

*These draft Regulations supersede the draft of the same title which was laid before the Scottish Parliament on 4 May 2022 and published on 5 May 2022 (ISBN 978-0-11-105458-1). It is being issued free of charge to all known recipients of those draft Regulations.*

*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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**2022 No.**

## **LEGAL AID AND ADVICE**

### **The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2022**

*Made* - - - - 2022

*Coming into force* - - 1st October 2022

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 9(1), (2)(a), (dd) and (de), 12(3), 31(9), 33(2), (3)(b) and (f) 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.

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 Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2022 and come into force on 1 October 2022.

#### **Amendments to the Civil Legal Aid (Scotland) (Fees) Regulations 1989**

2. In schedule 6, chapter 2 (sheriff court civil fees (defended)) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989(2)—

- (a) in paragraph 24, omit “Except as provided for by paragraph 25 or where otherwise prescribed,”,

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(1) 1986 c. 47 (“the Act”). The functions of the Secretary of State under the Act were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c. 46). Section 9(2)(dd) and (de) were inserted by section 32 of the Access to Justice Act 1999 (c. 22). Section 33(3A) was inserted by section 51 of the Crime and Punishment (Scotland) Act 1997 (c. 48). The powers to make these Regulations are exercised together by virtue of section 33(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10). The Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.

(2) S.I. 1989/1490, relevantly amended by S.S.I. 2003/178 and S.S.I. 2020/191.

- (b) omit paragraph 25.

### **Amendments to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989**

**3.** In schedule 2 (fees of counsel) of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989(3)—

- (a) in paragraph 13(d), omit “, unless claimed during the emergency period”,  
 (b) in paragraph 22 (interpretation), omit the entry relating to “emergency period”.

### **Amendments to the Advice and Assistance (Scotland) Regulations 1996**

**4.** In regulation 16A of the Advice and Assistance (Scotland) Regulations 1996(4) (interim payment of fees and outlays during the emergency period)—

- (a) for the heading substitute “Interim payments”,  
 (b) for paragraph (1) substitute—  
     “(1) This regulation applies where a claim is made for interim payment under the Act.”,  
 (c) omit paragraph (2).

### **Amendments to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999**

**5.** In regulation 4 (fixed payments allowable to solicitors) of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999(5)—

- (a) in paragraph (5C), omit “during the emergency period”,  
 (b) omit paragraph (5D).

### **Amendments to 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(6) are amended as follows.

- (2) In regulation 3 (miscellaneous proceedings), omit paragraph (v).  
 (3) In regulation 9 (prescribed proceedings), omit paragraph (j).

### **Amendments to the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011**

**7.** In regulation 7 (duty solicitors: persons prosecuted under summary procedure) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011(7)—

- (a) in paragraph (2)(b)(i), for “(5)” substitute “(5A)”,  
 (b) omit paragraphs (5) and (5B),  
 (c) in paragraph (5A), for “For the duration of the emergency period, representation” substitute “Representation”,  
 (d) for paragraph (8) substitute—  
     “(8) Paragraph (7) does not apply in relation to—

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(3) S.I. 1989/1491, relevantly amended by S.S.I. 2005/113, S.S.I. 2005/656, S.S.I. 2012/276 and S.S.I. 2020/191.

(4) S.I. 1996/2447; regulation 16A was inserted by regulation 4 of S.S.I. 2020/191.

(5) S.S.I. 1999/491, relevantly amended by S.S.I. 2020/191.

(6) S.S.I. 2003/179, relevantly amended by S.S.I. 2020/191.

(7) S.S.I. 2011/163, relevantly amended by S.S.I. 2020/191.

- (a) proceedings before a court which has been designated as a youth court or a domestic abuse court by the sheriff principal;
- (b) persons to whom paragraph (2)(b)(ii) applies.”.

St Andrew’s House,  
Edinburgh  
Date

*Name*  
Authorised to sign by the Scottish Ministers

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## EXPLANATORY NOTE

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

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

The following regulations remove provisions inserted into legal aid and advice and assistance regulations on a temporary basis during the coronavirus emergency period (which for the purposes of the provisions amended by these Regulations ends on 30 September 2022, the date on which Part 9 of schedule 4 of the Coronavirus (Scotland) Act 2020 expires)—

- regulation 2 amends the Civil Legal Aid (Scotland) (Fees) Regulations 1989 to remove the provisions allowing the Scottish Legal Aid Board (“the Board”) to make payments during the emergency period of the amount of the fees which would be payable if the work in a case had been completed in its entirety;
- regulation 3 amends the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 to remove the exception that during the emergency period a fee for separate preparation may be payable prior to the conclusion of the case during the emergency period;
- regulation 6 amends the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 to remove the provision made for assistance by way of representation in relation to restrictions or requirements under the Coronavirus Act 2020, following the expiry of the relevant provisions in that Act.

The following regulations remove temporary changes put in place during the coronavirus emergency period and replace these with permanent provisions with equivalent effect—

- regulation 4 amends the Advice and Assistance (Scotland) Regulations 1996 to provide that when assessing a claim for interim payment under the Act the 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 and to make provision for the recovery of interim sums paid out. Temporary interim payment provisions in the Act expire on 30 September 2022, with replacement provisions with similar overall effect proposed for insertion into the Act by Scottish Parliament bill (see the Coronavirus (Recovery and Reform) (Scotland) Bill);
- regulation 5 amends the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 to remove the provision that the fee due in a case is 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;
- regulation 7(a) to (c) amend the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 (“the 2011 Regulations”) 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.

Regulation 7(d) amends the 2011 Regulations to provide that a person being prosecuted under summary procedure who has been liberated by police on undertaking to appear may appoint a solicitor of their choice to advise or act for them even where a duty solicitor is made available.

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.

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**Draft Legislation:** *This is a draft item of legislation. This draft has since been made as a Scottish Statutory Instrument:  
The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2022 No. 229*