

CONVENTION RIGHTS (COMPLIANCE) (SCOTLAND) ACT 2001

EXPLANATORY NOTES

THE ACT

Part 3

Legal Aid

62. This Part of the Act deals with the extension of advice and assistance and civil legal aid under the Legal Aid (Scotland) Act 1986 (the “1986 Act”), gives additional powers to the Scottish Ministers to enable specified cases to be excluded from the fixed payments scheme, provides a retrospective power for future changes to the fixed payments scheme, and makes further provisions about the employment of solicitors by the Scottish Legal Aid Board (the “Board”).

Extension of advice and assistance and civil legal aid under the 1986 Act

63. [Section 6\(1\)](#) amends section 6(2) of the 1986 Act by extending the definition of "court or tribunal" in Part 2 of the 1986 Act, which relates to advice and assistance. This has the effect of allowing advice and assistance to be made available for any proceedings or bodies which determine persons' civil rights and obligations.
64. [Section 6\(2\)](#) amends section 13 of the 1986 Act by extending the definition of "court or tribunal" in Part 3 of the 1986 Act, which relates to civil legal aid. This has the effect of allowing civil legal aid to be made available for any proceedings or bodies which determine persons' civil rights and obligations. This section also repeals subsection (5) of section 13, which is considered redundant.
65. [Section 6\(3\)](#) inserts a new regulation making power into section 14 of the 1986 Act. It provides that for certain courts and tribunals as will be specified in the regulations, further tests of eligibility may be prescribed by those regulations over and above the existing tests of *probabilis causa*, reasonableness and financial eligibility. These regulations will be made by the Scottish Ministers and subject to negative resolution procedure.
66. [Section 6\(4\)](#) makes a consequential change to section 16, which relates to expenses in favour of certain assisted persons, to ensure that it also applies to any proceedings or bodies covered by the amended definition of “court or tribunal” as inserted in section 13(6) of the 1986 Act by section 6(2) of this Act.
67. [Section 6\(5\)](#) inserts a new section 38(1A). This is a consequential change to ensure that the amended definition of “court or tribunal” applies in section 38(1)(a), which relates to the power of the Court of Session to regulate the procedure of courts and tribunals in relation to legal aid.

Fixed payments for criminal legal assistance: exceptional cases

68. [Section 7](#) of the Act inserts new subsections (3C) to (3K) into section 33 of the 1986 Act.
69. New subsection (3C) allows the Scottish Ministers to make regulations in which they can prescribe the circumstances and conditions under which a solicitor shall be paid under section 33(2) and (3) of the 1986 Act instead of being paid under section 33(3A) of the 1986 Act. This means that a solicitor will be paid on a "time and line" basis rather than under the fixed payment scheme. The purpose of these regulations is to enable the Scottish Legal Aid Board to ensure that a person who is provided with criminal legal assistance under section 33(3A) of the 1986 Act is not deprived of the right to a fair trial because of the amount of the fixed payments payable under section 33(3A) of the 1986 Act (see new subsection (3D)). Such regulations will be subject to negative resolution procedure.
70. New subsection (3J) allows the Scottish Ministers to apply any regulations made under subsection (3C) retrospectively to cases ongoing at the time of the commencement of section 7 of the Act. It also enables the Scottish Ministers to disapply any conditions in the regulations made under subsection (3C)(b) to any such ongoing cases.
71. Subsection (3K) requires the Board to set up a procedure to allow the review of any decision by it to refuse an application under subsection (3H) or determine that a solicitor is not to be paid under section 33(2) and (3) of the 1986 Act.

Criminal legal assistance: retrospective revision of fixed payment regulations

72. [Section 8](#) of the Act inserts new subsections (3AA), (3AB) and (3AC) into section 33 of the 1986 Act. These new subsections will enable regulations made under section 33(3A) (which amend or replace existing regulations made under section 33(3A)) to apply retrospectively. This retrospective power is for the purpose of ensuring that no person is deprived of the right to a fair trial as a result of the total amount payable under the regulations prior to amendment or replacement. The regulations would apply retrospectively to any commenced and continuing proceedings where criminal legal assistance was being provided when the amendment or replacement regulations come into force.

Employment of solicitors by the Board: further provisions

73. [Section 9](#) of the Act makes amendments to sections 4, 11, 12, 25A, 25B, 26, 28A and 31 of the 1986 Act to enable the Board to use its powers under section 26 of that Act to directly employ solicitors for the purpose of providing criminal legal assistance.
74. [Sections 9\(1\)](#) and [\(2\)](#) amend sections 4 and 11 of the 1986 Act which deal with the provision of advice and assistance and any associated contributions to ensure that any client represented by a directly employed solicitor is treated in the same way as a client represented by a private solicitor under legal aid, in relation to expenses and payment of contributions respectively.
75. [Section 9\(3\)](#) amends section 12 of the 1986 Act. This is to ensure that the salary of a directly employed solicitor is not subject to the regulations that apply to the payment of legal aid fees and expenses to a private solicitor providing advice and assistance under Part II of the 1986 Act.
76. [Sections 9\(4\)](#) and [\(5\)](#) amend sections 25A and 25B of the 1986 Act respectively. The amendments have the effect of ensuring that any solicitor employed by the Board under section 26 of the 1986 Act for the purpose of providing criminal legal assistance is required to be registered under section 25A of the 1986 Act and allow the Board to set different provisions in a Code of Practice under section 25B for such directly employed solicitors.

*These notes relate to the Convention Rights (Compliance) (Scotland)
Act 2001 (asp 7) which received Royal Assent on 5 July 2001*

77. **Section 9(6)** amends section 26(1)(a) of the 1986 Act by inserting a new regulation making power. This power will allow the Scottish Ministers to prescribe the cases in which the Board may employ solicitors for the purposes of providing advice and assistance under Part II of the 1986 Act. Such regulations will be subject to negative resolution procedure.
78. **Section 9(7)** amends section 28A of the 1986 Act. The effect is to ensure that the provisions of section 28A have no effect on the power to commence sections 26 to 28 of the 1986 Act. The amendments also have the effect of ensuring that provisions that would by virtue of section 28A(12) cease to have effect would remain in force in relation to solicitors employed under sections 26 to 28 of the 1986 Act.
79. **Section 9(8)** amends section 31(1A) of the 1986 Act. The effect is that the entitlement of a person to select a solicitor or counsel under section 31(1) of the 1986 Act does not apply where that person is provided with criminal legal assistance by a solicitor employed by the Board under sections 26 and 27 of the 1986 Act.