

Draft Regulations laid before the Scottish Parliament under section 37 of the Legal Aid (Scotland) Act 1986, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2020 No.

LEGAL AID AND ADVICE

The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020

Made - - - - 2020

Coming into force

for the purpose of article

1(2)

1st July 2020

for the purpose of article

1(3)

5th August 2020

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 9, 12(3), 33(2), (3) and (3A), and 36(1), (2)(a) and (g) of the Legal Aid (Scotland) Act 1986(1) and all other powers enabling them to do so.

Citation and commencement

1.—(1) These Regulations may be cited as the Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020.

(2) With the exception of regulation 3, these Regulations come into force on 1 July 2020.

(3) Regulation 3 comes into force on 5 August 2020.

Amendment of the Civil Legal Aid (Scotland) (Fees) Regulations 1989

2.—(1) Chapter II (Sheriff Court Civil Fees (Defended)) of Schedule 6 of the Civil Legal Aid (Scotland) (Fees) Regulations 1989(2) is amended as follows.

(2) For paragraph 24, substitute—

“24. Except as provided for by paragraph 25 or where otherwise prescribed, no fee is allowable unless the work for which the fee is payable has been completed in its entirety.”.

(1) 1986 c.47. 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 (c.48), section 51. 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) S.I. 1989/1490, relevantly amended by S.S.I. 2003/178, S.S.I. 2007/14 and S.S.I. 2015/380.

(3) After paragraph 24 insert—

“**25.**—(1) During the emergency period, where a solicitor submits a claim for payment in such form as the Board may require for work which has been commenced but not yet completed in its entirety, the Board may make payment to account of the amount of the fee which would be payable in accordance with the table in this chapter if that work had been completed in its entirety, subject to the following conditions:—

- (a) a payment made under this paragraph shall be an interim payment only and the fee payable to the solicitor, if any, in respect of the work to which such interim payment relates shall be assessed upon receipt of a claim by the solicitor for fees payable in accordance with this chapter;
- (b) when assessing the fee payable to a solicitor in respect of legal aid the Board may have regard to any interim payment, or payments, made under this paragraph in relation to the same matter and may reduce the amount of the fee payable to the solicitor accordingly;
- (c) where interim payment has been made in accordance with this paragraph but the payment made exceeds the fee payable to the solicitor in respect of the work carried out under this chapter, the excess shall be repaid by the solicitor to the Fund.

(2) For the purposes of this chapter “emergency period” is the period beginning on 1 July 2020 and ending on the date on which Part 9 of schedule 4 of the Coronavirus (Scotland) Act 2020(3) expires in accordance with section 12 of that Act.”.

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

3.—(1) Schedule 2 (fees of counsel) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989(4) is amended as follows.

(2) In paragraph 13(d) after “concluded” insert “, unless claimed during the emergency period”.

(3) In paragraph 22 (interpretation) after the entry relating to “documentation” insert—

““emergency period” means the period beginning on 1 July 2020 and ending on the date on which Part 9 of schedule 4 of the Coronavirus (Scotland) Act 2020(5) expires in accordance with section 12 of that Act;”.

Amendment of the Advice and Assistance (Scotland) Regulations 1996

4. After regulation 16 (payment of fees and outlays from property recovered or preserved) of the Advice and Assistance (Scotland) Regulations 1996(6) insert—

“Interim payment of fees and outlays during the emergency period

16A.—(1) This regulation applies where—

- (a) a claim is made for interim payment of fees or outlays in accordance with section 33(6)(a)(ii) and (b) of the Act, as modified by the Coronavirus (Scotland) Act 2020(7);

(3) 2020 asp 7.

(4) S.I. 1989/1491 relevantly amended by S.S.I. 2005/113, S.S.I. 2005/656, S.S.I. 2007/180 and S.S.I. 2012/276.

(5) 2020 asp 7.

(6) S.I. 1996/2447 relevantly amended by S.S.I. 2007/60.

(7) 2020 asp 7.

- (b) the claim is made in such form and complying with such terms and containing such information as the Board may require for assessment purposes; and
 - (b) the claim is made during the emergency period.
- (2) For the purposes of this regulation “emergency period” means the period beginning on 5 August 2020 and ending on the date on which Part 9 of schedule 4 of the Coronavirus (Scotland) Act 2020(8) expires in accordance with section 12 of that Act.
- (3) In relation to a claim for interim payment made in accordance with this regulation, the Board may disapply the requirement created by section 12(3)(c) of the Act that, before recourse to the Fund, fees or outlays shall be paid to the solicitor out of any property which is recovered or preserved for the client, in relation to the whole or any part of any such property.
- (4) For the avoidance of doubt, except where otherwise provided section 12 of the Act continues to apply to all other fees or outlays.
- (5) Paragraph (6) applies where the Board has made an interim payment in accordance with this regulation to a solicitor who provided advice and assistance to a person, and at any time prior to or after such payment that person or any solicitor acting on that person’s behalf has, in respect of the same matter for which advice and assistance was provided—
- (a) received any expenses which (by virtue of a judgment or order of a court or an agreement or otherwise) are payable to that person; or
 - (b) recovered or preserved any property (of whatever nature and wherever situated), including that person’s rights under any settlement arrived at in connection with the matter in order to avoid or bring to an end any proceedings.
- (6) Where this paragraph applies, the Board may recover any sum paid out of the Fund to the solicitor in respect of the advice and assistance so given, from either—
- (a) the solicitor to whom the interim payment from the Fund was made; or
 - (b) the person to whom the advice and assistance was provided.
- (7) In any case to which paragraph (6) applies the sum recoverable by the Board shall be the amount of the interim payment made, less any amount which would have been properly payable by way of fees and outlays under section 12(3)(d) of the Act, taking into account the expenses or property referred to in paragraph (5).”

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

5.—(1) Regulation 4 (fixed payments allowable to solicitors) of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999(9) is amended as follows.

(2) In paragraph (5B), for “The amount payable” substitute “Except where paragraph (5C) applies, the amount payable”.

(3) After paragraph (5B) insert—

“(5C) This paragraph applies where during the emergency period the solicitor referred to in paragraph (5B)(a) appeared on behalf of the assisted person as a consequence of being instructed to do so by another solicitor who—

- (a) was instructed by the assisted person (whether or not an assisted person at that time); and

(8) 2020 asp 7.

(9) S.S.I. 1999/491, relevantly amended by S.S.I. 1999/48, S.S.I. 2011/162 and S.S.I. 2014/366.

- (b) has (or has had) a solicitor and client relationship with the accused that is demonstrable, to the satisfaction of the Board, by reference to circumstances apart from those relating solely to the appearance.

(5D) For the purposes of this regulation “emergency period” means the period beginning on 1 July 2020 and ending on the date on which Part 9 of schedule 4 of the Coronavirus (Scotland) Act 2020(10) expires in accordance with section 12 of that Act.”.

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

6.—(1) The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003(11) are amended as follows.

(2) In regulation 3 (miscellaneous proceedings)—

- (a) after paragraph (t) omit “and”,
- (b) after paragraph (u) for “.” substitute—
 - “; and
- (v) appeals—

- (i) against a decision taken under regulations made by the Scottish Ministers under paragraph 1(1) of schedule 19 of the Coronavirus Act 2020(12) to impose a special restriction or requirement on or in relation to a person; or
- (ii) under paragraph 38 of schedule 21 of the Coronavirus Act 2020 in relation to a requirement or restriction imposed by a public health officer under paragraph 35 of that schedule.”.

(3) In regulation 9 (prescribed proceedings)—

- (a) after paragraph (h) omit “and”,
- (b) after paragraph (i) for “.” substitute—
 - “; and
- (j) appeals—

- (i) against a decision taken under regulations made by the Scottish Ministers under paragraph 1(1) of schedule 19 of the Coronavirus Act 2020(13) to impose a special restriction or requirement on or in relation to a person; or
- (ii) under paragraph 38 of schedule 21 of the Coronavirus Act 2020 in relation to a requirement or restriction imposed by a public health officer under paragraph 35 of that schedule.”.

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

7.—(1) Regulation 7 (duty solicitors: persons prosecuted under summary procedure) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011(14) is amended as follows.

(2) In paragraph (5) for “Representation” substitute “Except as provided in paragraph (5A), representation”.

(3) After paragraph (5) insert—

(10) 2020 asp 7.

(11) S.S.I. 2003/179 relevantly amended by S.S.I. 2012/84, S.S.I. 2015/279 and S.S.I. 2017/291.

(12) 2020 c.7.

(13) 2020 c.7.

(14) S.S.I. 2011/163.

“(5A) For the duration of the emergency period representation by an appointed solicitor may be effected, from the appearance from custody onwards, through the services of another solicitor where—

- (a) the other solicitor is expressly authorised to act by the appointed solicitor or by a solicitor connected with the appointed solicitor’s firm; and
- (b) the other solicitor’s services are required because the appointed solicitor cannot attend personally due to—
 - (i) illness or incapacity;
 - (ii) the arising, after 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.

(5B) For the purposes of this regulation “emergency period” means the period beginning on 1 July 2020 and ending on the date on which Part 9 of schedule 4 of the Coronavirus (Scotland) Act 2020(15) expires in accordance with section 12 of that Act.”.

St Andrew’s House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

Draft Legislation: This is a draft item of legislation and has not yet been made as a Scottish Statutory Instrument. This draft has been replaced by a new draft, *The Legal Aid and Advice and Assistance (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020* ISBN 978-0-11-104558-9

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend a number of existing Regulations made under the Legal Aid (Scotland) Act 1986, to modify the provision of legal aid for the period during which the Coronavirus (Scotland) Act 2020 is in force.

Regulations 2 and 3 enable payments to be made from the Scottish Legal Aid Fund earlier than would otherwise be possible, to ensure access to funds for legal aid providers. The Civil Legal Aid (Scotland) (Fees) Regulations 1989 are amended to make provision for interim payments of fees for partially completed work in relation to defended civil actions in the Sheriff Court (regulation 2). The Criminal Legal Aid (Scotland) (Fees) Regulations 1989 are amended to provide that payment of counsel fees for separate preparation in respect of proceedings in the High Court of Justiciary (other than appeals) and the Sheriff Court may be made before the case to which the fee relates has been concluded (regulation 3).

Regulation 4 makes further provision in relation to interim payments provided for in the Coronavirus (Scotland) Act 2020, by amending the Advice and Assistance (Scotland) Regulations 1996 to provide that when assessing a claim for interim payment the Scottish Legal Aid Board need not take into account any property which may be recovered in the course of proceedings for the client to whom the advice and assistance has been provided. This regulation also makes provision for the recovery of interim sums paid out.

Regulation 5 amends the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999, in relation to the provisions in those Regulations which specify that the fee due will be halved where a duty solicitor makes an initial plea of not guilty on the instruction of another solicitor, and that solicitor later tenders a plea of guilty prior to trial. The Regulations are amended so that for the duration of the emergency period the fee is not halved for solicitors instructed by a person in receipt of legal aid with whom they have a pre-existing solicitor client relationship, meaning they will receive the full fee where they do not make an initial plea on their client's behalf in person.

Regulation 6 amends the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003, to provide for assistance by way of representation to be available to individuals in order to appeal against a special restriction or requirement imposed on them by virtue of the Coronavirus Act 2020.

Regulation 7 amends the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011, to provide that duty solicitors may represent persons prosecuted under summary procedure when authorised to do so by that person's appointed solicitor or a solicitor connected with the appointed solicitor's firm.

A Partial 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.