***Changes to legislation:*** *There are outstanding changes not yet made by the legislation.gov.uk editorial team to The Civil Legal Aid (Scotland) Regulations 2002. Any changes that have already been made by the team appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

SCOTTISH STATUTORY INSTRUMENTS

# 2002 No. 494

# LEGAL AID AND ADVICE

## The Civil Legal Aid (Scotland) Regulations 2002

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| *Made - - - -* | *6th November 2002* |
| *Laid before the Scottish Parliament - - - -* | *7th November 2002* |
| *Coming into force - -* | *1st December 2002* |

The Scottish Ministers, in exercise of the powers conferred by sections 17(2B), 19(4), 20(4), 36(1), (2)(a) and (c) to (h), (3)(bb), (e) and (f) and (4), 37(1) and (3) and 42 of the Legal Aid (Scotland) Act 1986[F1] and of all other powers enabling them in that behalf, hereby make the following Regulations:

**F1** 1986 c.47; section 17(2B) was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), **Schedule 8**, paragraph 36(6); section 37 was amended by S.I. 1999/1820, **Schedule 2**, paragraph 86(4); section 36(3)(bb) was inserted by the Adults with Incapacity (Scotland) Act 2000 (asp 4), **Schedule 5**, paragraph 19. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

## PART 1

## GENERAL

### Citation and commencement

**1.** These Regulations may be cited as the Civil Legal Aid (Scotland) Regulations 2002 and shall come into force on 1st December 2002.

### Interpretation

**2.**—(1) In these Regulations–

"the Act" means the Legal Aid (Scotland) Act 1986;

"the 1992 Act" means the Social Security Contributions and Benefits Act 1992 [F2];

"the 1995 Act" means the Children (Scotland) Act 1995 [F3];

"assisted person" means a person in receipt of legal aid in the proceedings in question;

"child" means a person under the age of 16 years;

"counsel" includes a solicitor-advocate, except in regulations 21(1)(c) and 44 below;

"Employment Appeal Tribunal" means the Employment Appeal Tribunal established under section 87 of the Employment Protection Act 1975 [F4];

"Fund" means the Scottish Legal Aid Fund;

"income" includes benefits and privileges, and the income of the person concerned includes any sum payable for the purpose of the maintenance of a child including any sum payable to that person under the order of a court or under any agreement for that purpose;

"interest in land" has the same meaning as in section 28(1) of the Land Registration (Scotland) Act 1979 [F5];

"junior counsel" includes a junior solicitor-advocate;

"legal aid" means "civil legal aid" within the meaning of section 13(2) of the Act [F6];

"legal representative" means a person having parental responsibilities in relation to a child, a judicial factor or a person authorised to act on an adult's behalf under the Adults with Incapacity (Scotland) Act 2000 [F7];

"maximum contribution" means the maximum amount of a person's contribution to the Fund in respect of any proceedings;

"opponent", in relation to an application for legal aid, means a party, other than the applicant, interested in the proceedings for which legal aid is sought;

"parental responsibilities" has the meaning given in section 1(3) of the 1995 Act;

"parental rights" has the meaning given in section 2(4) of the 1995 Act;

"period of computation" means the period of 12 months next ensuing from the date of the application for legal aid, or such other period of 12 months as in the particular circumstances of any case the Board may consider to be appropriate;

"person concerned" means the person whose disposable income, disposable capital, and maximum contribution are to be determined or redetermined or the person whose resources are to be treated as the resources of any other person, under these Regulations;

"right of audience" means, in relation to a solicitor, a right of audience in the Court of Session, the House of Lords and the Judicial Committee of the Privy Council which a solicitor has by virtue of section 25A (rights of audience in specified courts) of the Solicitors (Scotland) Act 1980 [F8];

"senior counsel" includes a senior solicitor-advocate, except in paragraph (2) below;

"solicitor-advocate" means a solicitor, whether instructed by another solicitor or not, when and only when exercising that solicitor's right of audience or acting in connection with the exercise of such a right and "junior solicitor-advocate" and "senior solicitor-advocate" shall be construed in accordance with paragraph (2) below;

"in writing" includes a reference to an electronic communication, as defined in the Electronic Communications Act 2000 [F9], which has been recorded and is consequently capable of being reproduced; and

unless the context otherwise requires, any reference in these Regulations to a solicitor does not include a solicitor when acting as a solicitor-advocate.

(2) For the purposes of these Regulations, a solicitor-advocate shall be–

(a) a senior solicitor-advocate, where undertaking work equivalent to that which would be done by a senior counsel in a case in the House of Lords or the Judicial Committee of the Privy Council, or where the Board has authorised the employment of senior counsel under regulation 21(1)(b) or (2) below; or

(b) a junior solicitor-advocate, where undertaking work equivalent to that which would be done by a junior counsel, irrespective of whether or not the Board has authorised the employment of senior counsel in the case.

**F2** 1992 c.4.
**F3** 1995 c.36.
**F4** 1975 c.71.
**F5** 1979 c.33; section 28(1) was amended by the Electricity Act 1989 (c.29), **Schedule 16**, the Coal Industry Act 1994 (c.21), **Schedule 9** and the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5), **schedules 12** and 13.
**F6** Section 13(2) was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), **Schedule 8**.
**F7** 2000 asp 4.
**F8** 1980 c.46. Section 25A was inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 24, and was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40), **Schedule 4**, paragraph 31.
**F9** 2000 c.7.

### Revocations and savings

**3.**—(1) Subject to paragraphs (2) and (3) below, the Regulations specified in Schedule 1 to these Regulations are hereby revoked.

(2) The revocation by these Regulations of–

(a) a transitional provision relating to the coming into force of, or

(b) an application provision which restricts the application of,

a provision, which is revoked and re-enacted by these Regulations, does not affect the operation of that transitional provision or, as the case may be, application provision, insofar as it remains capable of having effect in relation to the provision which is re-enacted in these Regulations.

(3) Where a period of time specified in any provision, which is revoked by these Regulations, is current at the date of coming into force of these Regulations, these Regulations have effect as if the provision which re-enacts that revoked provision in these Regulations had been in force when that period began to run.

### Distinct proceedings for purposes of legal aid

**4.**—(1) For the purposes of legal aid the following proceedings shall, subject to paragraph (2) below, be treated as distinct proceedings:–

(a) proceedings in the sheriff court insofar as they are proceedings in a court of first instance;

(b) proceedings before the sheriff principal on appeal from the sheriff;

(c) proceedings in the Court of Session, whether in the Inner House or before a Lord Ordinary, insofar as they are proceedings in a court of first instance;

(d) proceedings in the Court of Session, insofar as they are proceedings in an appellate court;

(e) proceedings in the House of Lords on appeal from the Court of Session;

(f) proceedings in the Lands Valuation Appeal Court;

(g) proceedings in the Scottish Land Court;

(h) proceedings before the Lands Tribunal for Scotland;

(i) proceedings before the Employment Appeal Tribunal;

(j) proceedings in the Judicial Committee of the Privy Council on appeal from the Court of Session under paragraph 10, 12 or 13(b) of Schedule 6 to the Scotland Act 1998 [F10] including any application for special leave to appeal;

(k) proceedings before the Social Security Commissioners and the Child Support Commissioners;

(l) proceedings before the Proscribed Organisations Appeals Commission.

(2) Where proceedings are initiated in the sheriff court and are thereafter remitted to the Court of Session or are initiated in the Court of Session and remitted to the sheriff court, the proceedings in the court to which the case is remitted shall not be treated as distinct from the proceedings in the initial court.

(3) Where in any of the distinct proceedings specified in paragraph (1) above, any decree or order has been granted in favour of the assisted person, those proceedings shall be treated as including any step, other than the taking of proceedings for civil imprisonment or for sequestration or the raising of an action of furthcoming following arrestment, in the execution of diligence following such decree or order.

**F10** 1998 c.46.

# PART II

## APPLICATIONS FOR LEGAL AID

### Form of application

**5.**—(1) Subject to regulations 6 and 18 below, an application for legal aid under section 14 of the Act [F11] shall be–

(a) in writing, in such form as the Board may require, and signed by–

(i) the applicant;

(ii) where the applicant on cause shown cannot sign the application, by a person authorised by the applicant; or

(iii) where the applicant is mentally disordered in terms of section 1(2) of the Mental Health (Scotland) Act 1984 [F12], or is an incapable adult in terms of section 1(6) of the Adults with Incapacity (Scotland) Act 2000, by the applicant's legal representative;

(b) accompanied by a statement, signed by the applicant, or, where the applicant in terms of the above sub-paragraph either cannot sign the application or is mentally disordered or incapable, by an authorised person or by the applicant's legal representative, and by or on behalf of the solicitor acting for the applicant, as to the nature of the case and the interest of the applicant therein;

(c) accompanied, so far as possible, by such precognitions and other documents as may be requisite to enable the Board to determine the application; and

(d) accompanied by a copy for each opponent of the statement referred to in sub-paragraph (b) above together with such form of intimation as the Board may require in relation to each opponent and either the address of each opponent or each opponent's solicitor or a statement that the whereabouts of the opponent are unknown following reasonable enquiry.

(2) Where the applicant resides outside the United Kingdom and is not able to be present in the United Kingdom when the application is being considered, the application, which shall be in English or in French, shall, subject to paragraph (3) below, be sworn–

(a) if the applicant resides within the Commonwealth or the Republic of Ireland, before any Justice of the Peace or Magistrate, or any person for the time being authorised by law, in the place where the applicant is, to administer an oath for any judicial or other legal purpose, or

(b) if the applicant resides elsewhere, before a consular officer in the service of Her Majesty's Government in the United Kingdom, or any other person for the time being authorised to exercise the functions of such an officer or having authority to administer an oath in that place for any judicial or other legal purpose,

and shall be accompanied by a statement in writing, itemising the applicant's disposable income and disposable capital.

(3) The requirements of paragraph (2) above may be waived in whole or in part by the Board where it is satisfied that compliance with them would cause serious difficulty, inconvenience or delay and the application satisfies the requirements of paragraph (1) above.

**F11** Section 14 was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), **Schedule 8**, paragraph 36.

**F12** 1984 c.36; section 1(2) was amended by the Mental Health (Public Safety and Appeals) (Scotland) Act 1999 (asp 1), **section 3**.

### Applications on behalf of children

**6.**—(1) Without prejudice to any right of a child to apply under regulation 5 above, application on behalf of a child may be made by the child's legal representative or by any person in whose care the child is, or by a person acting for the purposes of any proceedings as the child's tutor or curator.

(2) An application by or on behalf of a child under the upper age limit of compulsory school age in terms of paragraph (1) above shall be determined in terms of Part III below.

### Notification to opponent

**7.**—(1) Subject to paragraph (2) below, it shall be the duty of the Board to send to any opponent, or to the solicitor acting for any opponent–

(a) notification that application for legal aid has been made;

(b) a copy of the statement referred to in regulation 5(1)(b) above; and

(c) notice of the opponent's right, under regulation 8 below, to make representations to the Board.

(2) Paragraph (1) above shall not apply if–

(a) the addresses of the opponent and the opponent's solicitor are not known to the Board and could not reasonably be ascertained by the solicitor acting for the applicant; or

(b) the Board, on the application of the solicitor acting for the applicant, determines that notification should be dispensed with or postponed.

### Right of opponent to make representations

**8.** Any opponent may, within 14 days (or, in the case of an opponent resident outside the United Kingdom, 28 days) of being notified of the application, or such longer time as the Board may in the particular circumstances allow, make to the Board representations in writing as to the application, and the Board shall, except where it makes legal aid available under regulation 18 below, consider any such representations before determining the application.