

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.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2017 No.

LEGAL AID AND ADVICE

**The Advice and Assistance (Proceedings for
Recovery of Documents) (Scotland) Regulations 2017**

Made - - - - 2017
Coming into force - - 2017

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 9, 33(2)(b) and (3) and 41A of the Legal Aid (Scotland) Act 1986(1) and all other powers enabling them to do so.

In accordance with section 37(2) of that Act(2) a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament(3).

Citation and commencement

1. These Regulations may be cited as the Advice and Assistance (Proceedings for Recovery of Documents) (Scotland) Regulations 2017 and come into force on the day after the day on which they are made.

Application

2.—(1) Regulation 4 applies only in relation to a case where an application for advice and assistance or assistance by way of representation is made on or after the day on which these Regulations come into force.

(2) Regulation 5 applies only in relation to a case where an application for assistance by way of representation is made on or after the day on which these Regulations come into force.

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- (1) 1986 c.47. Section 9 was amended by the Access to Justice Act 1999 (c.22), section 32 and the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3), sections 18(1) and 23(5). Section 33(2) was amended by the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), section 67(7)(b). Section 41A was inserted by the Crime and Punishment (Scotland) Act 1997 (c.48), section 54. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (c.46), section 53.
- (2) There are amendments to section 37(2) which are not relevant to these Regulations. Section 37(2) has been modified by paragraph 5 of schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (the “2010 Act”).
- (3) The powers to make these Regulations are exercised together by virtue of section 33(2) of the 2010 Act. The Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.

Section 25A of the Legal Aid (Scotland) Act 1986: meaning of “criminal legal assistance”

3. In section 25A of the Legal Aid (Scotland) Act 1986(4), references to criminal legal assistance do not relate to advice and assistance provided to a client in relation to an application for an order for recovery of documents, in connection with criminal proceedings against another person, in which the documents sought include medical or other sensitive documents relating to the client.

Amendment of the Advice and Assistance (Scotland) Regulations 1996

4.—(1) The Advice and Assistance (Scotland) Regulations 1996(5) are amended as follows.

(2) In regulation 17 (fees and outlays of solicitors), after paragraph (4) insert—

“(4A) In the application of paragraph (1) above to recovery proceedings, the fees allowable to the solicitor shall be assessed as if the advice or assistance was a criminal matter.

(4B) In paragraph (4A), “recovery proceedings” means proceedings relating to an application for an order for recovery of documents, in connection with criminal proceedings, in which—

- (a) the documents sought include medical or other sensitive documents relating to a client;
- (b) the application has been intimated to the client; and
- (c) the client wishes to oppose recovery of the documents on the basis that the granting of the order would infringe their rights under Article 8 of the European Convention on Human Rights.”.

Amendment of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003

5.—(1) The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003(6) are amended as follows.

(2) In regulation 1(2) (interpretation), after the definition of “prisoner” insert—

““recovery proceedings” means proceedings relating to an application for an order for recovery of documents, in connection with criminal proceedings, in which—

- (a) the documents sought include medical or other sensitive documents relating to a client;
- (b) the application has been intimated to the client; and
- (c) the client wishes to oppose recovery of the documents on the basis that the granting of the order would infringe their rights under Article 8 of the European Convention on Human Rights;”.

(3) In regulation 3 (application of Part II of the Act to assistance by way of representation: miscellaneous proceedings)—

- (a) in paragraph (s), omit “and”; and
- (b) after paragraph (t), insert—
 - “; and
 - (u) recovery proceedings”.

(4) In regulation 9 (prescribed proceedings)—

(4) Section 25A was inserted by the Crime and Punishment (Scotland) Act 1997 (c.48), section 49.

(5) S.I. 1996/2447; relevantly amended by S.S.I. 2008/240.

(6) S.S.I. 2003/179; relevant amending instruments are S.S.I. 2005/165, S.S.I. 2006/615, S.S.I. 2008/251, S.S.I. 2011/216, S.S.I. 2012/84, S.S.I. 2013/200, S.S.I. 2015/13 and S.S.I. 2015/279.

- (a) in paragraph (f), omit “and”; and
 - (b) after paragraph (h), insert—
 - “; and
 - (i) recovery proceedings”.
- (5) In regulation 13 (assistance by way of representation requiring approval of the Board)—
- (a) in paragraph (1), after “(s)” insert “and (u)”; and
 - (b) after paragraph (3A) insert—
 - “(3B) The Board must only approve the provision of assistance by way of representation in relation to recovery proceedings where it is satisfied that the legal representation is required to allow the client to participate effectively in the proceedings.”.
- (6) In regulation 14—
- (a) the heading becomes “Effective participation in proceedings”; and
 - (b) after “13(3A)” insert “or (3B)”.

St Andrew’s House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to provide for the availability of Assistance by Way of Representation (“ABWOR”) in relation to proceedings relating to an application for an order for recovery of documents in connection with criminal proceedings (“recovery proceedings”), in which a client’s medical or other sensitive documents are sought. ABWOR for recovery proceedings will be approved by the Scottish Legal Aid Board where the Board is satisfied that legal representation is required to allow the client to participate effectively in the proceedings and is available without reference to the financial limits under section 8 of the Legal Aid (Scotland) Act 1986 (“the 1986 Act”) and without the payment of a contribution by the client in terms of section 11(2) of that Act.

These Regulations also amend the Advice and Assistance (Scotland) Regulations 1996 to provide advice and assistance and ABWOR in recovery proceedings will be paid at the criminal rate.

As a result of excluding recovery proceedings from references to criminal legal assistance in section 25A of the 1986 Act, all solicitors will be eligible to provide advice and assistance and ABWOR in recovery proceedings, and not only those solicitors whose name appears on the Criminal Legal Assistance Register.