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DRAFT SCOTTISH STATUTORY INSTRUMENTS

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**2021 No.**

**LEGAL AID AND ADVICE**

**The Criminal Legal Aid and Advice and Assistance (Counter-Terrorism and Border Security) (Scotland) Regulations 2021**

*Made* - - - - 2021

*Coming into force* - - 17th February 2021

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 8A(1), 31(9), 33(2), (3) and (3A), 36(1), (2)(a), (d) and (e) and 41A of the Legal Aid (Scotland) Act 1986(a) and all other powers enabling them to do so.

In accordance with section 37(2)(b) of that Act(c), a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

**Citation and commencement**

1. These Regulations may be cited as the Criminal Legal Aid and Advice and Assistance (Counter-Terrorism and Border Security) (Scotland) Regulations 2021 and come into force on 17 February 2021.

**Amendment of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993**

2.—(1) The Advice and Assistance (Financial Limit) (Scotland) Regulations 1993(d) are amended as follows.

(2) In regulation 3 (financial limit), after paragraph (c)(xiv), insert—

“(xv) where the advice and assistance is for personal attendance by a solicitor and the client has exercised the right to consult a solicitor under paragraph 16(6) of schedule 8 of the Terrorism Act 2000, the sum of £225.00, unless as part of

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- (a) 1986 c.47. Section 8A(1) was inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15, “the 2010 Act”) section 2(3), and amended by the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3), section 23(4). Section 8A(2) as amended by the Counter-Terrorism and Border Security Act 2019 (c.3), schedule 4, paragraph 19 contains a definition of “relevant client” relevant to the use of powers in these Regulations. Section 31(9) was amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40), sections 74(1), and schedule 8, paragraph 36(14). Section 33(2) was amended by the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), section 67(7)(b). Section 33(3A) was inserted by the Crime and Punishment (Scotland) Act 1997, (c.48) section 51; Section 41A was inserted by section 54. The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of the Scotland Act 1998 (c.46), section 53.
- (b) Relevantly amended by the 2010 Act, section 2(4). Section 37(2) has been modified by paragraph 5 of schedule 3 of the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10) (“ILRA”).
- (c) The powers to make these Regulations are exercised together by virtue of section 33(2) of ILRA. The Regulations are subject to the affirmative procedure by virtue of section 33(3) of that Act.
- (d) S.I. 1993/3187; regulation 3 was substituted by 2007/248 and relevantly amended by S.S.I. 2008/251 and S.S.I 2017/466.

that consultation the solicitor is present at an interview carried out in connection with a terrorist investigation or for the purposes of schedule 7 of that Act, in which case the sum of £550.00;

- (xvi) where the advice and assistance is for personal attendance by a solicitor and the client has exercised the right to consult a solicitor under paragraph 37(6) of schedule 3 of the Counter-Terrorism and Border Security Act 2019, the sum of £225.00, unless as part of that consultation the solicitor is present at an interview carried out in connection with an investigation for the purposes of Part 1 of that schedule, in which case the sum of £550.00.”.

### **Amendment of the Advice and Assistance (Scotland) Regulations 1996**

3.—(1) The Advice and Assistance (Scotland) Regulations 1996(a) are amended as follows.

(2) For regulation 4A (applications for advice and assistance: further provision) substitute—

“4A. The requirement in regulation 4 for an application for advice and assistance to be signed does not apply in the case of—

- (a) a client to whom section 32 of the Criminal Justice (Scotland) Act 2016 (right to have a solicitor present) applies;
- (b) a person who is detained under section 41 or schedule 7 of the Terrorism Act 2000;
- (c) a person who is detained under part 1 of schedule 3 of the Counter-Terrorism and Border Security Act 2019.”.

(3) In paragraph (4) of regulation 14A (change of solicitor etc.), after “2016”, insert “, or paragraphs 29 or 36 of schedule 8 of the Terrorism Act 2000”.

(4) In paragraph (1A) of regulation 17 (fees and outlays of solicitors), after sub-paragraph (b), insert—

- “(c) Part V of schedule 3, the reference to Part I of schedule 3 in paragraph (1)(a) above should be read as a reference to Part V of schedule 3;
- (d) Part VI of schedule 3, the reference to Part II of schedule 3 in paragraph (1)(a) above should be read as a reference to Part VI of schedule 3.”.

(5) In schedule 3 (Table of fees allowable to solicitors) after Part IV insert—

## **“PART V**

### **TABLE OF FEES ALLOWABLE TO SOLICITORS FOR ASSISTANCE BY WAY OF REPRESENTATION FOR PROCEEDINGS UNDER SCHEDULE 8 OF THE TERRORISM ACT 2000**

**In this Table of Fees “the 2000 Act” means the Terrorism Act 2000.**

Paragraph 29 of schedule 8 of the 2000 Act – *Application for warrant of further detention*

- |     |   |        |
|-----|---|--------|
| (a) | Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing. | £51.50 |
| (b) | Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing.         | £77.25 |
| (c) | Additional fee, excluding travel, for second or subsequent court hearing, per hearing.          | £51.50 |

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(a) S.I. 1996/2447, relevantly amended by S.S.I. 2008/240, S.S.I. 2017/291 and S.S.I. 2017/466.

|   |   |        |
|---|---|--------|
| (d)   | Fee for time necessarily spent travelling to and from court, where the court is not in a town or place where the solicitor has a place of business, per quarter hour. | £5.98  |
| <i>Paragraph 36 of Schedule 8 of the 2000 Act – Application for extension of warrant of further detention</i> |   |        |
| (a)   | Inclusive fee, excluding travel, for all work where matter does not proceed to a court hearing.   | £51.50 |
| (b)   | Inclusive fee, excluding travel, for all work where matter proceeds to a court hearing.   | £77.25 |
| (c)   | Additional fee, excluding travel, for second or subsequent court hearing, per hearing.  | £51.50 |
| (d)   | Fee for time necessarily spent travelling to and from court, where the court is not in a town or place where the solicitor has a place of business, per quarter hour. | £5.98  |

## PART VI

### TABLE OF FEES ALLOWABLE TO SOLICITORS FOR ADVICE AND ASSISTANCE IN RELATION TO SECTION 41 AND SCHEDULE 7 OF THE TERRORISM ACT 2000 AND PART 1 OF SCHEDULE 3 OF THE COUNTER-TERRORISM AND BORDER SECURITY ACT 2019

**In this Table of Fees “the 2000 Act” means the Terrorism Act 2000 and “the 2019 Act” means the Counter-Terrorism and Border Security Act 2019.**

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1. (a) Where a client to whom paragraph 16(6) of schedule 8 of the 2000 Act or paragraph 37(6) of schedule 3 of the 2019 Act applies has exercised their right to consult a solicitor in person, the fee under paragraph 3.
  - (b) Where a client to whom paragraph 16(6) of schedule 8 of the 2000 Act applies has not exercised their right to consult a solicitor in person, the fee under paragraph 4.
  - (c) Where a client to whom paragraph 16A(5) of schedule 8 of the 2000 Act applies or paragraph 37(6) of schedule 3 of the 2019 Act has exercised a right to consult a solicitor,

but the examining officer requires that a consultation is to take place other than in person, in accordance with paragraphs 16A(6) and (7) of schedule 8 of the 2000 Act or 38(6) and (7) of the 2019 Act, the fee under paragraph 4.

(d) Where a client's detention under section 41 of the 2000 Act is reviewed in accordance with paragraph 21 of schedule 8 of that Act and on the instruction of that client a solicitor makes representations to the review officer in accordance with paragraph 26 of that schedule,

(i) where the solicitor is in attendance already, an additional fee at the rate specified under paragraph 3(b)(ii);

(ii) where the solicitor is not in attendance already, the fee under paragraph 3.

(e) Where a client's detention under Part 1 of schedule 3 of the 2019 Act is reviewed in accordance with paragraph 52 of that schedule and on the instruction of that client a solicitor makes representations to the review officer in accordance with

paragraph 54 of that schedule,

(i) where the solicitor is in attendance already, an additional fee at the rate specified under paragraph 3(b)(ii);

(ii) where the solicitor is not in attendance already, the fee under paragraph 3.

(f) where a fee is claimed by virtue of this paragraph, a solicitor can only claim the higher rate, instead of the standard rate, if consultation takes place wholly or partly during an unsocial time.

2. In this part—

“unsocial time” has the meaning given in Part IV of these regulations

3. Inclusive fee, excluding travel, for personal attendance by a solicitor where the client has exercised a right to consult a solicitor in person –

(a) aggregate time engaged or waiting is 2 hours or less; or

(b)

(i) aggregate time engaged or waiting is more than 2 hours, up to and including 4 hours;

and

(ii) for each

|  | Standard Rate | Higher Rate |
|--|---------------|-------------|
| (a) aggregate time engaged or waiting is 2 hours or less; or                                 | £118.45       | £157.54     |
| (b) (i) aggregate time engaged or waiting is more than 2 hours, up to and including 4 hours; | £206.00       | £273.98     |
| (ii) for each  | £51.50        | £68.50      |

|    |  | additional hour<br>over 4 hours<br>(or part<br>thereof). |        |         |
|----|--|--|--------|---------|
| 4. | Inclusive fee for a consultation conducted by a solicitor, otherwise than in person—                                     |  | £30.90 | £41.10  |
| 5. | Fee for travelling time in relation to personal attendance—  |  |        |         |
|    | (a) travel time engaged is 2 hours or less per half hour (or part thereof); and  |  | £11.95 | £15.90  |
|    | (b) travel time engaged is more than 2 hours, where authorised by the Board, in advance per half hour (or part thereof). |  | £11.95 | £15.90” |

**Amendment of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008**

4. In regulation 7(5) (single payment in summary criminal cases) of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008<sup>(a)</sup> (single payment in summary criminal cases), after sub-paragraph (aa) insert—

“(ab) the provision of advice and assistance to a person to whom:

(i) paragraph 16(6) of schedule 8 of the Terrorism Act 2000 applies;

(ii) paragraph 37(6) of schedule 3 of the Counter-Terrorism and Border Security Act 2019 applies;

(ac) the provision of assistance by way of representation in proceedings in connection with an application for a warrant of further detention, or for an extension of such a warrant, under paragraph 29 or 36 of Schedule 8 to the Terrorism Act 2000;”.

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<sup>(a)</sup> S.S.I. 2008/240, relevantly amended by S.S.I. 2017/466.

**Amendment of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011**

5. In regulation 3 (duty solicitors: advice for suspects) of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011<sup>(a)</sup> after “2016” insert “, paragraph 16(6) of schedule 8 of the Terrorism Act 2000 (entitlement to consult a solicitor), or paragraph 37(6) of schedule 3 of the Counter-Terrorism and Border Security Act 2019 (entitlement to consult a solicitor)”.

*Name*

Authorised to sign by the Scottish Ministers

St Andrew's House,  
Edinburgh  
Date

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(a) S.S.I.2011/163, relevantly amended by S.S.I. 2017/466.

## EXPLANATORY NOTE

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

These Regulations amend 4 sets of Regulations made under the Legal Aid (Scotland) Act 1986.

The amendments are in consequence of paragraphs 19 and 27 of schedule 4 of the Counter-Terrorism and Border Security Act 2019 (“the 2019 Act”). Those provisions extend the class of person for whom the Scottish Ministers may make automatic, non-means tested criminal legal advice and assistance available, to include where a person is detained under section 41 or schedule 7 of the Terrorism Act 2000 (“the 2000 Act”) or Part 1 of schedule 3 of the 2019 Act.

Regulation 2 amends regulation 3(c) of the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993 to specify the financial limit for advice and assistance by way of personal attendance in respect of detention under paragraph 16(6) of schedule 8 of the 2000 Act or paragraph 37(6) of schedule 3 of the 2019 Act. Beyond this limit, the solicitor requires approval from the Scottish Legal Aid Board in order to give any further advice and assistance.

Regulation 3 amends the Advice and Assistance (Scotland) Regulations 1996 in several respects. Paragraph (2) substitutes regulation 4A to exclude applications for advice and assistance in respect of detention under section 41 or schedule 7 of the 2000 Act and part 1 of schedule 3 of the 2019 Act from the requirement that the application be signed by the client or other person on their behalf. It also restates the exclusion from this requirement for such applications in the case of clients to whom section 32 of the Criminal Justice (Scotland) Act 2016 applies. Paragraph (3) amends regulation 14A to provide that the requirements in the event of a change of solicitor set out in that regulation do not apply in respect of proceedings under paragraphs 29 or 36 of schedule 8 of the Terrorism Act 2000. Paragraph (4) amends regulation 17 to specify which tables of fees are to apply in the calculation of fees and outlays. Paragraph (5) inserts into schedule 3 fee tables to apply for advice and assistance in relation to section 41 and schedule 7 of the 2000 Act and part 1 of schedule 3 of the 2019 Act, and advice by way of representation for proceedings under schedule 8 of the 2000 Act.

Regulation 4 amends regulation 7 of the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 to provide that the restrictions on entitlement to payment in that regulation do not apply to separate payments in respect of advice and assistance provided to a person entitled to consult a solicitor under paragraph 16(6) of schedule 8 of the 2000 Act or paragraph 37(6) of schedule 3 of the 2019 Act.

Regulation 5 amends regulation 3 of the Criminal Legal Assistance (Duty Solicitors) (Scotland) Regulations 2011 to provide that where the Board has arranged for a duty solicitor to be available to a person entitled to consult a solicitor under paragraph 16(6) of schedule 8 of the 2000 Act or paragraph 37(6) of schedule 3 of the 2019 Act, that person is not entitled to select a solicitor themselves, and the advice and assistance must only be provided by the duty solicitor provided.

A Business and Regulatory Impact Assessment has been prepared for these Regulations and placed in the Scottish Parliament Information Centre. Copies can be obtained from the Scottish Government Justice Directorate, St Andrews House, Edinburgh EH1 3DG.

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