

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

2023 No.

LEGAL AID AND ADVICE

The Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 4) Regulations 2023

Made - - - - 2023
Coming into force - - 15th November 2023

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 9(1) and (2)(a), (b), (dd), (e), 17(2B), 31(9), 33(2) and (3)(a), (b) and (f), 36(1) and (2)(a) and (b), and 42 of the Legal Aid (Scotland) Act 1986(1) and all other powers enabling them to do so. In accordance with section 37(2)(2) of that Act(3), 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. 4) Regulations 2023 and come into force on 15 November 2023.

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

2.—(1) Chapter 2 of schedule 6 (table of fees chargeable by solicitors for defended proceedings in the sheriff court (except where otherwise specified) and in the Sheriff Appeal Court) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989(4) is amended as follows.

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- (1) 1986 c. 47. Section 9(dd) was inserted by the Access to Justice Act 1999 (c. 22), section 32. Section 17(2B) was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c. 40) (“the 1990 Act”), section 74(1) and schedule 8, paragraph 36(6). Section 31(9) was amended by the 1990 Act, section 74(1) and schedule 8, paragraph 36(14). Section 36(2)(b) was amended by the Legal Aid Act 1988 (c. 34), section 44 and schedule 4 Part 1, paragraph 6 and by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3), section 23(9)(a)(iii). 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) Section 37(2) has been modified by schedule 3, paragraph 5 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (“ILRA”).
- (3) The powers to make these Regulations are exercised together by virtue of section 33(2) of ILRA. The Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.
- (4) S.I. 1989/1490. Relevant amending instruments are S.S.I. 2003/178, S.S.I. 2015/380 and S.S.I. 2023/178. The amendments made by S.S.I. 2023/178 come into force on 21st September 2023.

(2) In the table of fees, in the fourth column of paragraph 2A(a)(iii) (progress fees (Family and Civil Partnership Actions)), for “10” substitute “11”.

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⁽⁵⁾ is amended as follows.

(2) In the notes on the operation of schedule 2—

(a) in paragraph 3(c)—

(i) for “junior with leader” where it first, second, and third occurs substitute “junior as leader”,

(ii) for “senior junior” substitute “junior as leader”,

(b) in paragraph 16, for “1AA(c)” substitute “1AA(d)”,

(c) in paragraph 16A(1)—

(i) in head (c), for “; or” substitute “.”,

(ii) omit head (d),

(d) in paragraph 17(ab), omit “or other hearing where a prescribed fee is payable at the rate for trial,”,

(e) in paragraph 18, for sub-paragraph (d) substitute—

“(d) no fee is payable unless counsel was required to attend and remain available at court in case the trial proceeded that day.”.

(3) In Part 1 of the Table of Fees (Fees of Counsel for Proceedings in the High Court of Justiciary), omit “Offences under the 2000 Act” where it first occurs in each of—

(a) Chapter 1 (junior counsel), paragraph 3(a) (trial per day),

(b) Chapter 2 (senior counsel), paragraph 3(a) (trial per day).

(4) In Part 3 of the Table of Fees (Fees of Counsel for Proceedings in the Sheriff and Justice of the Peace Court), omit “Offences under the 2000 Act” where it first occurs in each of—

(a) Chapter 1 (junior counsel), paragraph 2(a) (trial per day),

(b) Chapter 2 (senior counsel), paragraph 2(a) (trial per day).

Amendment of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993

4. In regulation 3(c) (financial limit) of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993⁽⁶⁾—

(a) in each of sub-paragraphs (xii) to (xiv) and (xvii), for “advice” substitute “assistance”,

(b) in sub-paragraph (xvi)—

(i) for “£225.00” substitute “£250.00”,

(ii) for “£550.00” substitute “£600.00”,

(c) after sub-paragraph (xvi), insert—

“(xvii) where the assistance by way of representation relates to an application for a warrant of further detention under paragraph 29 of schedule 8 of the Terrorism

(5) S.I. 1989/1491. Relevant amending instruments are S.S.I. 2005/113, S.S.I. 2005/656, S.S.I. 2007/180, S.S.I. 2012/276 and S.S.I. 2023/178. The amendments made by S.S.I. 2023/178 come into force on 21st September 2023.

(6) S.I. 1993/3187. Regulation 3 was substituted by S.S.I. 2007/248 and paragraph (c) of that regulation was inserted by S.S.I. 2008/251 and relevantly amended by S.S.I. 2021/55.

Act 2000, or for an extension of the period specified in such a warrant under paragraph 36 of that schedule, the sum of £385,”

(d) after sub-paragraph (xvii), insert—

“(xviii) where the advice and assistance is for personal attendance by a solicitor and the client has exercised the right to consult a solicitor under paragraph 15(6) of schedule 6 of the National Security Act 2023(7), the sum of £250.00 unless as part of that consultation the solicitor is present at an interview carried out in connection with the client’s detention under section 27 of that Act, in which case the sum of £600.00,

(xix) where the assistance by way of representation relates to an application for a warrant of further detention under paragraph 37 of schedule 6 of the National Security Act 2023, or for an extension of the period specified in such a warrant under paragraph 44 of that schedule, the sum of £385.”.

Amendment of the Advice and Assistance (Scotland) Regulations 1996

5.—(1) The Advice and Assistance (Scotland) Regulations 1996(8) are amended as follows.

(2) In regulation 4A (applications for advice and assistance: further provision), after paragraph (c) insert—

“(d) a person who is detained under section 27 of the National Security Act 2023.”.

(3) In regulation 14A(4) (change of solicitor etc.)—

(a) after “2016,” omit “or”, and

(b) after “2000” insert “, or paragraphs 37 or 44 of schedule 6 of the National Security Act 2023”.

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

“(e) Part VII of schedule 3, the reference to Part I of schedule 3 in paragraph (1)(a) above should be read as a reference to Part VII of schedule 3,

(f) Part VIII of schedule 3, the reference to Part II of schedule 3 in paragraph (1)(a) above should be read as a reference to Part VIII of schedule 3.”.

(5) In schedule 3 (table of fees allowable to solicitors)—

(a) for the table of fees in Part V (assistance by way of representation for proceedings under schedule 8 of the Terrorism Act 2000) substitute—

“Paragraph 29 (application for warrant of further detention) or 36 (application for extension of warrant of further detention) of schedule 8 of the Terrorism Act 2000

(a) Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing.	£62.59
(b) Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing.	£93.87
(c) Additional fee, excluding travel, for second or subsequent court hearing, per hearing.	£62.59

(7) 2023 c. 32.

(8) S.I. 1996/2447. Regulation 4A was inserted by S.S.I. 2021/55. Regulation 14A was inserted by S.S.I. 2008/240. Other relevant amendments were made by S.S.I. 2017/466 and S.S.I. 2021/55.

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“Paragraph 29 (application for warrant of further detention) or 36 (application for extension of warrant of further detention) of schedule 8 of the Terrorism Act 2000

- (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. £7.28”
- (b) in the table of fees in Part VI (advice and assistance in relation to section 41 and schedule 7 of the Terrorism Act 2000 and Part 1 of schedule 8 of the Counter-Terrorism and Border Security Act 2019), in paragraph 2 for “these regulations” substitute “this schedule”,
- (c) after Part VI insert—

“PART VII

TABLE OF FEES ALLOWABLE TO SOLICITORS FOR ASSISTANCE BY WAY OF REPRESENTATION FOR PROCEEDINGS UNDER SCHEDULE 6 OF THE NATIONAL SECURITY ACT 2023

A reference in this Table of Fees to a paragraph is a reference to a paragraph of schedule 6 of the National Security Act 2023.

Paragraph 37 (application for warrant of further detention) or 44 (application for extension of warrant of further detention)	
(a)	Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing. £62.59
(b)	Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing. £93.87
(c)	Additional fee, excluding travel, for second or subsequent court hearing (including a hearing in relation to an application for an order under paragraph 42 (information)), per hearing. £62.59
(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. £7.28

PART VIII

TABLE OF FEES ALLOWABLE TO SOLICITORS FOR ADVICE AND ASSISTANCE IN RELATION TO SECTION 27 AND SCHEDULE 6 OF THE NATIONAL SECURITY ACT 2023

In this Table of Fees “the 2023 Act” means the National Security Act 2023.

- (a) Where a client to whom paragraph 15(6) of schedule 6 of the 2023 Act applies has exercised their

right to consult a solicitor—

(i) if the solicitor attends the consultation in person, the fee under paragraph 3

(ii) if the solicitor attends the consultation other than in person, the fee under paragraph 4

(b) Where a client's detention under section 27 of the 2023 Act is reviewed in accordance with paragraph 29 of schedule 6 of that Act and on the instruction of that client the solicitor makes representations to the review officer in accordance with paragraph 34 of that schedule of that Act—

(i) if the solicitor makes representations in person—

(aa) where the solicitor was already in attendance in person at the time at which they were instructed to make the representations, an additional fee at the rate specified in paragraph 3(b)(ii);

(bb) where the solicitor was not already in attendance in person at the time at which they were instructed to make the representations, the fee under paragraph 3.

(ii) where the solicitor makes the

representations other than in person, the fee under paragraph 4

(c) where a fee is claimed by virtue of this paragraph, a solicitor can only claim the higher rate, instead of the standard rate, if consultation takes place wholly or partly during an unsocial time.

2. In this part—

“unsocial time” has the meaning given in Part IV of this schedule

3. Inclusive fee, excluding travel, for personal attendance by a solicitor where the client consults the solicitor in person—

<i>Standard Rate</i>	<i>Higher Rate</i>
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(a) where aggregate time engaged or waiting is 2 hours or less; or

£143.93	£ 191.42
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(b) where aggregate time engaged or waiting is more than 2 hours—

(i) time engaged or waiting up to and including 4 hours; and	£250.29	£332.89
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(ii) for each additional hour time engaged or waiting over 4 hours (or part thereof)	£62.59	£83.24
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4. Inclusive fee for a consultation conducted by a solicitor, otherwise than in person

£37.56	£49.95
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5. Fee for travelling time in relation to personal attendance by a solicitor—

(a) for travel time engaged of 2 hours or less, per half hour (or part thereof); and	£14.53	£19.33
(b) for travel time engaged of more than 2 hours, where authorised by the Board in advance, per half hour (or part thereof).	£14.53	£19.33”

Amendment of the Civil Legal Aid (Scotland) Regulations 2002

6.—(1) The Civil Legal Aid (Scotland) Regulations 2002(9) are amended as follows.

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

““carer support payment” means carer’s assistance given in accordance with the Carer’s Assistance (Carer Support Payment) (Scotland) Regulations 2023(10).”

(3) In regulation 33 (payments out of property recovered or preserved: exceptions), after subparagraph (a)(xxiv) insert—

“(xxv) by way of a carer support payment.”

(4) In schedule 2 (rules for computing disposable income), after paragraph 7(n), insert—

“(o) any carer support payment.”

(5) In schedule 3 (rules for computing disposable capital), after paragraph 8(j), insert—

“(k) any carer support payment.”

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(11) are amended as follows.

(2) In regulation 3(n) (application of Part 2 of the Act: miscellaneous proceedings), after “2000” insert “, or under paragraph 37 or 44 of schedule 6 of the National Security Act 2023”.

(3) In regulation 9(c) (prescribed proceedings), after “2000” insert “, or under paragraph 37 or 44 of schedule 6 of the National Security Act 2023”.

(9) S.S.I. 2002/494. Relevant amending instruments are S.S.I. 2023/11 and S.S.I. 2023/178. The amendments made by S.S.I. 2023/178 come into force on 21st September 2023.

(10) S.S.I. 2023/XXX.

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

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

8. In regulation 7(5) (single payment in summary criminal cases) of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008**(12)**—

- (a) in sub-paragraph (ab), after head (ii), insert—
 - “(iii) paragraph 15(6) of schedule 6 of the National Security Act 2023 applies,”
- (b) in sub-paragraph (ac), after “2000” insert “, or under paragraph 37 or 44 of schedule 6 of the National Security Act 2023,”.

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

9. In regulation 3 (duty solicitors: advice for suspects) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011**(13)**—

- (a) omit “or”,
- (b) after “(entitlement to consult a solicitor)” where it second occurs, insert “, or paragraph 15(6) of schedule 6 of the National Security Act 2023 (entitlement to consult a solicitor)”.

Amendment of the Children’s Legal Assistance (Scotland) Regulations 2013

10.—(1) The Children’s Legal Assistance (Scotland) Regulations 2013**(14)** are amended as follows.

- (2) In regulation 2(1) (interpretation), after the definition of “assisted person” insert—
 - ““carer support payment” means carer’s assistance given in accordance with the Carer’s Assistance (Carer Support Payment) (Scotland) Regulations 2023,”.
- (3) In schedule 1 (assessment of disposable income for the purposes of children’s legal aid), after paragraph 5(p), insert—
 - “(q) any carer support payment.”.
- (4) In schedule 2 (assessment of disposable capital for the purposes of children’s legal aid), after paragraph 8(j), insert—
 - “(k) any carer support payment.”.

St Andrew’s House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

(12) S.S.I. 2008/240. Relevant amending instruments are S.S.I. 2017/466 and S.S.I. 2021/55.
(13) S.S.I. 2011/163. Relevant amending instruments are S.S.I. 2017/466 and S.S.I. 2021/55.
(14) S.S.I. 2013/200. Relevant amending instruments are S.S.I. 2023/11 and S.S.I. 2023/178.

EXPLANATORY NOTE

(This note is not part of the Regulations)

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

Regulations 2 and 3 make minor amendments and corrections to the Civil Legal Aid (Scotland) (Fees) Regulations 1989 and the Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

Regulation 4 amends the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993 to specify the financial limit for advice and assistance provided by a solicitor to a person detained under section 27 of the National Security Act 2023 (“the 2023 Act”). A solicitor requires approval from the Scottish Legal Aid Board before giving advice and assistance where it appears that the cost of doing so will exceed this limit.

Regulation 5 makes amendments to the Advice and Assistance (Scotland) Regulations 1996:

- regulation 4A is amended to exclude applications for advice and assistance in respect of detention under section 27 of the 2023 Act from the requirement that the application be signed by the client, or another person on their behalf.
- regulation 14A is amended to provide that the requirements in the event of a change of solicitor set out in that regulation do not apply in respect of proceedings under paragraphs 37 or 44 of schedule 6 of the 2023 Act (relating to warrants for further detention or extension of further extension)
- regulation 17 is amended to specify which tables of fees are to apply in the calculation of fees and outlays in relation to detention under section 27 of the 2023 Act.
- fee tables are inserted into schedule 3 setting out fees for advice and assistance in relation to detention under section 27 and schedule 6 of the 2023 Act, and assistance by way of representation (“ABWOR”) for proceedings under paragraphs 37 or 44 of schedule 6 of that Act, and simplifying the fees table for schedule 8 of the Terrorism Act 2000.

Regulation 6 amends the Civil Legal Aid (Scotland) Regulations 2002. Regulation 33 is amended to provide that carer’s assistance given in accordance with the Carer’s Assistance (Carer Support Payment) (Scotland) Regulations 2023 (“the 2023 Regulations”) is excluded from bearing fees and outlays when forming part of any recovered or preserved property in proceedings. Schedules 2 and 3 are amended so such assistance is to be disregarded by the Board in the assessment and computation of the disposable capital and income of an applicant for civil legal aid.

Regulation 7 amends the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. Regulation 3 is amended to provide that ABWOR is available for proceedings under paragraph 37 or 44 of schedule 6 of the 2023 Act. Regulation 9 is amended to provide that ABWOR in such proceedings is available without reference to the financial limits under section 8 (availability of advice and assistance), and that section 11(2) of the 1986 Act (client’s contributions) does not apply to such assistance.

Regulation 8 amends regulation 7 of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 to provide that the restrictions on entitlement to payment in that regulation do not apply to separate payments in respect of advice and assistance provided to a person entitled to consult a solicitor under paragraph 15(6) of schedule 6 of the 2023 Act.

Regulation 9 amends regulation 3 of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 to provide that where the Board has arranged for a duty solicitor to be available

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to a person entitled to consult a solicitor under paragraph 15(6) of schedule 6 of the 2023 Act, that person is not entitled to select a solicitor themselves, and the advice and assistance must only be provided by the duty solicitor provided.

Regulation 10 amends the Children's Legal Assistance (Scotland) Regulations 2013 to make similar provision to regulation 6 to disregard carer's assistance given in accordance with the 2023 Regulations from the computation of the disposable capital and income of an applicant for children's legal aid.

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.