

## EXECUTIVE NOTE

### THE CRIMINAL LEGAL ASSISTANCE (DUTY SOLICITORS) (SCOTLAND) REGULATIONS 2011

#### SSI 2011/163

The above Regulations amend the Criminal Legal Aid (Scotland) Regulations 1996 (“the 1996 Regulations”).

#### **Policy Objectives**

##### *Police station duty scheme*

In 2010, Scottish law on detention was considered by the UK Supreme Court in the case of *Cadder v. Her Majesty’s Advocate*<sup>1</sup>. The Supreme Court ruled that the law was incompatible with the European Convention on Human Rights (“ECHR”) as interpreted in the context of the decision in *Salduz v. Turkey (November 2008)*. The decision in *Cadder* meant that amendment was required to the existing police powers to question suspects. The Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (which came into force on 30 October 2010) introduces a new section 15A to the Criminal Procedure (Scotland) Act 1995 creating a right of access to a solicitor before questioning by the police, in order to ensure that Scottish practice conforms to the standards of the ECHR.

The policy objective of regulation 3 is to ensure such access is effected by placing a duty on the Scottish Legal Aid Board (“the Board”) to arrange for solicitors to be available for the purpose of providing advice and assistance to any person who has a right of access to a solicitor under the new section 15A of the Criminal Procedure (Scotland) Act 1995. Regulation 3 also disapplies section 31(1) of the Legal Aid (Scotland) 1986 Act meaning that only a solicitor made available by the Board may provide advice and assistance in those circumstances. The Board are currently in discussions with the Law Society of Scotland (“the Society”) as to how they will take forward this duty, when it comes into force on 4th July 2011.

##### *Appointed firm*

The policy objective of regulation 7(3) and (4) is to extend the definition of “appointed solicitor”. At the moment assistance by way of representation (“ABWOR”) can only be provided to a person in custody in connection with a summary prosecution by the duty solicitor or by the person’s “appointed solicitor”. Appointed solicitor is defined to mean a solicitor with whom the person has (or has had) a solicitor and client relationship. Regulation 7 reproduces the appointed solicitor arrangements, that were previously contained in the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003, but also extends the definition of “appointed solicitor” to include any solicitor from the same firm as a solicitor with whom the client has (or has had) a solicitor and client relationship.

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<sup>1</sup> [2010] UKSC 43 ([http://www.supremecourt.gov.uk/docs/UKSC\\_2010\\_0022\\_Judgment.pdf](http://www.supremecourt.gov.uk/docs/UKSC_2010_0022_Judgment.pdf)).

### *Minor amendments to duty solicitors*

Regulations 4 to 7 re-enact regulation 5 of the Criminal Legal Aid (Scotland) Regulations 1996, which is the current basis for the Board operated court duty scheme. The only material change is that regulation 7 incorporates the provision in relation to appointed solicitors. Regulation 4 covers duty solicitors' representation at identification parades. Regulation 5 covers duty solicitors in the case of persons charges with murder, attempted murder or culpable homicide. Regulation 6 covers duty solicitors in the case of persons prosecuted under solemn procedure.

### **Consultation**

The Board, ACPOS, COPFS and the Society were consulted on regulation 3. The Board and the Society were consulted on the appointed firm changes. The Board were consulted on the remaining regulations. A Business and Regulatory Impact Assessment ("BRIA") for the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, which put into place the new right of access to a solicitor, has been completed and will be published shortly. The appointed firm regulation will be included in a BRIA which covers various legal aid savings measures impacting on business and will be published shortly.

### **Financial Implications**

Since June 2010, prior to the ruling in the *Cadder* case, interim legal aid arrangements have been in place for providing advice and assistance in police stations. The costs flow from the requirements placed on the justice system by the Supreme Court in the *Cadder* case. The Financial Memorandum<sup>2</sup> (paragraphs 59 to 64) accompanying the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 sets out the estimated financial implications for legal aid. The memorandum estimates that realistic costs lie within the range of £0.5 million to £1.7 million. The savings as a result of introducing appointed firms as opposed to appointed solicitors is estimated at £80,000 for 2011-12; £192,000 for 2012-13; and £200,000 for 2013-14 onwards. It is not considered there would be any financial implications for the other regulations.

Justice Directorate  
February 2011

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<sup>2</sup> Explanatory Notes (<http://www.legislation.gov.uk/asp/2010/15/notes/contents>).