



# Crime and Punishment (Scotland) Act 1997

## 1997 CHAPTER 48

### PART V

#### CRIMINAL LEGAL ASSISTANCE

#### 49 Criminal legal assistance

After Part IV of the 1986 Act there shall be inserted the following Part—

#### “PART IVA

#### CRIMINAL LEGAL ASSISTANCE

#### *Registration*

#### **25A Criminal Legal Assistance Register**

- (1) The Board shall, in accordance with the provisions of this section, establish and maintain a Criminal Legal Assistance Register (“the Register”) of—
  - (a) solicitors who are eligible to provide criminal legal assistance; and
  - (b) subject to subsection (4) below, the firms with which the solicitors mentioned in paragraph (a) above are connected.
- (2) A sole solicitor who wishes to provide criminal legal assistance shall require to be registered both as a solicitor and as a firm.
- (3) Only those solicitors whose names appear on the Register may provide criminal legal assistance; and, subject to subsection (4) below, a solicitor may provide criminal legal assistance only when working in the course of a connection with a registered firm.

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- (4) A solicitor employed by the Board under section 28A of this Act shall require to be registered, and the entry relating to his name on the Register shall include a note that he is so employed; but the Board shall not be regarded as a firm for the purposes of this section, and shall not itself require to be registered.
- (5) An application for entry on the Register shall be made in such form as the Board may determine, and shall be accompanied by such documents as the Board may specify, which shall include, in the case of a solicitor, a copy of his practising certificate.
- (6) Before making any decisions as to the matters mentioned in subsection (5) above the Board shall—
  - (a) send to the Law Society and to such other persons and bodies as it considers appropriate a draft of its proposals in that regard, inviting their comments on those proposals within such period, being not less than 8 weeks from the date on which the draft is sent, as it may specify; and
  - (b) consider any such comments timeously received by it,but, where it amends those proposals in the light of any such comments, it shall not be required to re-intimate the amended proposals to any of those who were invited to comment.
- (7) Subject to subsection (15) below, where a solicitor is connected with a firm the Board shall not consider his application unless the firm—
  - (a) is already registered; or
  - (b) has also applied for registration.
- (8) On receipt of an application the Board shall make such enquiries as it thinks appropriate for the purpose of determining whether the applicant complies with the relevant provisions of the code; and it may for that purpose use the powers conferred on it by section 35A of this Act.
- (9) Subject to subsection (10) below, where the Board is satisfied that an applicant complies with the code and, in the case of a solicitor, is not otherwise disqualified from providing criminal legal assistance, it shall make the appropriate entry on the Register.
- (10) Subject to subsection (15) below, where a solicitor is connected with a firm, the Board shall not enter his name on the Register unless the firm's name is already entered on the Register.
- (11) Where a solicitor is connected with a firm or firms, the name or names of which appear on the Register, the entry relating to that solicitor shall include the name of that firm or those firms.
- (12) Where the Board decides to refuse an application it shall forthwith intimate that decision to the applicant, and shall as soon as practicable thereafter send him or them, by recorded delivery, a written note of its reasons.
- (13) An applicant aggrieved by a decision of the Board to refuse registration may, within 21 days of the receipt of the notification of the Board's reasons under subsection (12) above, appeal to the Court of Session against that decision.

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- (14) An appeal under subsection (13) above may be on questions of both fact and law and the court, after hearing such evidence and representations as it considers appropriate, may make such order as it thinks fit.
- (15) Where a solicitor who is seeking registration, or is registered, is connected with more than one firm the requirements of subsections (7) and (10) above shall be satisfied if one of those firms has applied for registration or, as the case may be, is registered.

### *Code of practice*

#### **25B Code of practice in relation to criminal legal assistance**

- (1) The Board shall prepare a draft code of practice in relation to the carrying out by solicitors of their functions with regard to the provision of criminal legal assistance and, without prejudice to the generality of the foregoing, the code may include provision as to—
  - (a) the conditions to be complied with in order to qualify for registration, including—
    - (i) the attendance by the solicitor at a sufficient number of specified courses relevant to the provision of criminal legal assistance, including courses in criminal law, evidence and pleading and professional ethics;
    - (ii) the keeping of records in a particular format;
  - (b) the standards of conduct expected of a solicitor providing or proposing to provide criminal legal assistance;
  - (c) the manner in which a solicitor should conduct a case and represent his client, including—
    - (i) the passage of timeous and accurate information to the client in relation to his case;
    - (ii) the frequency of meetings with the client;
    - (iii) the giving of advice to the client as to the consequences of any decision made by the client in relation to his defence;
    - (iv) the taking of such precognitions as may be necessary;
    - (v) the conduct of relations with the prosecution;
  - (d) the manner in which applications for criminal legal assistance are to be presented;
  - (e) the monitoring of a solicitor's performance with a view to a decision by the Board as to whether he should continue to be registered, including—
    - (i) periodic review of his handling of particular cases by other solicitors or by the Board;
    - (ii) the extent to which he attends courses relevant to the provision of criminal legal assistance, including courses in criminal law, evidence and pleading and professional ethics;
  - (f) the manner in which records are kept, including—
    - (i) maintaining books of account, and presentation of accounts to the Board, in a specified format;
    - (ii) office procedures;

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- (iii) time recording systems;
  - (iv) instructions given to the staff,

and any other matter relating to the organisation of or accounting for criminal legal assistance which appears to the Board to be relevant.
- (2) The code may make different provision in relation to firms and solicitors including, in relation to solicitors employed by the Board by virtue of section 28A of this Act, different provision to reflect the fact that they are so employed.
- (3) The Board shall—
  - (a) send a copy of the draft code prepared by it under subsection (1) above to the Law Society and to such other persons and bodies as it considers appropriate, inviting their comments on the draft within such period, being not less than 8 weeks from the date on which the draft is sent, as it may specify; and
  - (b) consider any such comments timeously received by it,

but, where it amends the draft code in the light of any such comments, it shall not be required to re-intimate the amended code to any of those who were invited to comment.
- (4) After carrying out the consultation mentioned in subsection (3) above the Board shall submit the draft code to the Secretary of State for his approval.
- (5) The Secretary of State may approve the draft code, with or without modifications.
- (6) When the Secretary of State has approved the draft code under subsection (5) above he shall—
  - (a) return the draft to the Board; and
  - (b) specify the date upon which it is to come into force and how the Board is to publish it.
- (7) The Board—
  - (a) shall make and publish the code by the date and in the manner specified by the Secretary of State under subsection (6) above; and
  - (b) may make a copy of the code available to any person requesting one, on payment of such sum, if any, towards the cost of preparation, publication and, where relevant, postage, as it considers appropriate.
- (8) The Board shall keep under review the code prepared under this section and may from time to time revise it, and the provisions of this section shall apply in relation to any revision of the code as they apply in relation to the version originally prepared.

### **25C Supervision of registered solicitors and firms**

- (1) Solicitors and firms whose names appear on the Register (“registered solicitors” and “registered firms”) shall comply with the requirements of the code.
- (2) The Board shall monitor the carrying out by registered solicitors and firms of their duty under subsection (1) above.

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- (3) For the purpose of carrying out its duty under subsection (2) above the Board may use the powers conferred on it by sections 35A and 35B of this Act.

#### *Removal of name from Register*

#### **25D Removal of name from Register following failure to comply with code**

- (1) Where it appears to the Board (whether or not following a complaint made to it) that a registered firm or solicitor may not be complying with the code, it shall investigate the matter in such manner as it thinks fit, and shall give the firm or solicitor concerned an opportunity to make representations.
- (2) For the purpose of carrying out its duty under subsection (1) above the Board may use the powers conferred on it by sections 35A and 35B of this Act.
- (3) Following an investigation under subsection (1) above, the Board may give the firm or solicitor concerned an opportunity, within such time as it may specify, to remedy any defect in their or his compliance with the code.
- (4) Where, after carrying out the procedures mentioned in subsection (1) above and, where a time limit has been set under subsection (3) above, after the expiry of that time limit, the Board is satisfied that—
- (a) the firm are not complying with the code, it shall remove the names of the firm and, subject to subsection (5) below, of any registered solicitors connected with the firm from the Register;
  - (b) the solicitor is not complying with the code, it shall remove his name from the Register.
- (5) Where a registered solicitor mentioned in subsection (4)(a) above is also connected with another registered firm, the Board shall not remove his name from the Register, but shall alter the entry against his name in the Register so as to remove therefrom the name of the firm whose name has been removed from the Register.
- (6) Where the Board removes the name of a solicitor from the Register the solicitor shall—
- (a) in accordance with arrangements approved by the Board, forthwith, and without waiting for the resolution of any appeal, transfer—
    - (i) any work currently being undertaken by him for any client by way of criminal legal assistance; and
    - (ii) notwithstanding any lien to which he might otherwise be entitled, any documents connected with any such work, to a registered solicitor; and
  - (b) in accordance with section 25A(3) of this Act, stop providing criminal legal assistance.
- (7) Where the Board removes the name of a firm or solicitor from the Register it shall forthwith intimate that removal to the firm or solicitor concerned, and shall as soon as practicable thereafter send them or him, by recorded delivery, a written note of its reasons for its decision.

- (8) A firm or solicitor aggrieved by a decision of the Board under subsection (4) above may, within 21 days of the receipt of the notification under subsection (7) above, appeal to the Court of Session against that decision.
- (9) An appeal under subsection (8) above may be on questions of both fact and law and the court, after hearing such evidence and representations as it considers appropriate, may make such order as it thinks fit; but the making of such an appeal shall not have the effect of restoring the firm's or solicitor's name to the Register.

### **25E Further provision as to removal of name from Register**

- (1) Where the Board is satisfied, whether on being so informed by the solicitor concerned or not, that a registered solicitor—
  - (a) has become connected with an unregistered firm; and
  - (b) is no longer connected with a registered firm,
 it shall remove his name from the Register.
- (2) Subsections (6) to (9) of section 25D of this Act apply in relation to a solicitor whose name is removed from the Register under subsection (1) above as they apply in relation to a solicitor whose name is removed from the Register under subsection (4) of that section.

### **25F Publication of Register**

- (1) The Board shall make available for inspection, without charge—
  - (a) the Register;
  - (b) any decision refusing an application for entry on the Register; and
  - (c) any decision removing the name of a firm or solicitor from the Register,
 and the publication of a decision such as is mentioned in paragraphs (b) or (c) above shall be accompanied by a statement of the reasons for the decision.
- (2) The Board shall, as soon as is practicable after 1st December in each year, send a copy of the current Register to the Secretary of the Law Society.
- (3) When any change is made to the Register in the course of a year, the Board shall, as soon as is practicable, send written notice of that change to the Secretary of the Law Society.”.

### *Employment of solicitors*

## **50 Employment of solicitors in relation to criminal legal assistance**

After section 28 of the 1986 Act there shall be inserted the following section—

### **“28A Power of Board to employ solicitors to provide criminal assistance**

- (1) The Secretary of State may, in accordance with the provisions of this section, provide for the carrying out of a study into the feasibility of providing criminal legal assistance by means of solicitors employed directly by the Board and,

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accordingly, may by regulations made under this section empower the Board to employ solicitors for the purpose of providing criminal legal assistance.

- (2) The Board shall not, by virtue of this section, employ more solicitors than are necessary to enable it to maintain at all times a working staff of such number of full-time or part-time solicitors as will equal six full-time solicitors; and any solicitor employed by the Board on a casual or temporary basis to fill a vacancy left by the absence on leave or because of illness of a permanent appointee shall require to be a registered solicitor.
- (3) The Secretary of State may authorise the Board to make such preparations for the feasibility study as will enable it to begin the study as soon as regulations under subsection (1) above come into force; and such preparations may relate to the purchase and equipping of heritable and moveable property and the employment of staff including, but only for the purposes of training, solicitors.
- (4) The provisions of paragraph 8 of Schedule 1 to this Act shall apply to solicitors employed by the Board by virtue of this section as they apply to employees appointed by the Board under that paragraph.
- (5) Regulations made by the Secretary of State under this section may make such provision as appears to him to be appropriate for the purposes of this section and, without prejudice to the generality of the foregoing, may—
  - (a) specify in which area or areas employed solicitors are to be used; and
  - (b) make different provision in relation to different areas.
- (6) Regulations under this section may provide that where the Board has by virtue of this section employed solicitors to provide criminal legal assistance in any area, the Board may, subject to subsection (7) below, require as many of the persons seeking criminal legal assistance in that area as it considers appropriate to instruct the solicitors employed by it.
- (7) In requiring persons seeking criminal legal assistance to instruct solicitors employed by the Board, the Board shall, where there is or may be a conflict of interest, make provision for any particular person to be re-allocated to another solicitor or, where registration is in force, to a registered solicitor in the area.
- (8) Regulations made under this section may make such transitional and consequential provisions and savings as appear to the Secretary of State to be necessary or expedient.
- (9) Sections 26, 27 and 28 of this Act shall not apply in relation to solicitors employed by the Board by virtue of this section.
- (10) Within three years of the date on which regulations made under subsection (1) above first come into effect, the Secretary of State shall lay before each House of Parliament a report on the results of the feasibility study.
- (11) This section, and the provisions of this Act mentioned in subsection (12) below, shall cease to have effect five years after the date on which regulations made under subsection (1) above first come into effect.
- (12) The provisions referred to in subsection (11) above are—
  - (a) in section 4, subsection (2)(aa) and (3)(ab);
  - (b) in section 11—
    - (i) in subsection (1) the words “or (3)”; and

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- (ii) subsections (3) and (4);
  - (c) in section 12(2), the words “; but does not apply to the salary payable to a solicitor employed by the Board by virtue of section 28A of this Act.”;
  - (d) section 25A(4);
  - (e) in section 25B(2), the words from “including” to the end; and
  - (f) in section 31(1A), paragraph (c).
- (13) Prior to the date on which this section ceases to have effect the Board shall make arrangements for the transfer to solicitors or, where registration is in force, registered solicitors not employed by it of any work currently being undertaken by way of criminal legal assistance by solicitors employed by it by virtue of this section.
- (14) On the date when this section ceases to have effect the Board shall remove from the Register the name of any solicitor employed by it by virtue of this section who is not otherwise entitled to be registered.”.

*Fixed payments for criminal legal assistance*

**51 Fixed payments**

In section 33 of the 1986 Act (fees and outlays of counsel and solicitors), after subsection (3) there shall be inserted the following subsections—

- “(3A) The Secretary of State may by regulations under this section prescribe fixed payments to be made to a solicitor in respect of—
- (a) his professional services in providing criminal legal assistance; and
  - (b) such outlays as may be so prescribed.
- (3B) A solicitor who provides any criminal legal assistance in respect of which a fixed payment has been prescribed in regulations made under subsection (3A) above shall not be entitled to any other payment out of the Fund in respect of the professional services and outlays mentioned in that subsection, but shall be entitled to reimbursement of any other outlays which he has properly incurred.”.

**52 Contracts for the provision of criminal legal assistance**

After section 33 of the 1986 Act there shall be inserted the following section—

*“Contracts for the provision of criminal legal assistance*

**33A Contracts for the provision of criminal legal assistance**

- (1) The Secretary of State may by regulations made under this section empower the Board to enter into contracts with registered firms for the provision by registered solicitors connected with those firms of criminal legal assistance.
- (2) Regulations under this section may prescribe—
  - (a) the procedures to be followed by the Board in awarding any such contract; and



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- (b) subject to subsection (3) below, any terms and conditions which are to be included in any such contract.
- (3) Regulations under this section shall provide that any contract entered into by virtue of this section shall include a provision that, in the event of the termination of the contract, or a breach of it by the registered firm concerned, the Board may—
  - (a) withhold payments under the contract; and
  - (b) require the firm to secure the transfer of—
    - (i) any work currently being undertaken by any solicitor connected with them for any client by way of criminal legal assistance; and
    - (ii) notwithstanding any lien to which any such solicitor might otherwise be entitled, any documents connected with any such work,  
to a registered solicitor.
- (4) Regulations under this section may provide that where the Board has by virtue of this section entered into contracts with any registered firms for the provision of criminal legal assistance in any area, then, unless it seems to the Board to be inappropriate in a particular case, any person seeking such assistance in that area shall be required to instruct a registered solicitor connected with one of those firms.
- (5) Any money due to a firm under a contract made by virtue of this section shall be paid to the firm—
  - (a) firstly, out of any amount payable by the client in accordance with section 11(2) of this Act;
  - (b) secondly, in priority to all other debts, out of any expenses which by virtue of an order of a criminal court are payable to that client by any other person in respect of the matter in connection with which the criminal legal assistance was given; and
  - (c) thirdly, by the Board out of the Fund.
- (6) For the purposes of sections 32 and 33 of this Act, the money paid to a firm, as provided in subsection (5) above, in respect of a contract made by virtue of this section shall be taken to be a payment made in accordance with this Act, and no solicitor connected with such a firm shall be entitled to any other payment out of the Fund in respect of any work done by him by virtue of such a contract.”.

#### *Powers of investigation*

### **53 Power of investigation of Scottish Legal Aid Board**

After section 35 of the 1986 Act there shall be inserted the following sections—

#### **“35A Power of Board to require information**

- (1) The Board may, for the purpose of determining whether—
  - (a) a solicitor or any employee of him or of his firm may be committing a criminal offence in connection with criminal legal assistance; or

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- (b) a solicitor may be seeking, in relation to criminal legal assistance, to recover from the Fund money to which he is not entitled, as, for example, by performing unnecessary work; or
  - (c) a registered firm or solicitor is or may not be complying with the code, require any solicitor or firm to produce such information and documents relating wholly or partly to the provision of criminal legal assistance as it may specify, at such time and place as it may specify.
- (2) If it appears to the Board that there is good reason to do so, it may authorise any of its officers to require any solicitor or firm to produce forthwith any such information or documents as are mentioned in subsection (1) above.
- (3) An officer of the Board acting under subsection (2) above shall, if requested to do so, produce evidence of his authorisation by the Board.
- (4) The power under this section to require production of information and documents includes power—
  - (a) to require any person, who is a present or past partner or employee of any such solicitor or firm and who appears to the Board or one of its officers to have any information or documents, to produce them;
  - (b) if any documents are produced—
    - (i) to take copies of them or extracts from them; and
    - (ii) to require the person producing them, or any other person who is a present or past partner or employee of the solicitor or firm in question, to provide an explanation of them;
  - (c) if any document or information is held other than in legible form, to require the production of a copy of it in legible form; and
  - (d) if documents are not produced, to require the person who was required to produce them to state, to the best of his knowledge and belief, where they are.
- (5) Where any person claims a lien over any documents required to be produced under this section the production is without prejudice to the lien.
- (6) Any person who is required under this section to produce information or documents shall, notwithstanding any duty of confidentiality, comply with that requirement; and if he fails to comply he shall be guilty of an offence and liable—
  - (a) on conviction on indictment, to a fine; and
  - (b) on summary conviction, to a fine not exceeding the statutory maximum.
- (7) Where a person is charged with an offence under subsection (6) above in respect of a requirement to produce documents, it shall be a defence for him to prove that they were not in his possession or under his control and that it was not reasonably practicable for him to comply with the requirement.
- (8) No information or documents obtained by the Board by virtue of this section or section 35B of this Act shall be used by it or by any of its employees for any purpose other than the purposes mentioned in subsection (1) above.
- (9) Section 34 of this Act applies in relation to a contravention of subsection (8) above as it applies in relation to a contravention of subsection (1) of that section.

### *Power of entry*

#### **35B Power of Board to enter premises and investigate**

- (1) Where a sheriff is satisfied, by evidence on oath given on behalf of the Board by a person authorised by the Board for that purpose, that there are reasonable grounds for believing that—
  - (a) a solicitor or any employee of him or his firm may be committing a criminal offence in connection with criminal legal assistance; or
  - (b) a solicitor may be seeking, in relation to criminal legal assistance, to recover from the Fund money to which he is not entitled, as, for example, by performing unnecessary work; or
  - (c) a registered firm or solicitor may not be complying with the code; or
  - (d) there are on any premises documents the production of which has been required under section 35A of this Act and which have not been produced in accordance with that requirement,he may issue a warrant under this section to a person authorised for that purpose by the Board.
- (2) A person holding a warrant under this section may—
  - (a) search the premises named in the warrant;
  - (b) take possession of any documents which appear to him to relate, wholly or partly, to any criminal legal assistance provided in or from those premises;
  - (c) take copies of any such documents;
  - (d) take any other steps which appear to him to be necessary for preserving those documents or preventing their destruction or interference with them; and
  - (e) require any person named in the warrant to provide an explanation of the documents or to state where they may be found.
- (3) The duty to produce documents and to provide explanations applies notwithstanding any duty of confidentiality, but where any person claims a lien over any documents the production is without prejudice to that lien.
- (4) A warrant under this section shall continue in force for the period of one month from the date when it is issued.
- (5) The Board may retain any documents which it has obtained under this section for—
  - (a) a period of not more than 12 months; or
  - (b) where, within that period, proceedings to which the documents are relevant are commenced by the Board, the Law Society or a prosecutor, until the conclusion of those proceedings.
- (6) Any person who intentionally obstructs the execution of a warrant issued under this section or who fails without reasonable excuse to comply with any requirement imposed in accordance with subsection (2)(e) above shall be guilty of an offence, and liable—
  - (a) on conviction on indictment, to a fine; and

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- (b) on summary conviction, to a fine not exceeding the statutory maximum.

*Suspension of payments to solicitor*

**35C Suspension of payments to solicitor**

- (1) Where it appears to the Board that any solicitor has, in connection with the provision of criminal legal assistance, acted in such a way as to justify action being taken against him by the Law Society or the Scottish Solicitors' Discipline Tribunal it shall refer the matter to either of those bodies so that they can consider whether to take action under section 31(3) of this Act.
- (2) Where it appears to the Board that any solicitor may have been guilty of a criminal offence it shall refer the matter to the police or the procurator fiscal, so that they can consider whether any criminal offence may have been committed.
- (3) Where the Board refers a matter to any of the bodies mentioned in subsections (1) or (2) above, it may disclose to that body any information or documents which it has obtained from the solicitor concerned under this Act.
- (4) Where the Board has referred a matter to any of the bodies mentioned in subsections (1) or (2) above it may—
  - (a) suspend the solicitor concerned from providing criminal legal assistance; and
  - (b) withhold payment of any fees due to him in respect of such work, pending the outcome of the investigation by the body or bodies to which the matter has been referred.
- (5) A solicitor who is suspended from providing criminal legal assistance under subsection (4)(a) above shall, in accordance with arrangements approved by the Board, transfer—
  - (a) any work currently being undertaken by him for any client by way of criminal legal assistance; and
  - (b) notwithstanding any lien to which he might otherwise be entitled, any documents connected with any such work,
 to a solicitor (or, where registration is in force, a registered solicitor).”

**54 Regulations in relation to criminal legal assistance**

After section 41 of the 1986 Act there shall be inserted the following section—

**“41A Regulations in relation to criminal legal assistance**

- (1) The Secretary of State may by regulations made under this section provide that any reference in, under or by virtue of this Act to “criminal legal assistance” shall relate, for any of the purposes of this Act, to such class or classes of criminal legal assistance as he thinks appropriate.
- (2) Without prejudice to the generality of subsection (1) above, the power conferred by that subsection may be exercised by reference to—

- (a) the class or classes of person who are to receive criminal legal assistance;
- (b) the class or classes of case in respect of which such assistance is to be given;
- (c) the nature of the work;
- (d) the place or places where the assistance is to be provided;
- (e) the period for which it is to be provided,

or to any combination of the foregoing; and different provision may be made under that subsection for different purposes, or in relation to different areas or different periods.”.