Convention Rights (Compliance) (Scotland) Bill

Note by the Executive on impact of the Bill on Legal Aid (Scotland) Act 1986

The relevant sections of the Legal Aid (Scotland) Act 1986 (c.47), as amended by this Bill, are set out below.

The amendments proposed by the Convention Rights (Compliance) (Scotland) Bill are shown in bold and deletions scored through.

4 Scottish Legal Aid Fund

(1) The Board shall establish and maintain a fund to be known as the Scottish Legal Aid Fund (in this Act referred to as "the Fund").

(2) There shall be paid out of the Fund—

   (a) such sums as are, by virtue of this Act or any regulations made thereunder, due out of the Fund to any solicitor or counsel in respect of fees and outlays properly incurred or in respect of payments made in accordance with regulations made under section 33(3A) of this Act, in connection with the provision, in accordance with this Act, of legal aid or advice and assistance;

   (aa) any expenses incurred by the Board in connection with the provision of criminal legal assistance by solicitors employed by it by virtue of section 28A of this Act;

   (ab) any sums payable by the Board under contracts made by virtue of section 33A of this Act;

   (b) expenses awarded to any person under section 19 of this Act; and

   (c) such other payments as the Scottish Ministers may, with the concurrence of the Treasury, determine.

(3) There shall be paid into the Fund—

   (a) any contribution payable to the Fund by any person in pursuance of section 17 of this Act;

   (aa) any contribution payable to the Board by any person in pursuance of section 11 of this Act;

   (aaa) any award of expenses made by a criminal court to a person to whom criminal legal assistance has been provided by a solicitor employed by the Board under sections 26 and 27 of this Act.

   (ab) any award of expenses made by a criminal court to a person to whom criminal legal assistance has been provided by a solicitor employed by the Board by virtue of section 28A of this Act;

   (b) any sum recovered under an award of a court or an agreement as to expenses in any proceedings in favour of any party who is in receipt of civil legal aid;

   (c) any sum which is to be paid in accordance with section 17 of this Act out of property recovered or preserved for any party to any proceedings who is in receipt of civil legal aid;
(d) the sums to be paid by the Scottish Ministers in pursuance of section 40(1)(a) of this Act; and

(e) such other receipts of the Board as the Scottish Ministers may, with the concurrence of the Treasury, determine.
ADVICE AND ASSISTANCE

6 Definitions

(1) In this Act—

"advice and assistance" means any of the following—

(a) oral or written advice provided to a person by a solicitor (or, where appropriate, by counsel)—

(i) on the application of Scots law to any particular circumstances which have arisen in relation to the person seeking the advice;

(ii) as to any steps which that person might appropriately take (whether by way of settling any claim, instituting, conducting or defending proceedings, making an agreement or other transaction, making a will or other instrument, obtaining further legal or other advice and assistance, or otherwise) having regard to the application of Scots law to those circumstances;

(b) assistance provided to a person by a solicitor (or, where appropriate, by counsel) in taking any steps mentioned in paragraph (a)(ii) above, by taking such steps on his behalf or by assisting him in so taking them; and

"assistance by way of representation" means advice and assistance provided to a person by taking on his behalf any step in instituting, conducting or defending any proceedings—

(a) before a court or tribunal; or

(b) in connection with a statutory inquiry,

whether by representing him in those proceedings or by otherwise taking any step on his behalf (as distinct from assisting him in taking such a step on his own behalf).

(2) In this Part of this Act—

"client" means a person who seeks or receives advice and assistance in accordance with this Part of this Act;

"statutory inquiry" has the meaning assigned to it by section 16(1) of the Tribunals and Inquiries Act 1992;

"the solicitor" means the solicitor by whom any advice and assistance is provided or, where it is provided by counsel, the solicitor on whose instruction counsel provides it;

"tribunal" includes an arbiter or oversman, however appointed and references to a court, tribunal or statutory inquiry include references to any court, tribunal or statutory inquiry which is established by law for purposes which are or include those of determining persons' civil rights and obligations and to any person who or group of persons or body or procedure which (however described) is appointed or established by law for such purposes.
11 Clients’ contributions

(1) A client shall not be required to pay any fees or outlays in respect of advice and assistance received by him in pursuance of this Part of this Act except in accordance with subsection (2) or (3) below.

(2) Where—

(a) a client's disposable income exceeds £76 a week; and

(b) he is not (directly or indirectly) in receipt of income support, an income-based jobseeker's allowance (payable under the Jobseekers Act 1995) or family credit,

he shall be liable to pay, in respect of the advice and assistance, fees or outlays up to, but not in aggregate exceeding, such amount as may be prescribed by regulations made under this section, and such regulations may prescribe different maximum payments for different amounts of disposable income and for different cases or classes of case.

(2A) A client to whom paragraphs (a) and (b) of subsection (2) above apply and to whom criminal legal assistance has been provided by a solicitor employed by the Board under sections 26 and 27 of this Act shall pay to the Board such contribution in that respect as the Board may, subject to subsection (3A) below, determine.

(3) Where a client to whom paragraphs (a) and (b) of subsection (2) above apply receives criminal legal assistance from a solicitor employed by the Board by virtue of section 28A of this Act, he shall pay to the Board such contribution in respect of that assistance as the Board may, subject to subsection (4) below, determine.

(3A) The amount determined by the Board under subsection (2A) above shall not exceed the amount which would be charged by a solicitor who is not employed by the Board under sections 26 and 27 of this Act.

(4) The amount determined by the Board under subsection (3) above shall not exceed the amount which could have been charged in respect of the assistance in question by a solicitor.

12 Payments of fees or outlays otherwise than through clients’ contributions

(1) In this section, in relation to advice and assistance provided by a solicitor employed by—

(a) a firm of solicitors;

(b) an incorporated practice; or

(c) the Board,

in the course of that employment (or by counsel on instructions given to him by such a solicitor), "the solicitor" includes the firm, incorporated practice or the Board, as the case may be.

(2) This section applies to any fees or outlays properly chargeable (in accordance with section 33 of this Act), in respect of advice and assistance given to a client in pursuance of this Part of this Act; but does not apply to the salary payable to a solicitor employed by the Board under sections 26 and 27 of this Act or to the salary payable to a solicitor employed by the Board by virtue of section 28A of this Act.

(3) Except in so far as regulations made under this section otherwise provide, fees or outlays to which this section applies shall be paid to the solicitor as follows—
(a) first, 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 a judgement or order of a court or an agreement or otherwise) are payable to the client by any other person in respect of the matter in connection with which the advice and assistance is provided;

(c) thirdly, in priority to all other debts, out of any property (of whatever nature and wherever situated) which is recovered or preserved for the client in connection with that matter, including his rights under any settlement arrived at in connection with that matter in order to avoid or bring to an end any proceedings;

(d) fourthly, by the Board out of the Fund, following receipt by it of a claim submitted by the solicitor.

13 Meaning of “civil legal aid”

(1) This part of this Act applies to civil legal aid.

(2) In this Act, "civil legal aid" means representation by a solicitor and, where appropriate, by counsel in any proceedings mentioned in Part I of Schedule 2 to this Act, on the terms provided for in this Act, and includes all such assistance as is usually given by solicitor or counsel in the steps preliminary to or incidental to proceedings, or in arriving at or giving effect to a settlement to prevent them or bring them to an end.

(3) Subject to sections 14 and 15 of this Act and to regulations made under this section, civil legal aid shall be available in connection with any proceedings mentioned in subsection (2) above, except insofar as Part II of Schedule 2 to this Act otherwise provides.

(4) Schedule 2 to this Act may be varied by regulations made under this section, so as to extend or restrict the categories of proceedings in which civil legal aid is available, by reference to the court or tribunal, to the issues involved, to the capacity in which the person seeking civil legal aid is concerned, or otherwise.

(5) Regulations under subsection (4) above may not have the effect of adding any reference to proceedings in any court or tribunal before which persons have no right to be and are not normally represented by counsel or a solicitor.

(6) In subsections (4) and (5) above, the references to a court or tribunal include references to a court or tribunal which is established by law for purposes which are or include those of determining persons’ civil rights and obligations and to any person who or group of persons, body, statutory inquiry or other procedure which (however described) is appointed or established by law for such purposes.

14 Availability of civil legal aid

(1) Subject to section 15 of this Act and to subsection (2) below, civil legal aid shall be available to a person if, on an application made to the Board—

(a) the Board is satisfied that he has a probabilis causa litigandi; and

(b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.
(1A) In the case of proceedings in such courts or tribunals as may be specified in regulations under this Act, civil legal aid shall be available to a person only if, in addition to the requirements which have to be met under subsection (1) above and section 15 of this Act, such criteria as may be prescribed in those regulations are met.

(1B) In subsection (1A) above, the reference to courts or tribunals shall be construed in accordance with section 13(6) of this Act.

(2) The Board may require a person receiving civil legal aid 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 civil legal aid.

(3) Subject to subsections (4) to (6) below, the Board shall establish a procedure under which any person whose application for legal aid under this section has been refused may apply to the Board for a review of his application.

(4) Where—
   (a) the Board has refused an application for civil legal aid by a person who has applied for such aid for the purpose of raising an action against the Board; and
   (b) the applicant has applied to the Board for a review of his application,
the Board shall, unless they decide to grant the application forthwith, refer the application, together with all relevant precognitions, statements and other papers, including any observations they wish to make on the application, to the sheriff for Lothian and Borders at Edinburgh.

(5) Subject to section 15 of this Act, and to subsection (2) above, where the sheriff decides—
   (a) that the applicant has a probabilis causa litigandi; and
   (b) that it is reasonable in the particular circumstances of the case that he should receive legal aid,
he shall so inform the Board, and the Board shall make civil legal aid available to the applicant.

(6) A decision made by the sheriff under subsection (5) above shall be final.

16 Expenses in favour of certain assisted persons

(1) [repealed by the Legal Aid Act 1988 (c.34), section 44 and Schedule 4, paragraph 2(a), with effect from 29th July 1988]

(2) In sections 17 to 20 of this Act—
"court" includes tribunal and references to either shall be construed in accordance with section 13(6) of this Act;
"legally assisted person" means a person in receipt of civil legal aid in the proceedings in question or a person in receipt of assistance by way of representation in any proceedings to which this Part applies.
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.

(3A) A solicitor employed by the Board under sections 26 and 27 of this Act to provide criminal legal assistance 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.

(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 sub-section (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.
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.

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.

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.

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.

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.

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.

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;
   (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 under sections 26 and 27 of this Act to provide criminal legal assistance, different provision to reflect the fact that they are so employed and 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 Scottish Ministers for their approval.

(5) The Scottish Ministers may approve the draft code, with or without modification.

(6) When the Scottish Ministers 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 Scottish Ministers 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.
EMPLOYMENT OF SOLICITORS BY THE BOARD

26 Employment to which Part V applies

(1) This Part of this Act applies to the employment of solicitors by the Board for any of the following purposes—

(a) giving advice and assistance to which Part II of this Act applies either generally or in cases of any such description as may be prescribed by regulations made under this section;

(b) acting for persons receiving legal aid, either generally or in cases of any such description as may be prescribed by regulations made under this section;

(c) providing any such services as are mentioned in subsection (2) below.

(2) The services referred to in subsection (1)(c) above are services provided by a solicitor for or in connection with any local organisation and consisting of—

(a) assisting the organisation in its function of giving advice and guidance to applicants;

(b) promoting contacts between the organisation and solicitors practising in the locality for which the organisation is established, with a view to enabling applicants to obtain the professional services of those solicitors in cases where those services are required;

(c) giving oral advice to applicants, instead of referring them to other solicitors, in cases which can be readily disposed of by such advice.

(3) In subsection (2) above—

(a) "local organisation" means an organisation concerned in the giving of advice or guidance (whether generally or with respect to any particular classes of matters) to persons residing in the locality for which the organisation is established; and

(b) "applicants", in relation to such an organisation, means persons who apply to the organisation for advice or guidance or are referred to it with a view to their receiving advice or guidance from it.

(4) In this section "organisation" includes a branch or section of an organisation; and, in relation to such a branch or section, any reference to the locality for which the organisation is established shall be construed as a reference to the locality for which the branch or section is established.

28A Power of Board to employ solicitors to provide criminal assistance

(1) The Scottish Ministers 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, 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 Scottish Ministers 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 Scottish Ministers 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 consider 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 Scottish Ministers 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 Scottish Ministers 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
      (ii) subsections (3) and (4)
   (c) in section 12(2), the words "; but does not apply or 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, where it second occurs " to the end; and
   (f) in section 31(1A), paragraph (c).
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.

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.

The power to bring sections 26 to 28 of this Act into force is not affected—

(a) by the provisions of this section; or

(b) by the fact that it is exercised before the expiry of the period of five years referred to in subsection (11) above.

Solicitors and counsel

Subject to subsection (1A) 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, or a solicitor holding rights of audience by virtue of section 25A (rights of audience) of the Solicitors (Scotland) Act 1980, his counsel or such a solicitor,

and he shall be entitled to make the selection himself.

Subsection (1) above is subject to—

(a) section 25A(3) of this Act;

(b) section 30(2) of this Act;

(c) regulations made under section 28A(6) of this Act;

(d) regulations made under section 33A(4) of this Act; and

(e) regulations made under subsection (9) below.

and does not apply where the person is being provided with criminal legal assistance by a solicitor employed by the Board under section 26 and 27 of this Act.

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.

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.
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.

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.

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.

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.

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.

Where a solicitor is available as is mentioned in subsection (8) above, the Scottish Ministers may, by regulations made under this section, provide that—

(a) subsection (1) above shall not apply; and
(b) subject to subsection (11) below, legal aid or, as the case may be, advice and assistance shall be provided only by the solicitor so made available.

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.

Nothing in subsection (9)(b) above shall enable the Scottish Ministers to make regulations authorising the granting of legal aid only to solicitors holding rights of audience under section 25A (rights of audience) of the Solicitors (Scotland) Act 1980.

33 Fees and outlays of solicitor and counsel

(1) Subject to subsections (3A) and (3B) below, 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 Scottish Ministers 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 Scottish Ministers 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.

(3A) The Scottish Ministers 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.

(3AA) Regulations amending or replacing regulations made under subsection (3A) above may, for the purpose specified in subsection (3AB) below, make provision as to fixed payments in relation to criminal legal assistance provided in relation to proceedings commenced before and continuing as at the date of the making or coming into force of the amendment or replacement of the regulations.

(3AB) The purpose referred to in subsection (3AA) above is that of ensuring that persons to whom fixed payment criminal legal assistance is being provided are not, by reason of the amount of the fixed payment payable in respect of that criminal legal assistance under the regulations as they have effect immediately before the coming into force of the amendment or replacement of the regulations, deprived of the right to a fair trial.

(3AC) In subsection (3AB) above “fixed payment criminal legal assistance” and “fixed payments” have respectively the meanings given by subsection (3E) below.

(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.

(3C) The Scottish Ministers may, however, for the purpose of enabling the Board to ensure that a person to whom fixed payment criminal legal assistance is provided is not, for the reason specified in subsection (3D) below, deprived of the right to a fair trial, by regulations under this subsection, provide that—
   (a) in such circumstances; and
   (b) under such conditions,

as may be prescribed by the regulations, a solicitor who provides such criminal legal assistance shall, instead of receiving fixed payments, be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above.
(3D) The reason referred to in subsection (3C) above is the amount of the fixed payments payable for the criminal legal assistance provided.

(3E) In subsection (3C) above—

“fixed payment criminal legal assistance” means criminal legal assistance in respect of which fixed payments are prescribed under subsection (3A) above;

“fixed payments” means fixed payments so prescribed.

(3F) Regulations made under subsection (3C) above shall provide that it is for the Board to determine whether any prescribed circumstances exist and whether any prescribed conditions are met.

(3G) Circumstances may be prescribed under subsection (3C)(a) above by reference to such factors as the Scottish Ministers think fit.

(3H) The conditions which may be prescribed under subsection (3C)(b) above include those which stipulate that a solicitor providing criminal legal assistance—

(a) applies to the Board to exercise its power of determination under subsection (3F) above;

(b) does so in such manner and form as the Board may specify and at as early a stage in the provision of the criminal legal assistance as is reasonably practicable; and

(c) keeps proper records of all professional services provided by way of and outlays incurred in the provision of that criminal legal assistance, whether before or after the exercise of that power of determination.

(3I) Regulations may be made under subsection (3C) above so as to relate to criminal legal assistance provided in relation to proceedings commenced before and continuing as at the date of coming into force of section 7 of the Convention Rights (Compliance) (Scotland) Act 2001 (asp 00), and regulations so relating may disapply any condition which would otherwise apply under subsection (3C)(b) above.

(3J) The Board shall establish a procedure under which any person—

(a) whose solicitor’s application under subsection (3H) above has been refused; or

(b) on whose solicitor’s application under that subsection the Board has made a determination which is such that the solicitor will not be paid out of the Fund in accordance with regulations made under subsections (2) and (3) above, may apply to the board for review of that refusal or determination.

(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.

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)(b) 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.

(1A) In subsection (1)(a) above, the reference to any court or tribunal shall be construed, except in relation to criminal proceedings, in accordance with section 13(6) of this Act.

(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.