

*These notes relate to the Legal Profession and Legal Aid
(Scotland) Act (asp 5) which received Royal Assent on 19 January
2007 (asp 5) which received Royal Assent on 19 January 2007*

LEGAL PROFESSION AND LEGAL AID (SCOTLAND) ACT (ASP 5) WHICH RECEIVED ROYAL ASSENT ON 19 JANUARY 2007

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 4 – Legal Aid

Section 64: Criminal legal aid in solemn proceedings

164. **Section 64** repeals the provisions in section 23 of the Legal Aid (Scotland) Act 1986 ('the 1986 Act') which provide that applications for criminal legal aid in solemn proceedings are made to the court and transfers the power to grant criminal legal aid in such proceedings to the Scottish Legal Aid Board ('the Board'). It does not change the criteria by which such applications are determined. Section 64 inserts a new section 23A which provides that the Board can make criminal legal aid available to a person being prosecuted under solemn procedure only if it is satisfied, after consideration of the person's financial circumstances, that the expenses of the case cannot be met without undue hardship to the person or his dependants. It further stipulates that the Board shall establish a procedure whereby a person who has been refused criminal legal aid in solemn proceedings may apply to the Board for a review of their application.
165. New section 23A of the 1986 Act provides that the Board may make grants of legal aid in solemn cases subject to such conditions as it considers expedient. It provides that the Board may impose conditions at any time and require recipients to comply with such conditions. This will enable the Board to satisfy itself that the undue hardship test continues to be met and that it is reasonable for legal aid to continue to be received. It further stipulates that the Board shall establish a procedure whereby a person whose award of legal aid in solemn proceedings is made subject to conditions may apply to the Board for a review of the decision to make those conditions.
166. **Section 64** also makes consequential amendments to the 1986 Act so that all references made to the provision concerning criminal legal aid in solemn proceedings do so with reference to the relevant new provisions.

Section 65: Criminal legal aid: conditions and reviews

167. Section 24 of the 1986 Act deals with the availability of criminal legal aid in summary proceedings and, at subsection (2), enables the Board to require a person to comply with conditions once legal aid has been granted. This allows the Board to satisfy itself from time to time that it is in the interests of justice for legal aid to continue to be received. Section 65 amends that section so as to provide that the Board may be able to impose conditions when making such grants of legal aid.

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168. **Section 65** inserts subsection (1A) in section 24 of the 1986 Act to provide that the Board may make legal aid available subject to such conditions as it considers expedient and that these conditions may be made at any time, including when first making legal aid available. Subsection (2) of section 24, the pre-existing condition-making power, is amended to provide that the Board may impose conditions in relation to the continued application of the financial eligibility test. Such conditions may include the requirement that the assisted person provide full financial information to the Board at any stage in the case and will allow legal aid to be made available subject to case specific conditions including the reaching of a procedural step. The new subsection (5A) provides that the Board shall establish a procedure whereby an assisted person whose grant of criminal legal aid is subject to a condition made under the new subsection (1A) may apply to the Board for a review of that condition. An amendment is also made to subsection (6) of section 24. This provides that, in cases where at the trial diet there is no legal aid in place as a result of the grant of legal aid ceasing due to the operation of a condition, the court may adjourn the trial diet to allow an application to be made to the Board if it considers that, owing to the exceptional circumstances of the case, it would be inequitable to proceed with the trial without representation.
169. **Section 65** also amends section 25 of the 1986 Act. This concerns the availability of legal aid in connection with appeals against conviction, sentence, other disposal or acquittal in criminal proceedings. There is a pre-existing condition-making power at section 25(3) which allows the Board to require a person in receipt of legal aid to comply with conditions. Section 65 inserts a new subsection (2C) which provides that conditions may be imposed at any time, including at the time legal aid is made available. This will allow legal aid to be made available subject to case specific conditions including the reaching of a procedural step. It also inserts a new subsection (2B) which provides that the High Court can determine that legal aid should be made available for an appeal where the court thinks that it is in the interests of justice for it to do so in cases where the Board has terminated a grant because it is no longer satisfied that this is the case. This is an extension of the High Court's powers. There is an existing provision under section 25(2A) where the High Court can make a similar determination where an application for criminal legal aid for an appeal has been refused by the Board on the basis that it was not satisfied that it was in the interests of justice for it to be made available. Section 65 also inserts new subsections (3A) and (3B) in section 25 to provide that the Board shall establish a review procedure so that a person whose application for criminal legal aid in an appeal is refused or granted subject to conditions may apply to the Board for a review of the refusal or a review of the decision to make such conditions.
170. **Section 65** also amends section 25AB of the 1986 Act. This concerns the availability of legal aid in connection with references, appeals or applications for special leave to appeal to the Judicial Committee of the Privy Council (JCPC). It inserts new subsections (2A), (3A) and (3B) to provide that the Board may grant legal aid in such cases subject to such conditions as it considers expedient, that these conditions may be imposed at any time and that it shall establish a review procedure so that a person whose application for legal aid in connection with proceedings before the JCPC is either refused or granted subject to conditions may apply to the Board for a review of the refusal or a review of the decision to make such conditions.

Section 66: Criminal Legal Assistance Register: removal of name following failure to comply with code

171. Section 25D of the 1986 Act enables the Board to remove the name of a firm or solicitor from the register of those able to provide criminal legal assistance if it is satisfied that the firm or solicitor is not complying with the code of practice provided for by section 25B in relation to the provision of criminal legal assistance. Section 66 amends section 25D to enable the Board to act in situations where it suspects that a firm or solicitor has committed a breach of the code of practice in the past but has resumed compliance at the time of the Board's investigation. It adds a new subsection (4A) to section 25D which provides that the Board may, after carrying out the appropriate investigation, remove

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the name of a firm or solicitor from the register if it is satisfied that the firm or solicitor has in the past not complied with the code in a material regard. It may only do so after allowing the firm or solicitor concerned the opportunity to make representations and to remedy any defect in their or his compliance with the code within such time as it may specify.

Section 67: Register of advice organisations: advice and assistance

172. **Section 67(2)** amends section 4(2)(a) of the 1986 Act to enable the Board to make payments out of the Legal Aid Fund in respect of certain categories of advice and assistance to registered organisations in the same way as it is able to do in respect of solicitors and counsel.
173. **Section 67(3)** amends section 6 of the 1986 Act which provides for a number of definitions of terms used in the 1986 Act. It amends the definition of “advice and assistance” so as to extend it to include oral or written advice provided by an adviser, qualifies the definition of “assistance and assistance by way of representation” to include advice and assistance as provided by an adviser but only to the extent to which it is competent for the adviser to perform such steps and inserts a definition of “adviser” into subsection (2).
174. **Section 67(4)** amends section 10 of the 1986 Act by adding appropriate references to “advisers” to its provisions which relate to the providers of advice and assistance and their responsibilities in respect of the financial limits which apply to the scheme. Section 10(3) is amended to provide that the cost of providing advice and assistance shall include the outlays incurred and the fees properly chargeable by the registered organisation which approved the adviser. Section 67(5) amends section 12 of the 1986 Act which specifies that payment may be made from the Legal Aid Fund for the fees and outlays of providers of advice and assistance only after any client contributions, expenses or any property recovered or preserved are exhausted. The amendment means that registered organisations can receive such payments from client contributions, expenses or, as the case may be, from property recovered or preserved and that they can make claims to the Board for payment from the Fund where these other sources of payment are either not available or where they do not fully cover the amount due to them by way of outlays incurred and fees properly chargeable.
175. **Section 67(6)** inserts new sections 12A and 12B into the 1986 Act. Section 12A provides that a register of advice organisations is to be established and maintained by the Board. This register will consist of organisations which have been approved by the Board to provide advice and assistance as advisers. It is specified that solicitors, advocates, conveyancing practitioners, executry practitioners or persons who have a right to conduct litigation or right of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 may not be approved by a registered organisation as an adviser.
176. New section 12B enables regulations to be made which specify the categories of circumstances in which an adviser approved by a registered advice organisation may provide advice and assistance. It provides that the regulations may specify different categories for different purposes. It qualifies the definitions of “advice and assistance” and “assistance by way of representation” in relation to advisers. An adviser may assist or represent a person only to the extent to which it is competent for the adviser to so act.
177. **Section 67(7)** amends section 33 of the 1986 Act which deals with the payment of fees and outlays to solicitors and counsel. It inserts a new subsection (1A) which provides that fees and outlays incurred by advisers shall be paid to the registered organisation which had approved them as persons who may provide advice and assistance. It also amends subsection (2) of section 33. This deals with the Scottish Ministers’ ability to make appropriate provision by regulations in respect of the fees and outlays of solicitors and counsel in relation to proceedings for which legal aid has been made available and to cases in which advice and assistance is provided. The amendment specifies that the

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Scottish Ministers may also make such provision under this section in respect of the fees and outlays of advisers providing advice and assistance.

178. **Section 67(8)** adds definitions of “adviser”, “adviser code”, “the register of advice organisations” and “registered organisation” to section 41, the interpretation provision, of the 1986 Act.
179. **Section 67(9)** inserts a new Schedule 1A to the 1986 Act which makes further provision regarding the register of advice organisations. The Schedule makes general provision regarding the register of advice organisations and specifies the process by which an advice organisation may apply to be registered; the terms and conditions of the adviser code for advisers and registered advice organisations which the Board is to prepare, submit to Ministers for approval, lay before the Scottish Parliament and publish; the requirement of the Board to monitor both the compliance with the adviser code by registered organisations and the provision of advice and assistance and related activities by advisers approved by registered organisations; the procedures whereby the Board may remove an organisation from the register; and, the procedures by which an organisation may appeal against a decision of the Board to either refuse its application for registration or to remove its name from the register.

Section 68: Scottish Legal Aid Board: grants for certain purposes

180. **Section 68** of the Act amends section 4 of the 1986 Act, which deals with the establishment and management of the Legal Aid Fund, so that the Board will be able to use the Fund to provide grants. It inserts a new section 4A which makes provision as to the Board’s power to make grants available. Subsection (1) provides that the Board may, on an application made to it by any person, make grants of such amount and subject to such conditions, including conditions as to repayment, as it may determine to the person in respect of any of the matters mentioned in subsection (2) and in respect of any of the purposes mentioned in subsection (3). Subsection (2) provides that grants can be made in respect of advice and assistance in relation to civil matters or civil legal aid work undertaken by a solicitor or counsel; advice and assistance work in relation to civil matters undertaken by any adviser; or advice or assistance or representation in connection with civil matters which are not otherwise covered. Subsection (3) provides that the grants can be made in respect of work to facilitate, support and develop the provision of the matters set out in subsection (2). Subsection (10) provides that applications made to the Board under subsection (1) must include such information as the Board may reasonably require.
181. Subsections (4) and (5) of the new section 4A specify that the Scottish Ministers must set a financial limit to the total amount of grant that may be paid out of the Fund and a specific period of time to which that limit applies. Subsections (7), (8), (9) and (11) set out the process by which the Board will prepare and publish a plan of the criteria that it must apply when considering grant applications by virtue of subsection (6), that the plan is to be submitted to Scottish Ministers for approval and that Ministers may approve such a plan with or without being subject to modification. Subsection (9) provides that the Scottish Ministers may, at any time, approve a modification of an approved plan proposed by the Board or withdraw the approval of such a plan or modification and may require the Board to prepare and publish a plan. Subsection (11) provides that the Board, when preparing and publishing a plan, must do so in accordance with such directions as the Scottish Ministers may give.
182. Subsection (12) specifies that grant payments are to be made from the Legal Aid Fund. So as to prevent duplication of payment, subsection (13) provides that work which is funded by a grant will not also be funded under the advice and assistance or civil legal aid schemes.
183. Subsection (14) defines, for the purposes of the section, the term “approved plan”. Subsection (15) specifies that the term “person”, insofar as it is used in section 4A,

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Section 69: Financial limit: advice and assistance

184. Section 10 of the 1986 Act deals with the financial limits in relation to authorised expenditure for advice and assistance. Advice and assistance is granted by solicitors or, in categories of cases as specified by regulations, by advisers, rather than by application to the Board. The Board's approval is needed before the authorised limit for advice and assistance applicable under section 10 can be exceeded. Section 69 amends section 10 of the 1986 Act, by inserting new subsections (1A) and (1B), to enable the Board to approve increases in advice and assistance retrospectively in cases where the advice and assistance required to be given urgently and where it was not possible to seek the prior approval from the Board.
185. **Section 69** also inserts new subsections (4) and (5) in section 10 of the 1986 Act to provide that applications to exceed the financial limit cannot be made, either in advance or retrospectively, in cases where the matter with which the advice and assistance is concerned is not specified in regulations made under the 1986 Act as being a distinct matter for the purposes of advice and assistance or is not being treated as such by the Board by virtue of such regulations.

Section 70: Further provision in relation to the Fund: advice and assistance

186. Section 12(3) of the 1986 Act sets out the order by which the various sources of payments in relation to fees or outlays are to be applied. It provides that the costs of proceedings should be met from client contributions, awards of expenses or property recovered or preserved, in such order, before a claim may be made from the Legal Aid Fund. In some cases more than sufficient property may be recovered on behalf of the assisted person to meet the entire costs of the legal fees and outlays. Where this is the case the excess is paid to the assisted person. Section 70 of this Act inserts a new subsection (2)(ba) into section 4 of the 1986 Act and inserts a new section 12C which applies where advice and assistance has been provided either through the Board's grant funding power or through a solicitor employed by the Board and where payments have been made into the Legal Aid Fund in respect of client contributions, awards of expenses or property recovered. In such cases the costs of proceedings will have been met through the overall costs of employing the solicitor or the award of grant to fund the advice provision, although the costs of individual proceedings could be calculated. The new sections 4(2)(ba) and 12C enable the Board to repay to the assisted party any sums which would have been due to them through the operation of section 12(3) had the advice and assistance been provided through a private sector solicitor funded on a case by case basis.

Section 71: Availability of civil legal aid for defamation or verbal injury

187. Part II of Schedule 2 to the 1986 Act provides that civil legal aid shall not be available for certain specified proceedings including those which are wholly or partly concerned with defamation or verbal injury. This exception is not absolute and can be waived where it would otherwise require the withdrawal of legal aid from an assisted person as a result of their opponent lodging a claim for defamation against them. Section 71 of this Act amends Schedule 2, and section 14 of the 1986 Act, which deals with the availability of civil legal aid, to provide that civil legal aid can be made available by the Board to pursuers or defenders in defamation proceedings where exceptional circumstances are shown to exist.
188. **Section 71** inserts new subsections (1C), (1D) and (1E) into section 14 of the 1986 Act. New subsection (1C) provides that the Board must be satisfied that further criteria, in addition to those which are required to be met in accordance with the existing statutory tests provided by sections 14 and 15, are met before legal aid may be made available

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in defamation cases. Subsection (1C) specifies that the relevant criteria will be set out by the Scottish Ministers in directions issued to the Board and enables the Board to make legal aid available in cases where it is satisfied that the criteria as set down in the directions are satisfied. Subsection (1D) provides that the directions may include criteria which the Board requires to satisfy itself and provides that the directions may make different provision for different purposes and be varied or revoked at any time. Subsection (1E) provides that the Board must comply with directions and that the Scottish Ministers must arrange for their publication.

189. **Section 71** also amends Part II of Schedule 2. It removes the reference in paragraph 2 in that part of the Schedule to the granting of legal aid for the purposes of defending a counterclaim for defamation or verbal injury will allow the new test as set down in the directions to apply to applications for legal aid made in connection with counterclaims for defamation. This will enable a consistent approach to be taken in respect of the eligibility criteria for legal aid in all defamation proceedings.

Section 72: Civil legal aid: conditions and reviews

190. **Section 72** amends section 14 of the 1986 Act. This deals with the availability of civil legal aid. It inserts new subsections (1F) and (1G) in section 14 to enable the Board to impose any conditions which it considers expedient to grants of civil legal aid and requires the Board to establish a procedure whereby persons in receipt of legal aid made subject to conditions may apply to it for a review of any such conditions. These conditions may be set down at any time including at the time the Board makes legal aid available. This is an extension of the Board's pre-existing condition-making powers which it has under section 14(2) of the 1986 Act. This amendment allows the Board to set such conditions at any time, to include at the time civil legal aid is approved.
191. **Section 72** also amends section 29 of the 1986 Act. This deals with the availability of legal aid in certain proceedings relating to children. It inserts new subsections (5A), (6A) and (6B) in section 29 to enable the Board to impose any conditions which it considers expedient to grants of legal aid in such proceedings and to do so at any time, including at the time the Board first makes legal aid available. The new subsections also require the Board to establish procedures whereby a person whose application for legal aid under section 29 has been refused, or has been granted subject to conditions, may apply to the Board for a review of the application or a review of any such conditions.

Section 73: Availability of legal aid: Judicial Committee of the Privy Council

192. Section 25AB of the 1986 Act provides for the availability of legal aid in references, appeals or applications for special leave to appeal made to the Judicial Committee of the Privy Council (JCPC). These proceedings are in terms of paragraph 11 and 13(a) of Schedule 6 to the Scotland Act 1998. Section 73 amends section 25AB so that legal aid will also be available, subject to the applicant's eligibility, in relation to cases raising a devolution issue which are referred within the terms of paragraph 33 of Schedule 6 to the Scotland Act 1998. Section 73 also adds such proceedings to paragraph 1 of Part 1 of Schedule 2 of the 1986 Act, which sets out the proceedings for which civil legal aid may be made available.
193. **Section 73** also provides that legal aid may be available, subject to an applicant's eligibility, for any devolution issues arising in judicial proceedings in the House of Lords which are, in terms of paragraph 32 of Schedule 6 to the Scotland Act 1998, referred to the JCPC. It does so by adding such proceedings to paragraph 1 of Part 1 of Schedule 2 of the 1986 Act.

Section 74: Solicitors employed by the Scottish Legal Aid Board

194. Subsection (1) of section 74 amends section 4 of the 1986 Act to allow for payments to be made out of the Legal Aid Fund in respect of expenses incurred by the Board in connection with the employment by the Board of solicitors who provide advice

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and assistance in relation to civil matters, civil legal aid or who work with advice organisations and provide the services as are mentioned in section 26(2). Section 4 of the 1986 Act already provides the Board with the ability to pay such expenses in respect of solicitors employed to provide advice on criminal matters.

195. Subsection (2) of section 74 amends section 26 of the 1986 Act by removing the reference to “local” in the definition of organisations with which the Board may employ solicitors to work in partnership. It also amends the reference to the organisation’s “function of giving advice” so that this need only be part of the organisation’s role and not its sole or main function.
196. Subsection (3) of section 74 amends section 27 of the 1986 Act to clarify the powers of the Board in relation to the employment of staff and the setting of their terms and conditions of employment. Paragraph 8 of Schedule 1 of the 1986 Act sets out these powers which apply not only to the administrative staff employed by the Board but also, by virtue of section 28A(4), to solicitors employed by the Board to provide criminal legal assistance. Subsection (3) of section 74 replicates section 28A(4) in section 27 of the 1986 Act so that the Board’s powers set out in paragraph 8 of Schedule 1 will also apply to solicitors employed to provide assistance on civil matters.
197. Subsection (3) of section 74 also repeals section 27(2) and (3) of the 1986 Act. Section 27(2) disapplies section 32(a) which prohibits payment from another source where payment has been made from the Legal Aid Fund and section 27(3) prevents solicitors who are employed by the Board to provide assistance on civil matters from being paid from the Legal Aid Fund altogether. Repealing both of these subsections allows the Board to pay solicitors employed by them out of the Legal Aid Fund and not from any other source.

Section 75: Contributions, and payments out of property recovered

198. **Section 75** amends section 4 of the 1986 Act, which sets out the purposes for which money may be paid into and out of the Legal Aid Fund, and section 17 of the 1986 Act, which deals with contributions, and payments out of property recovered.
199. **Section 75(4)** inserts new subsections (2C) to (2I) into section 17 of the 1986 Act. Subsection (2C) provides that, in relation to proceedings in respect of which a person has been granted civil legal aid, if the total contribution made by a person exceeds the net liability then the excess shall be repaid to the person. Subsection (2D) makes similar provision in respect of sums paid to the Board from property preserved or recovered; where these are no longer required to meet the net liability on the Fund having taken into account an award of or agreement to expenses, the excess shall be repaid to the assisted party. Section 75(2) inserts new subsections (aba) and (abb) into section 4(2) which enable sums to be paid out of the Legal Aid Fund in respect of new subsections 17(2C) and (2D).
200. Subsection (2E) provides that the provisions in subsection (2B) requiring any net liability to be met from property preserved or recovered do not prejudice the court’s ability to allow an opponent to set-off an award of expenses or damages in that person’s favour against any damages or expenses awarded to the person in receipt of civil legal aid.
201. Subsection (2F) re-inserts a definition of “net liability of the Fund” into section 17 of the 1986 Act. The definition was removed as the result of a repeal made by the Legal Aid Act 1988 although “net liability of the Fund” is referred to in section 17(2B) of the 1986 Act. Subsection (2F) provides that a “net liability of the Fund” is the aggregate amount of the sums paid or payable to a solicitor or counsel out of the Fund in respect of proceedings, including any sums in relation to advice and assistance given by a solicitor, counsel or adviser approved by a registered organisation in connection with the proceedings, which are not recouped by the Fund from expenses or as a result of any right of indemnity against such expenses. It is intended that this will reduce the

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likelihood of confusion or disagreement about the limit of the amount which the Board is required to recover in terms of section 17(2A) and (2B) of the 1986 Act.

202. Subsections (2G), (2H) and (2I) make provision in relation to cases where civil legal aid or advice and assistance has been provided either by virtue of a grant made by the Board under section 4A or by a solicitor employed by the Board under Part V of the 1986 Act. They provide that the sums referred to in the definition of net liability at subsection (2F) should be taken to include sums which would have been payable had the assistance been provided by a privately employed solicitor, counsel or adviser funded on a case by case basis. This enables the net liability to be calculated and any excess to be repaid to the assisted party where sums have been paid from the Legal Aid Fund to meet the costs of providing an advice service rather than directly to a solicitor, counsel or adviser in respect of the assisted party's case.
203. **Section 75(3)** inserts new subsections 3(ca) and 3(cb) into section 4 of the 1986 Act to enable money to be paid into the Legal Aid Fund in respect of expenses or property recovered or preserved in proceedings where advice and assistance has been provided either by virtue of a grant made by the Board under section 4A or by a solicitor employed by the Board under Part V of the 1986 Act.

Section 76: Regulations under section 36 of the 1986 Act

204. Section 36 of the 1986 Act is a regulation making power and allows the Scottish Ministers to make such regulations as appear to them necessary or desirable so as to give effect to or prevent abuses of the 1986 Act. Regulations made under the section may also make different provision in relation to legal aid and advice and assistance respectively and for different cases or classes of case. Section 76 amends that section by inserting new subsections (2)(ca) and (2A) which provide the Board with extended powers. Subsection (2)(ca)(i) enables the Scottish Ministers to make regulations which allow the Board to determine a list of distinct matters for which advice and assistance may be provided by solicitors, advisers and, where appropriate, counsel. Subsection (2)(ca)(ii) allows regulations to be made which provide the Board with the power to treat a matter not on the list as if it was included there.
205. Subsection (2A)(a) requires that the Board may only determine the matters which are or are not to be treated as distinct matters for the purposes of advice and assistance following consultation with the Law Society of Scotland. Subsection (2A)(b) provides that the Board is required to seek the approval of the Scottish Ministers before it may determine that a matter which has been determined by the Board to be treated as a distinct matter is no longer to be so treated.