EXECUTIVE NOTE

THE CIVIL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2011

SSI 2011/160

The Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2011 ("the Regulations") amend the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ("the principal Regulations").

Policy Objective

In 2009-10, there were over 290,000 grants of legal assistance and legal assistance expenditure was £150.5 million. In 2010-11, total net expenditure on legal assistance is expected to rise due to the VAT increase, increases in fees and an increase in demand for civil legal assistance. The Scottish Government's budget will be cut by £1.3 billion in 2011-12 compared to this year. The legal aid and advice budget for financial year 2011-12 has been set at £142.3m, compared to £155m in 2010-11, which is an overall reduction of 8.2%. The Scottish Legal Aid Board ("the Board") is being asked to make savings of £1.1m (8.5%) in 2011-12 on its administration costs. This is a bigger proportion of savings than will be delivered on the Fund.

The financial circumstances of the public sector in Scotland mean that we need to ensure that taxpayers' money is used effectively and efficiently to target the limited resources available on those who need them most and to help safeguard the long term sustainability of the legal aid system. The Regulations are therefore designed to deliver efficiencies and savings to ensure that legal aid and advice can be targeted at those most in need, whilst creating a structure providing reasonable remuneration for Counsel.

To achieve those savings, the first policy objective is to update the table of fees which currently exists for Counsel conducting civil legal aid work in the Court of Session. The fees currently prescribed in the principal Regulations bear no resemblance to the actual fees that Counsel are paid. This has come about because the prescribed fees have not been increased since 1995 and are extremely out of date. Counsel who act in civil legal aid cases in the Court of Session therefore rely on paragraph 4 of Schedule 4 to the principal Regulations, which provides that "the auditor shall have the power to increase any fee set out in the Table of Fees in this Schedule where he is satisfied that because of the particular complexity or difficulty of the work or any other particular circumstances such an increase is necessary to provide reasonable remuneration for the work". This has meant that many cases have been referred to the Auditor. These referrals have latterly resulted in fees being paid at an unsustainable level. The Regulations therefore update the current table of fees. The Regulations also modify the role of the Auditor, which is restricted to determining the level of fee, either where no fee is prescribed, or where

determining the level of fee involves the exercise of discretion, such as where a range of fees is prescribed.

The second policy objective is to introduce, for the first time, a table of fees for Counsel undertaking civil legal aid work in the Sheriff Court. At present, Counsel who act in civil legal aid cases in the Sheriff Court are paid based on a formula prescribed in the principal Regulations which provides that "counsels fees for any work in relation to proceedings in the sheriff court…..shall be 90% of the amount of fees which would be allowed for that work on a taxation of expenses between solicitor and client, third party paying, if the work done were not legal aid". This situation, again, has led to fees being paid at an unsustainable level. The Regulations therefore introduce a table of fees for Counsel undertaking civil legal aid work in the Sheriff Court. The table includes provision for reduced daily rate fees to be payable to both junior and senior Counsel should a proof, debate or appeal under section 51(1) of the Children (Scotland) Act 1995 still be ongoing after 20 days.

The Regulations also introduce two important improvements in feeing arrangements for Counsel. First, Regulation 4 amends regulation 3 of the principal Regulations by allowing Counsel, for the first time, to request payment of the judicial expenses recovered in the proceedings in place of payment at the rates prescribed in Schedule 4, even when the solicitor acting has opted for payment at legal aid rates. Second, in order that Counsel can receive payment at various stages of a case, and not just at the end, regulation 8 amends regulation 11 of the principal Regulations by allowing payments to account of fees to be made to Counsel at 6-monthly intervals.

Consultation

We have consulted with the Board and the Faculty of Advocates on the Regulations. We have had a series of meetings with the Faculty of Advocates and the Board about the detail of the Regulations.

Business and Regulatory Impact Assessment (BRIA)

A BRIA has been completed for the majority of the legal aid savings Regulations directly affecting legal aid providers, including these Regulations. This is due to be published very shortly.

Financial Implications

The Regulations are expected to make savings of circa £600,000 in 2011-12 to the Legal Aid Fund in 2011-12 and circa £1.2 million in 2012-13 and in each year going forward.

Justice Directorate
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