(a)**
- F67** S. 41: definition of “registered organisation” inserted (30.7.2007) by [Legal Profession and Legal Aid \(Scotland\) Act 2007 \(asp 5\)](#), **ss. 67(8)(c)**, 82(2) (with s. 77); S.S.I. 2007/335, **art. 2(a)**

#### Marginal Citations

- M1** 1980 c. 46.

#### <sup>[F68]</sup> 41A Regulations in relation to criminal legal assistance.

- (1) The Secretary of State may by regulations made under this section provide that any reference in, under or by virtue of this Act to “criminal legal assistance” shall relate, for any of the purposes of this Act, to such class or classes of criminal legal assistance as he thinks appropriate.

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- (2) Without prejudice to the generality of subsection (1) above, the power conferred by that subsection may be exercised by reference to—
- (a) the class or classes of person who are to receive criminal legal assistance;
  - (b) the class or classes of case in respect of which such assistance is to be given;
  - (c) the nature of the work;
  - (d) the place or places where the assistance is to be provided;
  - (e) the period for which it is to be provided,
- or to any combination of the foregoing; and different provision may be made under that subsection for different purposes, or in relation to different areas or different periods.]

#### Textual Amendments

**F68** S. 41A inserted (1.10.1997) by 1997 c. 48, s.54; S.I. 1997/2323, art. 6, Sch.3

## 42 Disposable income and capital.

- (1) In this Act “disposable income” or “disposable capital” in relation to any person means his income or, as the case may be, the amount of his capital, after making such deductions and allowances as regulations made under this section may prescribe—
- (a) in respect of maintenance of dependants, interest on loans, income tax, rates, rent and other matters for which that person must or reasonably may provide;
  - (b) to take account of the nature of his resources,
- and does not include the subject matter of the dispute.
- (2) Regulations made under this section may make provision as to the determination of a person’s income and the amount of his capital and in particular for determining whether any resources are to be treated as income or capital and for taking into account fluctuations of income, and different provision may be made for legal aid and for advice and assistance.
- (3) Except in so far as regulations made under this section otherwise provide, the resources of a person’s spouse shall be treated for the purposes of this section as that person’s own resources, and such regulations may also make provision, in relation to minors and pupils and other special cases, for taking into account the resources of other persons.

#### Modifications etc. (not altering text)

- C5** S. 42 extended (7.10.1996) by S.I. 1996/2447, reg. 7(2)
- C6** S. 42 amended by S.S.I. 2002/494, reg. 11(2) (as substituted (7.4.2003 with effect as mentioned in reg. 2 of the substituting S.S.I.) by The Civil Legal Aid (Scotland) Amendment Regulations 2003 (S.S.I. 2003/49), reg. 4)

## 43 Act not to affect certain taxations etc.

Nothing in this Act shall affect the sum recoverable by virtue of—

- (a) an award of expenses in favour of a person to whom legal aid has been made available; or

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(b) an agreement as to expenses in favour of such a person which provides for taxation,

and for the purpose of any such award or agreement, the solicitor who acted for the person in whose favour it is made shall be treated as having paid any counsel's fees.

**[<sup>F69</sup> 43A Applications of Act to services provided under Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.**

- (1) Advice and assistance shall be available, in accordance with the provisions of this Act, in relation to the provision of executry services by executry practitioners <sup>F70</sup> . . . and conveyancing services by independent [<sup>F71</sup> conveyancing practitioners], all within the meaning of section 23 (interpretation of sections 16 to 22) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 as they are so available in relation to the provision of the like services by solicitors.
- (2) Subject to any act of sederunt or act of adjournal made under subsection (7) of section 26 of that Act (consideration of applications made under 25) advice and assistance, civil legal aid and criminal legal aid shall be available, in accordance with the provisions of this Act, in relation to the provision of services by persons who have acquired rights to conduct litigation or, as the case may be, rights of audience by virtue of that section as they are so available in relation to the provision of the like services by solicitors and, where appropriate, by advocates.
- (3) Where advice and assistance, civil legal aid or criminal legal aid has been made available by virtue of this section, the provisions of this Act shall apply in relation to the person providing those services as they apply in relation to a solicitor or advocate providing like services.]

**Textual Amendments**

**F69** S. 43A inserted (30.9.1991) by Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40, SIF 76:2), s.38; S.I. 1991/2151, art. 3, Sch.

**F70** Words in s. 43A(1) repealed (15.8.2003) by Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4), ss. 17, 21(2), Sch. 4 para. 9(a); S.S.I. 2003/384, art. 2(d)

**F71** Words in s. 43A(1) substituted (15.8.2003) by Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp. 4), ss. 17, 21(2), Sch. 4 para. 9(b); S.S.I. 2003/384, art. 2(d)

**44 Crown application.**

This Act shall bind the Crown.

**45 Amendments, transitional provisions, savings and repeals.**

- (1) The enactments mentioned in Schedule 3 to this Act shall have effect subject to the amendments there specified (being minor amendments and amendments consequential on this Act).
- (2) Without prejudice to sections 16 and 17 of the <sup>M2</sup>Interpretation Act 1978 (effect of repeals) and section 46(3) of this Act, the transitional provisions and savings contained in Schedule 4 to this Act shall have effect.



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- (3) The enactments set out in columns 1 and 2 of Schedule 5 to this Act are repealed to the extent specified in the third column of that Schedule.

**Marginal Citations**

**M2** [1978 c. 30.](#)

**46 Short title, commencement and extent.**

- (1) This Act may be cited as the Legal Aid (Scotland) Act 1986.
- (2) This Act, apart from this section, shall come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint; and different days may be so appointed for different purposes and for different provisions.
- (3) An order under subsection (2) above may contain such transitional provisions and savings as appear to the Secretary of State necessary or expedient.
- (4) This Act, except section 18(3), extends only to Scotland.

**Subordinate Legislation Made**

**P1** S. 46(2) power partly exercised: different dates appointed for specified provisions by S.Is. 1986/1617, 1987/289, 1992/1226.  
S. 46(2) power fully exercised: 2.11.2001 appointed for remaining provisions by [S.S.I. 2001/393](#), [art. 2](#)

**Status:**

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**Changes to legislation:**

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