

Draft Regulations laid before the Scottish Parliament under section 37(2) of the Legal Aid (Scotland) Act 1986 for approval by resolution of the Scottish Parliament. This draft replaces the one laid on 25th April 2008 and is being issued free to all known recipients of that draft Scottish Statutory Instrument

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2008 No.

LEGAL AID AND ADVICE

**The Advice and Assistance (Limits, Conditions
and Representation) (Scotland) Regulations 2008**

Made - - - -

Coming into force - - *30th June 2008*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 9, 11(2) and 36(2)(b)(1) of the Legal Aid (Scotland) Act 1986(2) and all other powers enabling them to do so.

In accordance with section 37(2) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Advice and Assistance (Limits, Conditions and Representation) (Scotland) Regulations 2008 and come into force on 30th June 2008.

Financial limit

2.—(1) The Advice and Assistance (Financial Limit) (Scotland) Regulations 1993(3) are amended as follows.

(2) In regulation 3—

(a) in paragraph (a), omit sub paragraph (ii) and the “and” immediately preceding it;

(b) in paragraph (b), omit sub paragraph (iii) and the “and” immediately preceding it;

(1) Section 9 was amended by the Access to Justice Act 1999 (c. 22), section 32. Section 11(2) was amended by the Social Security Act 1986 (c. 50), Schedule 10, paragraph 61, the Jobseekers Act 1995 (c. 18), Schedule 2, paragraph 9 and the Access to Justice Act 1999 (c. 22), section 33. Section 36(2)(b) was amended by the Legal Aid Act 1988 (c. 34), Schedule 4, paragraph 6.

(2) 1986 c. 47. Functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46).

(3) S.I.1993/3187. Regulation 3 was substituted by S.S.I. 2007/248. Regulations 3 and 4 specify financial limits for section 10(2) of the Legal Aid (Scotland) Act 1986.

(c) after paragraph (b) insert–

“(c) in other cases–

- (i) where the advice and assistance relates to a criminal matter as regards which a summary complaint has been served, the sum of £90;
- (ii) where the advice and assistance relates to a criminal matter as regards which a fixed penalty, compensation or work offer has been made under section 302, 302A or 303ZA of the Criminal Procedure (Scotland) Act 1995⁽⁴⁾, and the offer or any resulting measure occurring under that section is to be challenged (including by non acceptance of the offer or by disputing whether the offer has been accepted), the sum of £90;
- (iii) where the advice and assistance relates to any other summary criminal matter, the sum of £35;
- (iv) where in relation to criminal proceedings before a stipendiary magistrate, or the sheriff sitting summarily, the assistance by way of representation is as described in regulation 6(1) or (2) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003⁽⁵⁾, or regulation 6A of those Regulations otherwise than in connection with a plea of not guilty, the sum of £550;
- (v) where in relation to criminal proceedings in the justice of the peace court (other than before a stipendiary magistrate) the assistance by way of representation is as described as referred to in sub paragraph (iv) above, the sum of £185;
- (vi) where the assistance by way of representation relates to any other summary criminal matter, the sum of £90;
- (vii) where the advice and assistance or assistance by way of representation relates to a solemn criminal matter, the sum of £90;
- (viii) despite sub paragraphs (vi) and (vii), where the assistance by way of representation involves a second or subsequent diet that has been ordered by the court, the sum of £165;
- (ix) where the assistance by way of representation relates to Parole Board proceedings, the sum of £165.”.

(3) In regulation 4, sub paragraphs (i) and (iii) of paragraph (a) and the “or” immediately following each of them are revoked.

Financial conditions

3. In regulation 7 of the Advice and Assistance (Financial Conditions) (Scotland) Regulations 2008⁽⁶⁾–

- (a) in paragraph (1), omit “by way of a diagnostic interview and the work undertaken is made up solely of a diagnostic interview”;
- (b) after paragraph (1) insert–
 - “(1A) In relation to a criminal matter, the reference in paragraph (1) above to advice and assistance is reference to advice and assistance to which the sum specified in paragraph

(4) 1995 c. 46.

(5) S.S.I. 2003/179.

(6) S.S.I. 2008/137.

3(c)(iii) of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993(7) applies.

(1B) In relation to a civil matter, the reference in paragraph (1) above to advice and assistance is reference to advice and assistance by way of a diagnostic interview where the work undertaken is made up solely of a diagnostic interview.”;

(c) in paragraph (2)–

(i) after “apply” insert “in relation to a civil matter”;

(ii) for “a matter” substitute “the matter”.

Assistance by way of representation

4.—(1) The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003(8) are amended as follows.

(2) In regulation 6–

(a) after paragraph (1)(b) insert–

“(ba) at any diet to which the case has been adjourned under section 145 of the 1995 Act;”;

(b) in paragraph (2)–

(i) after sub paragraph (a) insert “or”;

(ii) omit sub paragraph (c) and the “or” immediately preceding it.

(3) In regulation 6A–

(a) in paragraph (1), for “a sheriff court which has been designated as a summary justice pilot court by the sheriff principal” substitute “any court”;

(b) after paragraph (1) insert–

“(1A) Except where paragraph (1D) below applies, an appointed solicitor is the only person who–

(a) may provide the assistance by way of representation described in paragraph (1) above;

(b) is entitled to any fees attributable to the provision of that representation.

(1B) However, the provision of that representation by an appointed solicitor may be effected, from the appearance from custody onwards, through the services of another solicitor (except the duty solicitor) where–

(a) the other solicitor is expressly authorised by the appointed solicitor; and

(b) the services of the other solicitor are required in circumstances where the appointed solicitor cannot reasonably attend because of–

(i) illness or incapacity;

(ii) the arising (since instruction in relation to the appearance) of a professional obligation to act (in person) in another case that is to call elsewhere at or around the same time; or

(iii) another good reason.

(1C) Paragraph (1D) below applies where an appointed solicitor is not available to act immediately (whether in person or through the services of another solicitor under

(7) S.S.I. 1993/3187.

(8) Regulations 6 and 7 were amended, and regulations 6A, 6B and 9(g) were inserted, by S.S.I. 2006/345.

paragraph (1B) above) for the purpose of providing the assistance by way of representation described in paragraph (1) above.

(1D) Where this paragraph applies, the duty solicitor is the only person who may provide the representation under the Act in relation to the appearance from custody (and, accordingly, no other person is entitled to any fees attributable to the provision of that representation).

(1E) In this regulation, an “appointed solicitor” is a solicitor–

- (a) with whom the person appearing in answer to the complaint has (or has had) a solicitor and client relationship that is demonstrable by reference to circumstances apart from those relating solely to the appearance; and
- (b) who is instructed directly by that person for the purposes of that person’s representation.”.

(4) Regulation 6B is omitted.

(5) In regulation 7–

(a) for paragraphs (1) and (2) substitute–

“(2A) The assistance by way of representation described in regulation 6(1) above is to be provided under Part II of the Act only if the solicitor to whom the application has been made is satisfied that it is in the interests of justice for the assistance to be provided.

(2B) The factors to be taken into account in determining whether it is in the interests of justice for the assistance to be provided include those listed in section 24(3)(a) to (c) of the Act.”;

(b) in paragraph (3), for “Paragraphs (1) and (2) above” substitute “This regulation”.

(6) In regulation 9, omit paragraph (g).

St Andrew’s House,
Edinburgh
2008

A member of the Scottish Executive

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make changes to existing regulations which respectively concern financial limits, financial conditions and assistance by way of representation.

Regulation 2 provides for new financial limits (which apply under section 10(2) of the Legal Aid (Scotland) Act 1986) relating to advice and assistance, and assistance by way of representation, in various types of summary and solemn criminal case.

Regulation 3 provides for a scale of contributions to apply in relation to advice and assistance in certain types of summary criminal case.

Regulation 4 makes changes in relation to assistance by way of representation in certain types of summary criminal case. References to the 'summary justice pilot courts' are removed so that the representation presently available in those courts is available generally. There is added, to the list of things for which the assistance is available in non custody cases, representation at a diet to which a case has been adjourned without plea. For non custody cases, the assistance is to be available subject to an 'interests of justice' test. For custody cases, a solicitor other than the duty solicitor is to be able to provide the representation only if, where instructed directly in the context of a demonstrable solicitor and client relationship, available to act immediately (whether in person or, in certain circumstances, through another solicitor). Otherwise, it is to be the duty solicitor only (as part of the duty solicitor scheme) who may provide the representation.