

*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.*

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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2017 No.**

**LEGAL AID AND ADVICE**

**The Criminal Legal Assistance (Miscellaneous  
Amendments) (Scotland) Regulations 2017**

*Made* - - - - 2017  
*Coming into force* - - 25th January 2018

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 8A(1), 9, 31(9), 33(2), (3) and 3A, 36(1), (2)(a), (d) and (e) 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 Criminal Legal Assistance (Miscellaneous Amendments) (Scotland) Regulations 2017 and come into force on 25th January 2018.

**Application**

2. These Regulations do not apply to a person detained or arrested before 25th January 2018.

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- (1) 1986 c.47. Section 8A(1) was inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15), section 2(3), and amended by the Scottish Civil Justice Council and Criminal Legal Assistance 2013 (asp 3), section 23(4). 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), section 18(1) and section 23(5). Section 31(9) was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), sections 74(1), 75(2) and schedule 8, paragraph 36(14). Section 33(2) was amended by the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), section 67(7)(b). Section 33(3A) was inserted by the Crime and Punishment (Scotland) Act 1997, section 51. 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) Relevantly amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15), section 2(2). 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.

### **Amendment of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989**

**3.**—(1) The Criminal Legal Aid (Scotland) (Fees) Regulations 1989<sup>(4)</sup> are amended as follows.

(2) After regulation 4(1) insert—

“(1A) Where—

- (a) a client to whom section 32 of the Criminal Justice (Scotland) Act 2046 applies has exercised a right to have a solicitor present while being interviewed in terms of section 32(2) of that Act or a right to consultation under section 44 of that Act, or
- (b) there has been an application for authorisation for questioning by a prosecutor under section 36(1)(a) of that Act,

solicitors are to be paid in accordance with the fees prescribed in Parts III and IV of schedule 3 of the Advice and Assistance (Scotland) Regulations 1996.”

(3) In regulation 11(1) (disputes as to allowable fees or outlays)—

- (a) in paragraph (a), omit “or the Sheriff Appeal Court,”;
- (b) in paragraph (b), omit “or”; and
- (c) after paragraph (b) insert—

“(ba) the Sheriff Appeal Court, the matter shall be referred for taxation to the auditor of the Sheriff Appeal Court; or”.

### **Amendment of the Advice and Assistance (Financial Limits) (Scotland) Regulations 1993**

**4.** In regulation 3(c) of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993 (financial limit)<sup>(5)</sup>, after sub-paragraph (ix) insert—

- “(x) where the advice and assistance is for personal attendance by a solicitor and the client has exercised the right to a consultation in terms of section 44 of the Criminal Justice (Scotland) Act 2016, the sum of £225.00;
- (xi) where the advice and assistance is for personal attendance by a solicitor and the client has exercised a right to have a solicitor present in terms of section 32(2) of the Criminal Justice (Scotland) Act 2016, the sum of £550;
- (xii) where the advice by way of representation is for review of a condition under section 19 of the Criminal Justice (Scotland) Act 2016, the sum of £200;
- (xiii) where the advice by way of representation is for review of a condition of an undertaking under section 30 of the Criminal Justice (Scotland) Act 2016, the sum of £200;
- (xiv) where the advice by way of representation relates to an application for authorisation for questioning by a prosecutor under section 36(1)(a) of the Criminal Justice (Scotland) Act 2016, the sum of £200”.

### **Amendment of the Advice and Assistance (Scotland) Regulations 1996**

**5.**—(1) The Advice and Assistance (Scotland) Regulations 1996<sup>(6)</sup> are amended as follows.

(2) After regulation 4 (application for advice and assistance), insert—

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(4) S.I. 1989/1491; relevantly amended by S.S.I. 2007/180, S.S.I. 2009/312 and S.S.I. 2015/337.

(5) S.I. 1993/3187; regulation 3 was substituted by the Advice and Assistance (Financial Limits) (Scotland) Amendment Regulations 2007/248 and relevantly amended by S.S.I. 2008/251.

(6) S.I. 1996/2447; relevantly amended by S.S.I. 2008/240 and S.S.I. 2017/291.

**“Applications for advice and assistance: further provision**

**4A.** The requirement in regulation 4 for an application for advice and assistance to be signed does not apply in the case of a client to whom section 32 (right to have a solicitor present) of the Criminal Justice (Scotland) Act 2016 applies.”.

(3) In regulation 14A (change of solicitor etc.), after paragraph (3) insert—

“(4) This regulation does not apply to proceedings under sections 19, 30 or 36(1)(a) of the Criminal Justice (Scotland) Act 2016.”.

(4) In regulation 17 (fees and outlays of solicitors), after paragraph (1) insert—

“(1A) In the application of paragraph (1)(a) above to fees for work actually, necessarily and reasonably done in connection those matters described in—

(a) Part III of Schedule 3, the reference to Part I of schedule 3 in paragraph (1)(a) above should be read as a reference to Part III of schedule 3;

(b) Part IV of Schedule 3, the reference to Part II of schedule 3 in paragraph (1)(a) should be read as a reference to Part IV of schedule 3.”.

(5) In the Table of Fees in Part II of schedule 3 (table of fees allowable to solicitors)—

(a) delete paragraphs F and G;

(b) at the end insert—

**“PART III**

**TABLE OF FEES ALLOWED TO SOLICITORS FOR ASSISTANCE BY WAY OF REPRESENTATION FOR PROCEEDINGS UNDER SECTIONS 19, 30 AND 36(1) (a) OF THE CRIMINAL JUSTICE (SCOTLAND) ACT 2016**

A reference in this Table of Fees to a section is a reference to a section of the Criminal Justice (Scotland) Act 2016.

1. *Section 19 - Application for review of conditions of investigative liberation*
  - (a) Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing £50.00
  - (b) Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing £75.00
  - (c) Additional fee, excluding travel, for second or subsequent court hearing, per hearing £50.00
  - (d) Fee for time necessarily spent travelling to and from court, where the court is not in a town or place where the solicitor has a place of business, per quarter hour £5.80
2. *Section 30 - Application for review of undertaking conditions*
  - (a) Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing £50.00
  - (b) Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing £75.00

- (c) Additional fee, excluding travel, for second or subsequent court hearing, per hearing. £50.00
  - (d) Fee for time necessarily spent travelling to and from court, where the court is not in a town or place where the solicitor has a place of business, per quarter hour. £5.80
  - 3. *Section 36(1)(a) – Application for authorisation for questioning by a prosecutor*
    - (a) Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing. £50.00
    - (b) Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing. £75.00
    - (c) Additional fee, excluding travel, for second or subsequent court hearing, per hearing. £50.00
    - (d) Fee for time necessarily spent travelling to and from court, where the court is not in a town or place where the solicitor has a place of business, per quarter hour. £5.80
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## PART IV

### TABLE OF FEES ALLOWED TO SOLICITORS FOR ADVICE AND ASSISTANCE IN RELATION TO SECTIONS 32 AND 44 OF THE CRIMINAL JUSTICE (SCOTLAND) ACT 2016

- 1.(a) Where a client to whom section 32 applies has exercised a right to have a solicitor present while being interviewed in terms of section 32(2), a solicitor can only claim a fee under paragraph 4 for all work undertaken in a single period in which that client—
- (i) voluntarily attends for interview,
  - (ii) is in custody,
  - (iii) voluntarily attends for interview and during that interview, or immediately after it, is arrested and in custody.
- (b) Where a client to whom section 32 applies has not exercised their right under section 32(2), a solicitor can only claim a fee under paragraph 3 or 5 for all work undertaken in a single period in which that client is in custody.
- (c) (i) Where a fee under paragraph 3 or 4 is claimed, a solicitor can only claim the higher rate, instead of the standard rate, if personal attendance on the client takes place wholly or partly during an unsocial time.
- (ii) Where a fee under paragraph 5 is claimed, a solicitor can only claim a higher rate, instead of the standard rate, if the attendance on the client (personal or otherwise) takes place wholly or partly at an unsocial time.
2. In this part—

“unsocial time” means—

- (a) a Saturday, Sunday or specified holiday;
- (b) any time between 1900 hours and 0700 hours on any other day;

“constable” means—

- (a) a constable within the meaning given by section 99(1) of the Police and Fire Reform (Scotland) Act 2012;
- (b) a person appointed under section 21(1), 22(1), 23(1), 24(1) or 25(1) of the Railways and Transport Safety Act 2003;
- (c) a person appointed under section 55(1) of the Energy Act 2004;
- (d) a person who is a member of the Ministry of Defence Police by virtue of section 1(2) of the Ministry of Defence Police Act 1987;
- (e) a person appointed as an immigration officer under paragraph 1 of Schedule 2 to the Immigration Act 1971;
- (f) a person who is designated as a general customs official under section 3(1) of the Borders, Citizenship and Immigration Act 2009 or as a customs revenue official under section 11(1) of that Act;
- (g) a person appointed as an officer of Revenue and Customs under section 2(1) of the Commissioners for Revenue and Customs Act 2005;

“mental disorder” has the meaning given in section 328 of the Mental Health (Care and Treatment)(Scotland) Act 2003;

“specified holiday” means—

- (a) New Year’s Day, if it is not a Saturday or Sunday or, if it is a Saturday or Sunday, the first Monday following New Year’s Day;
- (b) 2nd January or
  - (i) if it is a Saturday, 4th January;
  - (ii) if it is Sunday, 4th January;
- (c) Good Friday;
- (d) Easter Monday;
- (e) the first Monday in May;
- (f) 30th November, if it is not a Saturday or Sunday or, if it is a Saturday or Sunday, the first Monday following the 30th November;
- (g) Christmas Day, if it is not a Saturday or Sunday or, if it is a Saturday or Sunday, the first Monday following Christmas Day;
- (h) 26th December or
  - (i) if it is a Saturday, 28th December;
  - (ii) if it is a Sunday, 28th December.

	Standard Rate	Higher Rate
3. Inclusive fee, excluding travel, for personal attendance by a solicitor where a constable determines the client has a mental disorder and the client has exercised a right to consultation under section 44.	£75.00	£99.75
4. Inclusive fee, excluding travel, for personal attendance by a solicitor where the client has exercised a right to have a solicitor present in terms of section 32(2)—		
(a) aggregate time engaged or waiting is 2 hours or less; or	£115.00	£152.95

(b)(i)	aggregate time engaged or waiting is more than 2 hours, up to and including 4 hours; and	£200.00	£266.00
(ii)	for each additional hour over 4 hours (or part thereof).	£50.00	£66.50
5.	Inclusive fee, excluding travel, for attendance by a solicitor where the client has exercised a right to consultation under section 44 other than in the circumstances provided for in paragraph 3.	£30.00	£39.90
6.	Fee for travelling time in relation to personal attendance—		
(a)	travel time engaged is 2 hours or less per half hour (or part thereof); and	£11.60	£15.43
(b)	travel time engaged is more than 2 hours, where authorised by the Board, in advance per half hour (or part thereof).	£11.60	£15.43”

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#### **Amendment of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999**

6.—(1) The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999(7) are amended as follows.

(2) In regulation 2(1) (interpretation), in the definition of “excluded proceedings”, after (m) insert—

“(n) where a client to whom section 32 of the Criminal Justice (Scotland) Act 2016 applies has exercised a right to have a solicitor present while being interviewed in terms of section 32(2) of that Act or a right to consultation under section 44 of that Act;

(o) where there has been an application for authorisation for questioning by a prosecutor under section 36(1)(a) of the Criminal Justice (Scotland) Act 2016;”.

(3) In regulation 4(3)(b)—

(a) omit “22, 22ZA(1)(a),”; and

(b) after “the 1995 Act” insert “or paragraph 1(1)(b) of schedule 1 of the Criminal Justice (Scotland) Act 2016”.

(4) In schedule 1, in paragraph 2 of Part 1 of the table of fees—

(a) omit “22ZA(1)(b), 22ZB or”; and

(b) after “the 1995 Act” insert “or paragraph 1(1)(a) or (c) of schedule 1 of the Criminal Justice (Scotland) Act 2016”.

(5) In schedule 1A, in paragraph 2 of the table of fees—

(a) omit “22ZA(1)(b), 22ZB or”; and

(b) after “the 1995 Act” insert “or paragraph 1(1)(a) or (c) of schedule 1 of the Criminal Justice (Scotland) Act 2016”.

(6) In schedule 1B, in paragraph 3 of Part 1 of the table of fees—

(a) omit “22ZA(1)(b), 22ZB or”; and

(b) after “the 1995 Act” insert “or paragraph 1(1)(a) or (c) of schedule 1 of the Criminal Justice (Scotland) Act 2016”.

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(7) S.I. 1999/491; relevantly amended by S.S.I. 2004/263 and S.S.I. 2014/366.

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

7.—(1) The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003<sup>(8)</sup> are amended as follows.

(2) After regulation 4 (application of Part II of the Legal Aid (Scotland) Act 1986 to assistance by way of representation: proceedings under the Criminal Procedure (Scotland) Act 1995), insert—

#### **“Application of Part II of the Act to assistance by way of representation: proceedings under sections 19, 30 and 36(1)(a) of the Criminal Justice (Scotland) Act 2016**

**4A.** Part II of the Act shall apply to assistance by way of representation in relation to proceedings under sections 19, 30 and 36(1)(a) of the Criminal Justice (Scotland) Act 2016.”.

(3) In regulation 13 (assistance by way of representation requiring approval of the Scottish Legal Aid Board)—

(a) in paragraph (1) for “and 5” substitute “, 4A, 5”; and

(b) after paragraph (3B) insert—

“(3C) The Board must only approve the provision of assistance by way of representation in relation to the proceedings in regulation 4A where it is satisfied that it is in the interests of justice.

(3D) The factors to be taken into account by the Board in determining whether it is in the interests of justice for the purposes of paragraph (3C) that assistance by way of representation be made available include whether—

(a) it is reasonable in the particular circumstances of the case that assistance by way of representation is made available;

(b) the case is too complex to allow the applicant to present it to the minimum standard of effectiveness in person; and

(c) it is in the interests of someone other than the applicant that the applicant be legally represented.”.

### **Amendment of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008**

8. In regulation 7(5) of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008<sup>(9)</sup> (single payment in summary criminal cases), for sub-paragraphs (a) and (ab) substitute—

“(a) the provision of advice and assistance to a person to whom section 32 (right to have solicitor present) of the Criminal Justice (Scotland) Act 2016 applies;

(aa) the provision of assistance by way of representation to a person who:

(i) applies for a review of conditions under section 19 of the Criminal Justice (Scotland) Act 2016;

(ii) applies for a review of a condition of an undertaking under section 30 of the Criminal Justice (Scotland) Act 2016; or

(iii) is the subject of an application for authorisation for questioning by a prosecutor under 36(1)(a) of the Criminal Justice (Scotland) Act 2016;”.

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<sup>(8)</sup> S.S.I. 2003/179; relevantly amended by S.S.I. 2015/13 and S.S.I. 2017/291.

<sup>(9)</sup> S.S.I. 2008/240; relevantly amended by S.S.I. 2011/333.

### **Amendment of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011**

**9.** For regulation 3 of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011<sup>(10)</sup> (duty solicitors: advice for suspect) substitute—

“**3.** In the circumstances where the Board has arranged, in accordance with section 31(8) of the Act, that a solicitor is to be available for the purpose of providing advice and assistance to any person to whom section 32 (right to have a solicitor present) of the Criminal Justice (Scotland) Act 2016 applies—

- (a) section 31(1) of the Act does not apply; and
- (b) the advice and assistance referred to must only be provided by the solicitor so made available.”.

### **Amendment of the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011**

**10.** For regulation 8 of the Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2011<sup>(11)</sup> (criminal advice and assistance: automatic availability in certain circumstances), substitute—

“**8.** Advice and assistance is to be available without reference to the financial limits in section 8 of the Act for any person to whom section 32 (right to have solicitor present) of the Criminal Justice (Scotland) Act 2016 applies.”.

### **Revocation**

**11.** The Criminal Legal Assistance (Fees) (Scotland) Regulations 2011<sup>(12)</sup> are revoked.

St Andrew’s House,  
Edinburgh  
Date

*Name*  
Authorised to sign by the Scottish Ministers

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<sup>(10)</sup> S.S.I. 2011/163; relevantly amended by S.I. 2011/1739 and the Crime and Courts Act 2013 (c.22), schedule 21, paragraph 50.  
<sup>(11)</sup> S.S.I. 2011/217; relevantly amended by S.I. 2011/1739, the Crime and Courts Act 2013 (c.22) and schedule 21, paragraph 50.  
<sup>(12)</sup> S.S.I. 2011/333.



## EXPLANATORY NOTE

*(This note is not part of the Regulations)*

These Regulations amend several regulations made under the Legal Aid (Scotland) Act 1986.

Changes are made in consequence of the coming into force on 25th January 2018 of Part 1 of the Criminal Justice (Scotland) Act 2016 (arrest and custody) (“the 2016 Act”), which replaces existing provisions on arrest and detention. Related to that:

- (a) transitional provision is made in regulation 2 for those persons that are arrested or detained on the 24th January and are still under arrest or detained on the 25th January when Part 1 of the 2016 Act comes into force;
- (b) the fees payable for criminal legal assistance in respect of proceedings under Part 1 of the 2016 Act are set out in the Advice and Assistance (Scotland) Regulations 1996.

Regulation 3 amends regulation 11(1) of the Criminal Legal Aid (Scotland) Fees Regulations 1989 to specify the auditor of the Sheriff Appeal Court as the relevant auditor in relation to taxation in the Sheriff Appeal Court instead of the Auditor of the Court of Session.

A Business and Regulatory Impact Assessment has been prepared for these Regulations and placed in the Scottish Parliament Information Centre. Copies can be obtained from the Scottish Government Justice Directorate, St Andrews House, Edinburgh EH1 3DG.