



# Legal Aid (Scotland) Act 1986

## 1986 CHAPTER 47

### PART VI

#### MISCELLANEOUS

##### *Proceedings in relation to children*

#### **29 Legal aid in certain proceedings relating to children**

- (1) This section applies to legal aid in connection with—
  - (a) proceedings before the sheriff in respect of any matter arising under Part III of the Social Work (Scotland) Act 1968 (in this section referred to as "the 1968 Act"); and
  - (b) any appeal to the Court of Session in connection with such proceedings.
- (2) Subject to subsections (3) to (5) below, legal aid to which this section applies shall be available to a child or his parent—
  - (a) in connection with an appeal to the sheriff under Part III of the 1968 Act—
    - (i) against a decision of a children's hearing to grant a warrant for the detention of the child; or
    - (ii) against any other decision of a children's hearing;
  - (b) in connection with an application to the sheriff under section 42 of the 1968 Act for a finding as to whether the grounds for a referral (or any of them) are established ; and
  - (c) in connection with an appeal to the Court of Session against a decision of the sheriff under Part III of the 1968 Act.
- (3) Legal aid shall be available under subsection (2)(a)(i) above on an application made to the sheriff without inquiry into the resources of the child or his parent.
- (4) Legal aid shall be available under subsection (2)(a)(ii) or (b) above on an application made to the sheriff if the sheriff is satisfied—
  - (a) that it is in the interests of the child that legal aid be made available; and

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- (b) after consideration of the financial circumstances of the child and his parent that the expenses of the case cannot be met without undue hardship to the child or his parent or the dependants of either.
- (5) Legal aid shall be available under subsection (2)(c) above on an application made to the Board if it is satisfied—
- (a) after consideration of the financial circumstances of the child and his parent that the expenses of the appeal cannot be met without undue hardship to the child or his parent or the dependants of either ; and
  - (b) that the child or, as the case may be, his parent has substantial grounds for making or responding to the appeal and that it is reasonable, in the particular circumstances of the case, that legal aid should be made available to him.
- (6) The Board may require a person receiving legal aid under subsection (2)(c) above to comply with such conditions as it considers expedient to enable it to satisfy itself from time to time that it is reasonable for him to continue to receive such legal aid.
- (7) Where, in connection with any proceedings, the sheriff or the Board has been satisfied as is mentioned in subsection (4)(b) above or, as the case may be, subsection (5)(a) above and has made legal aid available to a child or his parent, it shall not be necessary for the Board or, as the case may be, the sheriff to be so satisfied in respect of an application for legal aid by the child or his parent in connection with any subsequent proceedings arising from such proceedings.
- (8) Legal aid to which this section applies shall consist of representation by a solicitor and (so far as is necessary) by counsel in any proceedings (including any appeal) mentioned in subsection (1) above and shall include all such assistance as is usually given by solicitor or counsel in the steps preliminary to or incidental to proceedings.
- (9) In this section " child " and " parent " shall be construed in accordance with section 30 of the 1968 Act.

### *Contempt of court*

## **30 Legal aid in contempt proceedings**

- (1) Where a person is liable to be dealt with for contempt of court during the course of or in connection with any proceedings, legal aid shall be available to him on an application being made to the court if it is satisfied—
- (a) after consideration of the person's financial circumstances that the expenses of the proceedings for contempt of court cannot be met without undue hardship to him or his dependants; and
  - (b) that in all the circumstances of the case it is in the interests of justice that legal aid should be made available to him.
- (2) In making legal aid available under subsection (1) above, the court may order in any case that the legal aid shall consist of representation by counsel only or, in a court where solicitors have a right of audience, by a solicitor only ; and, notwithstanding section 31 of this Act, the court may assign for the purpose any counsel or solicitor who is within the precincts of the court at the time when the order is made.
- (3) Section 25 of this Act shall apply in relation to legal aid in connection with an appeal against a decision of a court in proceedings for contempt of court as it applies in

relation to legal aid in connection with an appeal against conviction, sentence or acquittal in criminal proceedings, and in such application—

- (a) for the reference in subsection (4) of that section to criminal legal aid having been made available under section 23 or 24 of this Act there shall be substituted a reference to legal aid having been made available under subsection (1) above; and
  - (b) in subsection (5) of that section the reference to the nobile officium of the High Court of Justiciary shall include a reference to the nobile officium of the Court of Session.
- (4) Subject to subsection (2) above legal aid made available under this section shall consist of representation by a solicitor and (so far as necessary) by counsel and shall include all such assistance as is usually given by a solicitor or counsel in the steps preliminary to or incidental to proceedings for contempt of court or, in the case of legal aid made available under subsection (3) above, any appeal in connection with such proceedings.

#### *Solicitors and counsel*

### **31 Solicitors and counsel**

- (1) Subject to section 30(2) of this Act and to regulations made under subsection (9) below, a person to whom legal aid or advice and assistance is made available may select—
- (a) the solicitor to advise or act for him ; and
  - (b) if the case requires counsel, his counsel,
- and he shall be entitled to make the selection himself.
- (2) Nothing in subsection (1) above shall prejudice any right of a solicitor or advocate to refuse or give up a case or to entrust it to another solicitor or advocate.
- (3) The relevant body may decide to exclude any advocate or solicitor either from being selected under subsection (1) above, or from giving advice and assistance to or from acting for a person to whom legal aid is made available on the ground that there is good reason for excluding him arising out of—
- (a) his conduct when acting or selected to act for persons to whom legal aid or advice and assistance is made available;
  - (b) his professional conduct generally ;
  - (c) in the case of a member of a firm of solicitors or a director of an incorporated practice, such conduct on the part of any person who is for the time being a member of the firm or a director of the practice.
- (4) The relevant body may decide to exclude a solicitor or advocate under subsection (3) above in respect of any specified period or without limit of time.
- (5) A solicitor or advocate who is aggrieved by a decision of the relevant body under subsection (3) above may appeal against his exclusion or the period of such exclusion to the Court of Session ; and the court in determining such an appeal may make such order as it thinks fit.
- (6) Where the relevant body decides or the Court of Session, on an appeal against such a decision, orders that an advocate or solicitor be excluded under subsection (3) above, the relevant body shall inform the Board of the decision or order.

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- (7) Except in so far as expressly provided under this Act, the fact that the services of counsel or a solicitor are given by way of legal aid or advice and assistance shall not affect the relationship between or the respective rights in that connection of counsel, solicitor and client.
- (8) The Board may arrange that, in such circumstances as it may specify, a solicitor shall be available for the purposes of providing legal aid or advice and assistance.
- (9) Where a solicitor is available as is mentioned in subsection (8) above, the Secretary of State may, by regulations made under this section, provide that—
- (a) subsection (1) above shall not apply ; and
  - (b) legal aid or, as the case may be, advice and assistance shall be provided only by the solicitor so made available.
- (10) In this section, " the relevant body " means—
- (a) in relation to an advocate, the Faculty of Advocates ;
  - (b) in relation to a solicitor, the Law Society or the Scottish Solicitors' Discipline Tribunal,
- and in considering whether to exclude a solicitor under subsection (3) above, section 52 of and Part II of Schedule 4 to the Solicitors (Scotland) Act 1980 shall apply in relation to the procedure of that Tribunal as they apply in relation to its procedure in respect of a complaint under section 51(1) of that Act.

### **32 Restriction on payment and employment of solicitor or counsel**

Where legal aid is available to a person in connection with any proceedings (whether legal aid is available in connection with all or only part of the proceedings)—

- (a) the solicitor or counsel providing legal aid shall not take any payment in respect of any advice given or anything done in connection with such proceedings during any period when legal aid was so available except for such payment as may be made, in accordance with this Act, out of the Fund; and
- (b) except as is mentioned in section 31(2) of this Act, no solicitor or counsel other than the solicitor or counsel referred to in paragraph (a) above shall advise or act for him in connection with the proceedings.

### **33 Fees and outlays of solicitors and counsel**

- (1) Any solicitor or counsel who acts for any person by providing legal aid or advice and assistance under this Act shall be paid out of the Fund in accordance with section 4(2) (a) of this Act in respect of any fees or outlays properly incurred by him in so acting.
- (2) The Secretary of State may, by regulations made under this section, make such provision as seems to him appropriate in respect of the fees and outlays of solicitors and counsel—
  - (a) acting in any proceedings for a person to whom legal aid has been made available ; or
  - (b) providing advice and assistance in accordance with Part II of this Act.
- (3) Without prejudice to the generality of subsection (2) above, regulations made under this section may—
  - (a) prescribe the work in respect of which fees may be charged;

- (b) prescribe rates or scales of payment of fees and outlays allowable and the conditions under which such fees and outlays may be allowed ;
  - (c) provide for the assessment and taxation of fees and outlays, and for the review of any such assessment or taxation, either by the Secretary of State or by any other person;
  - (d) prescribe general principles to be applied in connection with any such assessment, taxation or review;
  - (e) prescribe forms to be used for the purposes of any regulations made under this section ; and
  - (f) make different provision for different cases.
- (4) In subsection (1) above the reference to acting for a person includes, in relation to a solicitor, a reference to acting for such a person on the instructions of another solicitor.
- (5) Where a person is in receipt of legal aid in connection with any proceedings, any expenses incurred in connection with the proceedings which would, if he were not in receipt of legal aid, be paid, in the first instance, by or on behalf of the solicitor acting for him, shall be so paid.

### *Information*

## **34 Confidentiality of information**

- (1) Subject to subsection (2) below, no information furnished for the purposes of this Act to the Board or to any person acting on its behalf shall be disclosed—
- (a) in the case of such information furnished by, or by any person acting for, a person seeking or receiving legal aid or advice and assistance, without the consent of the person seeking or receiving legal aid or advice and assistance; or
  - (b) in the case of such information furnished otherwise than as mentioned in paragraph (a) above, without the consent of the person who furnished it,
- and any person who, in contravention of this subsection, discloses any information obtained by him when employed by, or acting on behalf of, the Board shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale.
- (2) Subsection (1) above shall not apply to the disclosure of information—
- (a) for the purpose of the proper performance or facilitating the proper performance by the Secretary of State, the Board, any court or tribunal or by any other person or body of duties or functions under this Act;
  - (b) for the purpose of investigating, prosecuting or determining any complaint of professional misconduct—
    - (i) against a solicitor, by the Law Society or the Scottish Solicitors' Discipline Tribunal;
    - (ii) against an advocate, by the Faculty of Advocates ;
  - (c) for the purpose of investigating or prosecuting any offence or for the report of any proceedings in relation to such an offence.
- (3) For the purposes of this section, information furnished to any person in his capacity as counsel or a solicitor by or on behalf of a person seeking or receiving legal aid or

advice and assistance is not information furnished to the Board or to a person acting on its behalf.

### **35 False information, etc.**

- (1) If any person seeking or receiving legal aid or advice and assistance—
- (a) wilfully fails to comply with any regulations as to the information to be furnished by him ; or
  - (b) for the purpose of obtaining legal aid or advice and assistance knowingly makes any false statement or false representation,
- he shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale or to imprisonment for a term not exceeding 60 days or to both.
- (2) Notwithstanding section 331 of the Criminal Procedure (Scotland) Act 1975, proceedings for an offence under subsection (1) above may be commenced at any time within 2 years from the date of the commission of the offence or within 6 months from the date when evidence sufficient in the opinion of the Lord Advocate to justify proceedings comes to his knowledge, whichever period is the shorter; and for the purposes of this subsection a certificate by the Lord Advocate as to the date on which such evidence came to his knowledge shall be conclusive evidence of that fact.

#### *Regulations and rules of court*

### **36 Regulations**

- (1) The Secretary of State may make such regulations under this section as appear to him necessary or desirable for giving effect to, or for preventing abuses of, this Act; and regulations made under this section may make different provision—
- (a) in relation to legal aid and to advice and assistance respectively; and
  - (b) for different cases or classes of case.
- (2) Without prejudice to subsection (1) above or to any other provision of this Act authorising the making of regulations, regulations made under this section may—
- (a) make provision as to the exercise by the Board of its functions under this Act;
  - (b) substitute different amounts for any of the amounts specified in section 8, 10(2), 11(2), 15 and 17(2) of this Act;
  - (c) make provision as to the proceedings which are or are not to be treated as distinct proceedings for the purposes of legal aid, and as to the matters which are or are not to be treated as distinct matters for the purposes of advice and assistance;
  - (d) make provision as to the manner of making applications for legal aid or advice and assistance under this Act and the time when such applications may be made and disposed of;
  - (e) make provision as to the information to be furnished by a person seeking or receiving legal aid or advice and assistance;
  - (f) make provision as to the cases in which a person may be refused legal aid or advice and assistance by reason of his conduct when seeking or receiving legal aid or advice and assistance (whether in the same or in a different matter or proceedings);

- (g) make provision in connection with the recovery of sums due to the Fund and making effective the priorities conferred by this Act on the payment of such sums out of awards of expenses or property recovered or preserved for a person receiving legal aid, including—
    - (i) provision in connection with the enforcement (by whatever means) for the benefit of the Fund of any award of expenses or any agreement as to expenses in favour of a person who has received legal aid; and
    - (ii) provision making a solicitor's right to payment out of the Fund dependent, in whole or in part, on his performing any duties imposed on him by regulations made for the purposes of this paragraph ;
  - (h) modify any provision of this Act so far as appears to the Secretary of State necessary to meet any of the special circumstances mentioned in subsection (3) below.
- (3) The special circumstances referred to in subsection (2)(h) above are where a person seeking or receiving legal aid or advice and assistance—
- (a) is not resident in Scotland ;
  - (b) is concerned in a representative, fiduciary or official capacity;
  - (c) is concerned jointly with or has the same interest as other persons, whether receiving legal aid or advice and assistance or not;
  - (d) has available to him rights and facilities making it unnecessary for him to take advantage of the provisions of this Act, or has a reasonable expectation of receiving financial or other help from a body of which he is a member;
  - (e) seeks legal aid or advice and assistance in a matter of special urgency;
  - (f) begins to receive legal aid or advice and assistance after having consulted a solicitor in the ordinary way with respect to the same proceedings, or ceases to receive legal aid or advice and assistance before the proceedings in question are finally settled ;
  - (g) has, while receiving legal aid or advice and assistance, any change of circumstances such that, had the changed circumstances subsisted at the time the application for legal aid or advice and assistance was made, the original disposal of the application would have been likely to have been affected.
- (4) Regulations made under this section may also modify this Act or any instrument having effect under this Act (including so much of any of those provisions as specifies a sum of money) for the purposes of its application—
- (a) in cases where such modification appears to the Secretary of State necessary for the purpose of fulfilling any obligation imposed on the United Kingdom or Her Majesty's government therein by any international agreement; or
  - (b) in relation to proceedings for securing the recognition or enforcement in Scotland of judgments given outside the United Kingdom for whose recognition or enforcement in the United Kingdom provision is made by any international agreement.

### **37 Parliamentary procedure**

- (1) Regulations under this Act shall be made by the Secretary of State by statutory instrument and, except as provided in subsection (2) below, shall be subject to annulment in pursuance of a resolution of either House of Parliament.

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- (2) No regulation shall be made under section 7, 9, 11(2), 13(4), 17(2), 21(2), 24(4) or 36(2)(b) of this Act unless a draft of it has been laid before, and approved by a resolution of, each House of Parliament.
- (3) Regulations made under section 42 of this Act shall be made with the concurrence of the Treasury.

### **38 Rules of court**

- (1) The court may by act of adjournal or, as the case may be, by act of sederunt—
  - (a) regulate the procedure of any court or tribunal in relation to legal aid, and in particular may make provision as to the cases in which and the extent to which a person receiving legal aid may be required to find caution, and the manner in which caution in such cases may be found;
  - (b) make provision as to the cases in which a person may be treated as having disentitled himself to a continuance of legal aid by his conduct in connection with his receipt of legal aid ;
  - (c) make provision as to the apportionment of sums recovered or recoverable by virtue of any award of expenses made generally with respect to proceedings or matters which are to be treated as distinct by virtue of regulations made under section 36(2)(c) of this Act;
  - (d) make provision as to the proceedings which are or are not to be treated as having been instituted by the legally assisted person for the purposes of section 19(3)(6) of this Act;
  - (e) regulate the procedure to be followed in connection with an order under section 19 of this Act, in particular to enable the Board to be heard in connection with such an order.
- (2) The court may by act of adjournal or, as the case may be, by act of sederunt restrict the fees to be paid to auditors of court, messengers-at-arms, sheriff officers and shorthand writers in any case where such fees are payable in the first instance by or on behalf of a person receiving legal aid to such proportion thereof as may be provided for the time being.
- (3) Before making rules of court regulating the procedure of any court or tribunal, the court shall, so far as practicable, consult any rules council or similar body by whom or on whose advice rules of procedure for the court or tribunal may, apart from this Act, be made or whose consent or concurrence is required to any such rules so made.
- (4) In this section " the court" means in relation to criminal proceedings, the High Court of Justiciary, and in relation to civil proceedings, the Court of Session.

#### *Rights of indemnity*

### **39 Adaptation of rights to indemnity**

- (1) This section shall have effect in relation to any right (however and whenever created or arising) which a person may have to be indemnified against expenses incurred by him in connection with any proceedings.



- (2) In determining in respect of any such right the reasonableness of any expenses, the possibility of avoiding them or part of them by taking advantage of the provisions of this Act shall be disregarded.
- (3) Where a person, having any such right to be indemnified against expenses, receives legal aid in connection with the proceedings, then the right shall enure also for the benefit of the Fund as if the expenses incurred by the Fund on his behalf in connection with the proceedings had been incurred by him.
- (4) Where—
  - (a) such a right to be indemnified against expenses arises by virtue of an agreement and is subject to any express provision conferring on those liable under the agreement any right with respect to the bringing or conduct of the proceedings ; and
  - (b) those liable have been given a reasonable opportunity of exercising the right so conferred and have not availed themselves of that opportunity,the right to be indemnified shall be treated, for the purposes of subsection (3) above, as not being subject to that provision.

### *General*

## **40 Finance**

- (1) The Secretary of State shall pay to the Board out of moneys provided by Parliament—
  - (a) such sums as are required (after allowing for payments into the Fund under paragraphs (a) to (c) and (e) of section 4(3) of this Act) to meet payments out of the Fund under this Act; and
  - (b) such sums as he may, with the approval of the Treasury, determine are required for the other expenditure of the Board.
- (2) The Secretary of State may, with the approval of the Treasury—
  - (a) determine the manner in which and times at which the sums referred to in subsection (1) (a) above shall be paid to the Board ; and
  - (b) impose conditions on the payment of the sums referred to in subsection (1) (b) above.
- (3) The Secretary of State shall pay to the Law Society in accordance with paragraph 1(2) (b) of Schedule 4 to this Act out of moneys provided by Parliament the amount required to make up any deficit in the Legal Aid (Scotland) Fund.
- (4) Any payments received by the Secretary of State from the Law Society in accordance with paragraph 1(2) (a) of Schedule 4 to this Act shall be paid by him into the Consolidated Fund.

## **41 Interpretation**

In this Act, unless the context otherwise requires—

" advice and assistance " has the meaning given to it in section 6(1) of this Act;

" assistance by way of representation " has the meaning given to it in section 6(1) of this Act;

" the Board " has the meaning given to it in section 1(1) of this Act;  
 " civil legal aid " has the meaning given to it in section 13(2) of this Act;  
 " criminal legal aid " has the meaning given to it in section 21(1) of this Act;  
 " the Fund " has the meaning given to it in section 4(1) of this Act:  
 " incorporated practice " has the same meaning as in the Solicitors' (Scotland) Act 1980 ;  
 " the Law Society " means the Law Society of Scotland ;  
 " legal aid " means civil legal aid, criminal legal aid, or legal aid given in connection with proceedings for contempt of court or proceedings under Part III of the Social Work (Scotland) Act 1968 ;  
 " person " does not include a body corporate or unincorporate, except where such body is acting in a representative, fiduciary or official capacity, so as to authorise legal aid or advice and assistance to be provided to such a body.

#### **42 Disposable income and capital**

- (1) In this Act " disposable income " or " disposable capital " in relation to any person means his income or, as the case may be, the amount of his capital, after making such deductions and allowances as regulations made under this section may prescribe—
- (a) in respect of maintenance of dependants, interest on loans, income tax, rates, rent and other matters for which that person must or reasonably may provide ;
  - (b) to take account of the nature of his resources, and does not include the subject matter of the dispute.
- (2) Regulations made under this section may make provision as to the determination of a person's income and the amount of his capital and in particular for determining whether any resources are to be treated as income or capital and for taking into account fluctuations of income, and different provision may be made for legal aid and for advice and assistance.
- (3) Except in so far as regulations made under this section otherwise provide, the resources of a person's spouse shall be treated for the purposes of this section as that person's own resources, and such regulations may also make provision, in relation to minors and pupils and other special cases, for taking into account the resources of other persons.

#### **43 Act not to affect certain taxations etc.**

Nothing in this Act shall affect the sum recoverable by virtue of—

- (a) an award of expenses in favour of a person to whom legal aid has been made available ; or
- (b) an agreement as to expenses in favour of such a person which provides for taxation,

and for the purpose of any such award or agreement, the solicitor who acted for the person in whose favour it is made shall be treated as having paid any counsel's fees.

#### **44 Crown application**

This Act shall bind the Crown.

#### **45 Amendments, transitional provisions, savings and repeals**

- (1) The enactments mentioned in Schedule 3 to this Act shall have effect subject to the amendments there specified (being minor amendments and amendments consequential on this Act).
- (2) Without prejudice to sections 16 and 17 of the Interpretation Act 1978 (effect of repeals) and section 46(3) of this Act, the transitional provisions and savings contained in Schedule 4 to this Act shall have effect.
- (3) The enactments set out in columns 1 and 2 of Schedule 5 to this Act are repealed to the extent specified in the third column of that Schedule.

#### **46 Short title, commencement and extent**

- (1) This Act may be cited as the Legal Aid (Scotland) Act 1986.
- (2) This Act, apart from this section, shall come into force on such day as the Secretary of State may, by order made by statutory instrument, appoint; and different days may be so appointed for different purposes and for different provisions.
- (3) An order under subsection (2) above may contain such transitional provisions and savings as appear to the Secretary of State necessary or expedient.
- (4) This Act, except section 18(3), extends only to Scotland.