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STATUTORY INSTRUMENTS

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**1997 No. 3070 (S.197)**

**LEGAL AID AND ADVICE, SCOTLAND**

**The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997**

*Made* - - - - 23rd December 1997

*Coming into force* - - 1st January 1998

The Secretary of State, in exercise of the powers conferred on him by sections 9 and 37(1) of the Legal Aid (Scotland) Act 1986<sup>(1)</sup> and of all other powers enabling him in that behalf, hereby makes the following Regulations, a draft of which has, in accordance with section 37(2) of that Act, been laid before Parliament and approved by resolution of each House of Parliament:

**Citation commencement and interpretation**

1.—(1) These Regulations may be cited as the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1997 and shall come into force on 1st January 1998.

(2) In these Regulations unless the context otherwise requires—

“the Act” means the Legal Aid (Scotland) Act 1986;

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995<sup>(2)</sup>;

“the chairman of a tribunal”, in relation to a Parole Board case, has the same meaning as in Rule 2(1) of the Parole Board (Scotland) Rules 1993<sup>(3)</sup>;

“disciplinary proceedings”, in relation to a prisoner means an inquiry before a governor held in pursuance of rules 94, 97 and 99 of and Schedule 3 to the Prisons and Young Offenders Institutions (Scotland) Rules 1994<sup>(4)</sup> in respect of a breach of discipline which the prisoner is alleged to have committed;

“governor” means the person who is appointed by the Secretary of State under section 3(1) of the Prisons (Scotland) Act 1989<sup>(5)</sup> as the governor of a prison and includes any officer of a governor grade or where there is no such officer present for the time being in the prison, the most senior officer who is present in the prison at that time;

“officer” means an officer of the prison appointed by the Secretary of State;

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(1) 1986 c. 47.  
(2) 1995 c. 46.  
(3) S.I. 1993/2225 amended by S.I. 1997/2317.  
(4) S.I. 1994/1931 amended by S.I. 1996/32.  
(5) 1989 c. 45.

“Parole Board case” means a case of a prisoner to which Part IV of the Parole Board (Scotland) Rules 1993 applies;

“prison” has the same meaning as in section 43(1) of the Prisons (Scotland) Act 1989 and also includes a young offenders institution;

“prisoner” –

- (a) in relation to disciplinary proceedings, has the same meaning as in section 43(1) of the Prisons (Scotland) Act 1989 and also includes a person serving a sentence of detention in a young offenders institution, and
- (b) in relation to a Parole Board case, has the same meaning as in Rule 2(1) of the Parole Board (Scotland) Rules 1993;

“tribunal” in relation to a Parole Board case, means a tribunal formed under Rule 18 of the Parole Board (Scotland) Rules 1993, and includes a preliminary hearing before the chairman of a tribunal under Rule 19 of those Rules; and

“young offenders institution” has the same meaning as in section 19(1) of the Prisons (Scotland) Act 1989.

## **Revocation**

2. The Regulations specified in the Schedule to these Regulations are hereby revoked.

## **Application of Part II of the Act to assistance by way of representation: miscellaneous proceedings**

3. Part II of the Act shall apply to assistance by way of representation in relation to–
  - (a) summary criminal proceedings;
  - (b) petitions for the appointment of an executor to a deceased person under the Act of Sederunt (Confirmation of Executors) 1964<sup>(6)</sup>;
  - (c) proceedings under Part V of the Mental Health (Scotland) Act 1984<sup>(7)</sup>;
  - (d) petitions by a debtor for the sequestration of his estate under section 5(2)(a) of the Bankruptcy (Scotland) Act 1985<sup>(8)</sup>;
  - (e) disciplinary proceedings before a governor in relation to a prisoner, where the prisoner has been permitted by the governor to be legally represented;
  - (f) proceedings in Parole Board cases;
  - (g) applications under section 42 of the Road Traffic Offenders Act 1988<sup>(9)</sup> for the removal of a disqualification;
  - (h) proceedings under section 66(6) of the Criminal Justice and Public Order Act 1994<sup>(10)</sup> for the return of sound equipment;
  - (i) civil proceedings arising from a failure by a person to–
    - (i) pay a fine or other sum; or
    - (ii) obey an order of the court; and

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<sup>(6)</sup> 1964/1143.

<sup>(7)</sup> 1984 c. 36.

<sup>(8)</sup> 1985 c. 66; section 5(2) of the 1985 Act was substituted by section 3(2) of the Bankruptcy (Scotland) Act 1993 (c. 6).

<sup>(9)</sup> 1988 c. 53; section 42 was amended by the Road Traffic Act 1991 (c. 40), Schedule 4, paragraph 98.

<sup>(10)</sup> 1994 c. 33.

- (j) applications, by someone other than the accused, under section 31(6) of the Criminal Law (Consolidation) (Scotland) Act 1995<sup>(11)</sup>.

**Application of Part II of the Act to assistance by way of representation: proceedings under the 1995 Act**

4.—(1) Any reference in this regulation to a numbered section, paragraph or schedule is to a section, paragraph or schedule bearing that number in the 1995 Act.

- (2) Part II of the Act shall apply to assistance by way of representation in relation to proceedings:
  - (a) under section 232 in relation to failure to comply with the requirements of a probation order;
  - (b) under section 233 in relation to the conviction of a probationer by a court in Great Britain of an offence committed during his probation period;
  - (c) under section 239(4) to (6) in relation to failure to comply with the requirements of a community service order;
  - (d) under section 240(1) and (3) in relation to amendment or revocation of a community service order;
  - (e) under paragraph 4 of Schedule 7 in relation to failure to comply with the requirements of a supervised attendance order;
  - (f) under paragraph 5(1) and (3) of Schedule 7 in relation to amendment or revocation of a supervised attendance order.

**Application of Part II of the Act to assistance by way of representation: proceedings under the Proceeds of Crime (Scotland) Act 1995**

5.—(1) Any reference in this regulation to a numbered section is to a section bearing that number in the Proceeds of Crime (Scotland) Act 1995<sup>(12)</sup>.

- (2) Part II of the Act shall apply to assistance by way of representation in relation to:
  - (a) applications under section 5(3) in relation to an application for property not to be treated as a gift;
  - (b) appeals under section 5(4) in relation to an appeal against a refusal of an application under section 5(3);
  - (c) applications under section 6(3) in relation to an application for property not to be treated as an implicative gift;
  - (d) appeals under section 6(4) in relation to an appeal against a refusal of an application under section 6(3);
  - (e) applications, by someone other than the accused, under section 18(7) in relation to a discharge or variation of an order under section 18(2);
  - (f) applications under section 25 in relation to a recall or variation of suspended forfeiture order or 26 in relation to a property wrongly forfeited: return or compensation;
  - (g) appeals under section 27 in relation to an appeal against a court decision under section 25(1) or 26(1); and
  - (h) applications under section 45(2)(b) in relation to the disposal of a family home where representations are made to the Court by someone other than the accused.

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(11) 1995 c. 39.

(12) 1995 c. 43.

### Summary Criminal Proceedings

6.—(1) The assistance by way of representation which may be provided under Part II of the Act in relation to summary criminal proceedings shall be representation of an accused person who is not in custody—

- (a) at any diet (other than a diet which has been preceded by a plea of not guilty) at which a plea to the competency or relevancy of the complaint or proceedings, or a plea in bar of trial, is tendered on his behalf, and thereafter until that plea has been determined by the court and any related appeal to the High Court of Justiciary under section 174(1) of the 1995 Act has been disposed of or withdrawn;
- (b) at any diet (other than a diet which has been preceded by a plea of not guilty) at which a question within the meaning of rule 31.1(1) of the Act of Adjournment (Criminal Procedure Rules) 1996(13) is raised and thereafter until that question has been determined by the court;
- (c) at any diet at which there is tendered, on behalf of an accused who has not previously tendered a plea of not guilty, a plea of guilty to the charges against him, or a plea of guilty to part thereof, which partial plea is accepted by the prosecutor, and thereafter until his case has been finally disposed of;
- (d) at any diet at which the court is considering the accused's plea of guilty to the charges and where there has been no change of plea, and thereafter until final disposal of the case;
- (e) at any diet at which the court is considering the accused's changed plea of guilty to the charges, provided that no application for criminal legal aid has been made, and thereafter until final disposal of the case; and
- (f) at any diet where the judge orders a proof in mitigation, and thereafter until final disposal of the case.

7.—(1) The assistance by way of representation described in regulation 6(1)(a) and (b) above shall be provided under Part II of the Act only where the solicitor to whom application has been made is satisfied that—

- (a) the offence is such that if proved it is likely that the court will impose a sentence which would deprive the applicant of his liberty or lead to loss of his livelihood;
- (b) it is in the interests of justice to tender the plea or, as the case may be, raise the question; and
- (c) it is reasonable in the particular circumstances of the case that assistance by way of representation be made available.

(2) The assistance by way of representation described in regulation 6(1)(c), (d), (e) and (f) above shall be provided under Part II of the Act only where the solicitor to whom application has been made is satisfied either—

- (a) that it is likely that the court will impose a sentence which would deprive the applicant of his liberty or lead to loss of his livelihood; or
- (b) that the applicant is unable to understand the proceedings or is unable to make his own plea in mitigation because of his age, inadequate knowledge of English, mental illness, other mental or physical disability or otherwise.

### Petitions for the appointment of an executor

8. The assistance by way of representation which may be provided under Part II of the Act in relation to petitions for the appointment of an executor shall be for representation of the petitioner

in all stages of an unopposed petition until the petitioner be decerned executor and extract decree dative obtained.

### **Petitions by a debtor under the Bankruptcy (Scotland) Act 1985**

9. The assistance by way of representation which may be provided under Part II of the Act in relation to petitions by a debtor for the sequestration of his estate under section 5(2)(a) of the Bankruptcy (Scotland) Act 1985 shall be providing the debtor with advice and assistance by taking on his behalf any step in instituting or conducting any proceedings or by otherwise taking any step on his behalf (as distinct from assisting him in taking such a step on his own behalf).

### **Disciplinary Proceedings**

10. The assistance by way of representation which may be provided under Part II of the Act in relation to disciplinary proceedings shall be for representation of the prisoner at all stages of the proceedings before the governor.

### **Parole Board Cases**

11. The assistance by way of representation which may be provided under Part II of the Act in relation to a Parole Board case shall be for representation of the prisoner at all stages of the proceedings before a tribunal relating to that case.

### **Civil proceedings where there is a risk of imprisonment**

12. The assistance by way of representation described in regulation 3(i) shall be provided under Part II of the Act only where the solicitor to whom application has been made is satisfied that—

- (a) it is reasonable in the particular circumstances of the case that assistance by way of representation be made available; and
- (b) it is likely that the Court will deprive the applicant of his liberty.

### **Assistance by way of representation requiring approval of Board**

13. The approval of the Board shall be required as a pre-condition of the provision of assistance by way of representation in relation to the proceedings described in regulations 3(g), 3(j) and 5 above.

St Andrew's House,  
Edinburgh  
23rd December 1997

*Henry McLeish*  
Minister of State, Scottish Office

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## SCHEDULE

Regulation 2

## REGULATIONS REVOKED

<i>Title</i>	<i>Reference</i>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1988	S.I. <a href="#">1988/2290</a>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1992	S.I. <a href="#">1992/1588</a>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1993	S.I. <a href="#">1993/972</a>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment (No.2) Regulations 1993	S.I. <a href="#">1993/3186</a>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1994	S.I. <a href="#">1994/1000</a>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1995	S.I. <a href="#">1995/1219</a>
The Advice and Assistance (Assistance by Way of Representation) (Scotland) Amendment Regulations 1996	S.I. <a href="#">1996/1011</a>

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations consolidate with amendments and revoke the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 1988 and subsequent amending instruments.

The main amendments provide:–

- (a) for assistance by way of representation to be made available in relation to certain additional proceedings under the Criminal Procedure (Scotland) Act 1995 (regulation 4(2)(d) and regulation 4(2)(f));
- (b) for assistance by way of representation to be made available in relation to the certain proceedings under the Proceeds of Crime (Scotland) Act 1995 (including those proceedings under the Criminal Justice (Scotland) Act 1995 for which assistance by way of representation was previously available) (regulation 5);
- (c) for assistance by way of representation to be made available in civil proceedings to a person who is at risk of imprisonment for:

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- (i) failing to pay a fine or other sum; or
- (ii) failing to obey a court order.
- (d) for assistance by way of representation to be made available in relation to proceedings under section 31(6) of the Criminal Law (Consolidation) (Scotland) Act 1995.

The opportunity has also been taken to make minor and drafting amendments.