

**2003 No. 179**

**LEGAL AID AND ADVICE**

**The Advice and Assistance (Assistance by Way of  
Representation) (Scotland) Regulations 2003**

*Made*

*7th March 2003*

*Coming into force*

*24th March 2003*

The Scottish Ministers, in exercise of the powers conferred by sections 9 and 37(1) of the Legal Aid (Scotland) Act 1986(a), and of all other powers enabling them in that behalf, hereby make the following Regulations, a draft of which has, in accordance with section 37(2) of that Act, been laid before and approved by resolution of the Scottish Parliament:

**Citation, commencement and interpretation**

1.—(1) These Regulations may be cited as the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003 and shall come into force on 24th March 2003.

(2) In these Regulations—

“the Act” means the Legal Aid (Scotland) Act 1986;

“adjudicator” means an adjudicator appointed by virtue of Schedule 3 to the 1999 Act(b) and includes—

(a) an adjudicator who acts as a special adjudicator for the purposes of section 8 of the Asylum and Immigration Appeals Act 1993(c); and

(b) an adjudicator who acts as a special adjudicator for the purposes of section 3 of the Asylum and Immigration Act 1996(d);

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995(e);

“the 1999 Act” means the Immigration and Asylum Act 1999(f);

“the chairman of a tribunal”, in relation to a Parole Board case, has the same meaning as in Rule 2(1) of the Parole Board (Scotland) Rules 1993(g);

“disciplinary proceedings”, in relation to a prisoner, means an inquiry before a governor held in pursuance of rules 97 and 98 of the Prisons and Young Offenders Institutions (Scotland) Rules 1994(h) in respect of a breach of discipline which the prisoner is alleged to have committed;

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(a) 1986 c.47; section 9(2)(dd) and (de) was inserted by the Access to Justice Act 1999 (c.22), section 32. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

(b) By virtue of article 3 of S.I. 2000/168, “adjudicator” and the “Immigration Appeal Tribunal” for the purposes of the Immigration and Asylum Act 1999 (c.33) are to be treated as the adjudicators and the Immigration Appeal Tribunal for the purposes of the previous Immigration Acts as defined in that article.

(c) 1993 c.23; section 8 was amended by the Asylum and Immigration Act 1996 (c.49), Schedule 3, paragraph 2.

(d) 1996 c.49.

(e) 1995 c.46.

(f) 1999 c.33.

(g) S.I. 1993/2225, amended by S.I. 1997/2317 and 1999/1116.

(h) S.I. 1994/1931; relevant amending instruments are S.I. 1996/32, 1997/2007 and 1998/1589.

“employment tribunal” means a tribunal established under section 1 of the Employment Tribunals Act 1996(a);

“governor” means any of the following persons:–

- (a) the person who is appointed by the Scottish Ministers under section 3(1) of the Prisons (Scotland) Act 1989(b) as the Governor-in-Charge of a prison;
- (b) the officer who is the Deputy Governor of a prison;
- (c) any officer who is appointed to manage a function or group of functions within a prison and is known as a Unit Manager and who has been authorised to adjudicate disciplinary proceedings; and
- (d) where there is no officer as mentioned in sub-paragraphs (a) to (c) above present for the time being in a prison, the most senior officer who is present in the prison at that time.

“Immigration Appeal Tribunal” means the Tribunal continued in force by virtue of section 56(1) of the 1999 Act;

“officer” means an officer of the prison appointed by the Scottish Ministers;

“Parole Board case” means a case of a prisoner to which Part IV of the Parole Board (Scotland) Rules 1993 applies;

“prison” has the same meaning as in section 43(1) of the Prisons (Scotland) Act 1989(c) and also includes a young offenders institution;

“prisoner”–

- (a) in relation to disciplinary proceedings, has the same meaning as in section 43(1) of the Prisons (Scotland) Act 1989 and also includes a person serving a sentence of detention in a young offenders institution; and
- (b) in relation to a Parole Board case, has the same meaning as in Rule 2(1) of the Parole Board (Scotland) Rules 1993;

“tribunal” in relation to a Parole Board case, means a tribunal formed under Rule 18 of the Parole Board (Scotland) Rules 1993, and includes a preliminary hearing before the chairman of a tribunal under Rule 19 of those Rules; and

“young offenders institution” has the same meaning as in section 19(1) of the Prisons (Scotland) Act 1989.

## **Revocation**

2. The Regulations specified in the Schedule to these Regulations are hereby revoked.

## **Application of Part II of the Act to assistance by way of representation: miscellaneous proceedings**

3. Part II of the Act shall apply to assistance by way of representation in relation to–
  - (a) summary criminal proceedings;
  - (b) petitions for the appointment of an executor to a deceased person under the Act of Sederunt (Confirmation of Executors) 1964(d);
  - (c) proceedings under section 17 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981(e);
  - (d) proceedings under Part V of the Mental Health (Scotland) Act 1984(f);

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(a) 1996 c.17. Section 1 of the Employment Rights (Dispute Resolution) Act 1998 (c.8) provides that the Industrial Tribunals Act 1996 may be cited as the Employment Tribunals Act 1996, and substitutes the term “industrial tribunal” with “employment tribunal” wherever it occurs in any enactment.

(b) 1989 c.45. Section 3(1) was modified by the Criminal Justice and Public Order Act 1994 (c.33), section 110 and amended by the Scotland Act 1998 (c.46), Schedule 8, paragraph 27 and the Crime and Punishment (Scotland) Act 1997 (c.48), section 43.

(c) Section 43(1) was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40), Schedule 4 and the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9), Schedule 5.

(d) S.I. 1964/1143.

(e) 1981 c.59; section 17 was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40), Schedule 4, paragraph 37.

(f) 1984 c.36.

- (e) petitions by a debtor for the sequestration of that debtor's estate under section 5(2)(a) of the Bankruptcy (Scotland) Act 1985(a);
- (f) disciplinary proceedings before a governor in relation to a prisoner, where the prisoner has been permitted by the governor to be legally represented;
- (g) proceedings in Parole Board cases;
- (h) applications under section 42 of the Road Traffic Offenders Act 1988(b) for the removal of a disqualification;
- (i) proceedings under section 66(6) of the Criminal Justice and Public Order Act 1994(c) for the return of sound equipment;
- (j) civil proceedings arising from a failure by a person to—
  - (i) pay a fine or other sum; or
  - (ii) obey an order of the court;
- (k) applications, by someone other than the accused, under section 31(6) of the Criminal Law (Consolidation) (Scotland) Act 1995(d);
- (l) proceedings before an adjudicator or the Immigration Appeal Tribunal;
- (m) proceedings before an employment tribunal;
- (n) proceedings in connection with an application for a warrant of further detention, or for an extension of such a warrant, made to the sheriff under paragraph 29 or 36 of Schedule 8 to the Terrorism Act 2000(e);
- (o) proceedings before a hearing established under—
  - (i) paragraph 12 or paragraph 59 of the schedule to the Convention Rights (Compliance) (Scotland) Act 2001(f); or
  - (ii) section 10(2F) of the Prisoners and Criminal Proceedings (Scotland) Act 1993(g);
- (p) proceedings under section 5 of the Protection from Abuse (Scotland) Act 2001(h); and
- (q) proceedings before the VAT and Duties tribunals for Scotland(i) which consist of an appeal against a penalty imposed under—
  - (i) section 60 of the Value Added Tax Act 1994(j); or
  - (ii) section 8 of the Finance Act 1994(k).

**Application of Part II of the Act to assistance by way of representation: proceedings under the Criminal Procedure (Scotland) Act 1995**

4.—(1) Any reference in this regulation to a numbered section, paragraph or Schedule is to a section, paragraph or Schedule bearing that number in the 1995 Act.

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(a) 1985 c.66; section 5(2) was substituted by the Bankruptcy (Scotland) Act 1993 (c.6), section 3(2).  
 (b) 1988 c.53; section 42 was amended by the Road Traffic Act 1991 (c.40), Schedule 4, paragraph 98, and S.I. 1990/144, 1996/2824 and 1999/2864.  
 (c) 1994 c.33.  
 (d) 1995 c.39.  
 (e) 2000 c.11.  
 (f) 2001 asp 7.  
 (g) 1993 c.9; section 10(2F) was inserted by section 3(1)(b) of the Convention Rights (Compliance) (Scotland) Act 2001.  
 (h) 2001 asp 14.  
 (i) The VAT and duties tribunals for Scotland are constituted in accordance with the Value Added Tax Act 1994 (c.23), Schedule 12, paragraph 1.  
 (j) 1994 c.23.  
 (k) 1994 c.9.

- (2) Part II of the Act shall apply to assistance by way of representation in relation to proceedings—
- (a) under section 232(a) in relation to failure to comply with the requirements of a probation order;
  - (b) under section 233(b) in relation to the conviction of a probationer by a court in Great Britain of an offence committed during his or her probation period;
  - (c) under section 239(4) to (6) in relation to failure to comply with the requirements of a community service order;
  - (d) under section 240(1) and (3) in relation to amendment or revocation of a community service order;
  - (e) under paragraph 4 of Schedule 7 in relation to failure to comply with the requirements of a supervised attendance order;
  - (f) under paragraph 5(1) and (3) of Schedule 7 in relation to amendment or revocation of a supervised attendance order;
  - (g) under section 234A(6)(c) in relation to revocation or variation of a non-harassment order;
  - (h) under section 234E, 234F or 234G(d) in relation to the variation or revocation of a drug treatment and testing order, the review of a drug treatment and testing order, or, as the case may be, the failure to comply with any requirement of a drug treatment and testing order; and
  - (i) under section 245E or 245F(e) in relation to the variation or revocation of a restriction of liberty order, or, as the case may be, the failure to comply with any of the requirements of a restriction of liberty order.
- (3) Sub-paragraphs (a), (b), (c), (d), (e), (f), (h) and (i) of paragraph (2) of this regulation shall not apply to proceedings before a court which has been designated as a drug court by the sheriff principal.

**Application of Part II of the Act to assistance by way of representation: proceedings under the Proceeds of Crime (Scotland) Act 1995 and the Proceeds of Crime Act 2002**

5.—(1) Any reference in paragraph (2)(a) to (h) to a numbered section is to a section bearing that number in the Proceeds of Crime (Scotland) Act 1995(f).

- (2) Part II of the Act shall apply to assistance by way of representation in relation to—
- (a) applications under section 5(3)(g) in relation to an application for property not to be treated as a gift;
  - (b) appeals under section 5(4) in relation to an appeal against a refusal of an application under section 5(3);
  - (c) applications under section 6(3) in relation to an application for property not to be treated as an implicative gift;
  - (d) appeals under section 6(4) in relation to an appeal against a refusal of an application under section 6(3);
  - (e) applications, by someone other than the accused, under section 18(7) in relation to a discharge or variation of an order under section 18(2);
  - (f) applications under section 25(h) in relation to a recall or variation of a suspended forfeiture order or section 26 in relation to property wrongly forfeited: return or compensation;
  - (g) appeals under section 27 in relation to an appeal against a court decision under section 25(1) or 26(1);

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(a) Section 232 was amended by the Crime and Punishment (Scotland) Act 1997 (c.48), Schedule 1, paragraph 21 and the Crime and Disorder Act 1998 (c.37), Schedule 6, paragraph 2.

(b) Section 233 was amended by the Crime and Punishment (Scotland) Act 1997 (c.48), section 26 and Schedule 1, paragraph 1.

(c) Section 234A was inserted by the Protection from Harassment Act 1997 (c.40), section 11.

(d) Sections 234E to 234G were inserted by the Crime and Disorder Act 1998 (c.37), sections 92 and 93.

(e) Sections 245E and 245F were inserted by the Crime and Punishment (Scotland) Act 1997 (c.48), section 5.

(f) 1995 c.43.

(g) Sections 5, 6 and 18 were modified by S.I. 1999/673.

(h) Sections 25, 26, 27 and 45 were modified by S.I. 1999/675.

- (h) applications under section 45(2)(b) in relation to the disposal of a family home where representations are made to the court by someone other than the accused; and
- (i) representations made to the court under section 92 of the Proceeds of Crime Act 2002(a) by any person, other than the accused, who is likely to be affected by a confiscation order.

### **Summary criminal proceedings**

**6.**—(1) The assistance by way of representation which may be provided under Part II of the Act in relation to summary criminal proceedings shall be representation of an accused person who is not in custody—

- (a) at any diet (other than a diet which has been preceded by a plea of not guilty) at which a plea to the competency or relevancy of the complaint or proceedings, or a plea in bar of trial, is tendered on the accused person's behalf, and thereafter until that plea has been determined by the court and any related appeal to the High Court of Justiciary under section 174(1) of the 1995 Act has been disposed of or withdrawn;
- (b) at any diet (other than a diet which has been preceded by a plea of not guilty) at which a question within the meaning of rule 31.1(1) of the Act of Adjournal (Criminal Procedure Rules) 1996(b) is raised and thereafter until that question has been determined by the court;
- (c) at any diet at which there is tendered, on behalf of an accused who has not previously tendered a plea of not guilty, a plea of guilty to the charges against the accused, or a plea of guilty to part thereof, which partial plea is accepted by the prosecutor, and thereafter until the case has been finally disposed of;
- (d) at any diet at which the court is considering the accused's plea of guilty to the charges and where there has been no change of plea, and thereafter until final disposal of the case;
- (e) at any diet at which the court is considering the accused's changed plea of guilty to the charges, provided that no application for criminal legal aid has been made, and thereafter until final disposal of the case; and
- (f) at any diet where the judge orders a proof in mitigation, and thereafter until final disposal of the case.

**7.**—(1) The assistance by way of representation described in regulation 6(1)(a) and (b) above shall be provided under Part II of the Act only where the solicitor to whom application has been made is satisfied that—

- (a) the offence is such that if proved it is likely that the court will impose a sentence which would deprive the applicant of liberty or lead to loss of the applicant's livelihood;
- (b) it is in the interests of justice to tender the plea or, as the case may be, raise the question; and
- (c) it is reasonable in the particular circumstances of the case that assistance by way of representation be made available.

(2) The assistance by way of representation described in regulation 6(1)(c), (d), (e) and (f) above shall be provided under Part II of the Act only where the solicitor to whom application has been made is satisfied either—

- (a) that it is likely that the court will impose a sentence which would deprive the applicant of liberty or lead to loss of the applicant's livelihood; or
- (b) that the applicant is unable to understand the proceedings or is unable to make his or her own plea in mitigation because of age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.

### **Petitions for the appointment of an executor**

**8.** The assistance by way of representation which may be provided under Part II of the Act in relation to petitions for the appointment of an executor shall be for representation of the petitioner in all stages of an unopposed petition until the petitioner be decerned executor and extract decree dative obtained.

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(a) 2002 c.29.

(b) S.I. 1996/513; rule 31.1 was amended by S.I. 1999/1282.

### **Prescribed proceedings**

**9.** In relation to the following, assistance by way of representation shall be available without reference to the financial limits under section 8 of the Act (availability of advice and assistance), and section 11(2) of the Act (client's contributions) shall not apply as respects assistance by way of representation:—

- (a) proceedings under section 17 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
- (b) proceedings under Part V of the Mental Health (Scotland) Act 1984;
- (c) proceedings in connection with an application for a warrant of further detention, or for an extension of such a warrant, made to the sheriff under paragraph 29 or 36 of Schedule 8 to the Terrorism Act 2000;
- (d) proceedings before a hearing established under—
  - (i) paragraph 12 or paragraph 59 of the schedule to the Convention Rights (Compliance) (Scotland) Act 2001; or
  - (ii) section 10(2F) of the Prisoners and Criminal Proceedings (Scotland) Act 1993; and
- (e) proceedings under section 5 of the Protection from Abuse (Scotland) Act 2001.

### **Disciplinary proceedings**

**10.** The assistance by way of representation which may be provided under Part II of the Act in relation to disciplinary proceedings shall be for representation of the prisoner at all stages of the proceedings before the governor.

### **Parole Board cases**

**11.** The assistance by way of representation which may be provided under Part II of the Act in relation to a Parole Board case shall be for representation of the prisoner at all stages of the proceedings before a tribunal relating to that case.

### **Civil proceedings where there is a risk of imprisonment**

**12.** The assistance by way of representation described in regulation 3(j) shall be provided under Part II of the Act only where the solicitor to whom application has been made is satisfied that—

- (a) it is reasonable in the particular circumstances of the case that assistance by way of representation be made available; and
- (b) it is likely that the court will deprive the applicant of his or her liberty.

### **Assistance by way of representation requiring approval of the Board**

**13.—(1)** The approval of the Board shall be required as a pre-condition of the provision of assistance by way of representation in relation to the proceedings described in regulations 3(h), (k), (m) and (q) and 5 above.

(2) The Board shall only approve the provision of assistance by way of representation in relation to the proceedings described in regulation 3(m) where it is satisfied that—

- (a) the case is arguable;
- (b) it is reasonable in the particular circumstances of the case that assistance by way of representation be made available; and
- (c) the case is too complex to allow the applicant to present it to a minimum standard of effectiveness in person.

(3) The factors to be taken into account by the Board in determining whether paragraph (2)(c) above applies shall include—

- (a) the determination of the issue may involve procedural difficulty or consideration of a substantial question of law, or of evidence of a complex or difficult nature;

(b) the applicant may be unable to understand the proceedings or to state the applicant's own case because of age, inadequate knowledge of English, mental illness, other mental or physical disability, or otherwise.

(4) The Board shall only approve the provision of assistance by way of representation in relation to the proceedings described in regulation 3(q) where it is satisfied that in all the circumstances of the case it is—

(a) in the interests of justice; and

(b) reasonable,

that assistance by way of representation be made available.

(5) 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 (4)(a) that assistance by way of representation be made available shall include the factors set out at paragraph (3)(a) and (b).

St Andrew's House,  
Edinburgh  
7th March 2003

*JAMES WALLACE*  
A member of the Scottish Executive

SCHEDULE  
REGULATIONS REVOKED

<i>Title</i>	<i>Reference</i>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997	S.I. 1997/3070
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1998	S.I. 1998/972
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1999	S.I. 1999/214
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2000	S.S.I. 2000/109
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2001	S.S.I. 2001/2
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 2) Regulations 2001	S.S.I. 2001/43
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No. 3) Regulations 2001	S.S.I. 2001/382
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 2002	S.S.I. 2002/37

## **EXPLANATORY NOTE**

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

These Regulations consolidate with amendments and revoke the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997 and subsequent amending instruments.

The main amendments provide for assistance by way of representation to be made available for certain proceedings–

before the VAT and Duties tribunals for Scotland, where the Scottish Legal Aid Board considers that this is reasonable and in the interests of justice (regulations 3(q) and 13(4)); and

relating to confiscation orders under the Proceeds of Crime Act 2002 (regulation 5(2)(i)).

The Regulations also make various minor and drafting amendments.





