POLICY NOTE

CIVIL LEGAL AID (SCOTLAND) (MISCELLANEOUS AMENDMENTS) REGULATIONS 2016

SSI 2016/257

The above instrument was made by the Scottish Ministers in exercise of the powers conferred by sections 33(2)(a) and (3) and 36(1) and (2)(a) and (c) of the Legal Aid (Scotland) Act 1986(**1**) and all other powers enabling them to do so.

Policy Background

The Tribunals (Scotland) Act 2014 ('the Tribunals Act') creates a new, simplified statutory framework for tribunals in Scotland, bringing existing tribunal jurisdictions together and providing a structure for new jurisdictions. The Tribunals Act creates two tribunals, the First-tier Tribunal for Scotland for first decisions and the Upper Tribunal for Scotland, primarily for appeals from the First-tier. They will be known collectively as 'the Scottish Tribunals'.

Existing tribunal jurisdictions will transfer into the Scottish Tribunals structure in a phased process with their existing membership, functions and rules of procedure where possible. In the new structure appeals will be decided by the Upper Tribunal, as opposed to the Sheriff Court or Court of Session where the majority of appeals are currently heard.

Civil legal aid is available in relation to the civil courts and proceedings listed in paragraph 1 of Schedule 2 of the Legal Aid (Scotland) Act 1986 ("the 1986 Act"). This list includes proceedings in the Court of Session and the Sheriff Court, and civil legal aid is accordingly available for appeals to these courts. The Legal Aid (Scotland) Act 1986 Amendment Regulations 2016 (SSI 2016/xx), which come into force on the same date as these Regulations, amend paragraph 1 of Schedule 2 of the 1986 Act to make legal aid available in or with respect to an appeal to the Upper Tribunal for Scotland (including an application for permission to appeal) and in proceedings arising from the remittal to that Tribunal under section 57 of the Tribunals (Scotland) Act 2014 of an application to the supervisory jurisdiction of the Court of Session (that is, of an application for judicial review).

Policy Objectives

The policy objectives of this instrument are—

- To provide for the fees payable to solicitors and counsel in the Upper Tribunal for Scotland;
- To provide for proceedings on appeal to the Upper Tribunal for Scotland to be treated as distinct proceedings for the purposes of legal aid (requiring a separate grant of legal aid) and for proceedings initiated in the Court of Session and remitted to the Upper Tribunal for Scotland not to be treated as distinct proceedings;
- To require the prior approval of the Scottish Legal Aid Board for the employment of counsel in proceedings before the Upper Tribunal for Scotland; and

(**1**) 1986 c.47 ("the 1986 Act"). Section 33(2) of the 1986 Act was amended by section 67(7)(b) of the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5). The functions of the Secretary of State were transferred to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998 (c.46).

- To specify the auditor of the Court of Session as the relevant auditor in relation to legal aid accounts for work in the Upper Tribunal for Scotland, and the auditor of the Sheriff Appeal Court as the relevant auditor in relation to legal aid accounts relating to work in the Sheriff Appeal Court.

Regulation 2 makes amendments to the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ('the 1989 Regulations).

Regulation 2(2) amends the definition of "auditor" in regulation 2 of the 1989 Regulations to provide for the Auditor of the Court of Session to be the auditor in relation to legal aid accounts for work in the Upper Tribunal for Scotland and the auditor of the Sheriff Appeal Court to be the auditor in relation to legal aid accounts for work in the Sheriff Appeal Court.

Regulation 2(3) amends regulation 5(1) of the 1989 Regulations to provide solicitors will be paid detailed fees as set out in Schedule 5 of the 1989 Regulations for appeals to the Upper Tribunal. These are the same rates as are paid for appeals to the Court of Session.
Regulation 2(4) amends regulation 10(1) of the 1989 Regulations to provide that counsel will be paid detailed fees as set out in Schedule 4 of the 1989 Regulations for proceedings in the Upper Tribunal for Scotland. These are the same rates as are paid for proceedings in the Court of Session.

Regulation 2(5) and (6) amend Schedules 4 and 5 of the 1989 Regulations to reflect the addition of proceedings before the Upper Tribunal for Scotland.

Regulation 3 amends the Civil Legal Aid (Scotland) Regulations 2002 ("the 2002 Regulations"). Regulation 3(2) amends regulation 4 of the 2002 Regulations to provide for appeals to the Upper Tribunal for Scotland to be treated as distinct proceedings for the purposes of legal aid and for judicial review proceedings remitted from the Court of Session to the Upper Tribunal for Scotland not to be treated as distinct proceedings. Distinct proceedings require a separate application to the Scottish Legal Aid Board ("SLAB"). Regulation 3(3) amends regulation 21 of the 2002 Regulations to require the prior approval of SLAB for the employment of counsel in the Upper Tribunal for Scotland. The prior approval of SLAB is already required for the employment of counsel in the sheriff court, the Scottish Land Court, the Lands Tribunal for Scotland or the Employment Appeal Tribunal or in proceedings before the Proscribed Organisations Appeal Commission, the Social Security Commissioners or the (UK) Upper Tribunal.

These changes provide clarity as to the civil legal aid fees for work in the Upper Tribunal. The legal aid provision for cases heard in the Sheriff Court and the Court of Session is unaffected.

Consultation

Draft provisions were shared with the Faculty of Advocates, the Law Society of Scotland, the Auditor of the Court of Session, the Lord President and the first President of the Scottish Tribunals, Scottish Courts and Tribunal Service, the Tribunal Chamber Presidents, the Temporary President of the Scottish Tax Tribunals and the Scottish Legal Aid Board.

The Faculty of Advocates and the Auditor of the Court of Session wished to make no comment. The Panel President of PRHP and HOHP highlighted a technical point which was subsequently amended and the Law Society of Scotland were consulted but offered no comments.

Impact Assessments

An equality impact assessment has been completed on the draft SSI and is attached. There are no equality impact issues.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that the new simplified statutory framework for tribunals in Scotland will make clear how certain mechanisms and fees would apply in these cases, hopefully reducing bureaucracy.

Most of the appeals to be heard in the Upper Tribunal are currently heard by either Sheriffs in the Sheriff Court or Judges in the Court of Session and conducted by Counsel. Legal aid in these cases currently accounts for around £74,000 from the Legal Aid Fund.

Based on anticipated average cases costs and procedures there could be a saving of between £20,000 and £40,000 on current legal aid expenditure (£74,000) once all jurisdictions transfer over to Scottish Tribunals. If cases do proceed to the Upper Tribunal, rather than being filtered out, then these savings may not be realised. If appeals to the Upper Tribunal are generally more complex then there is a possibility that there would be an additional cost to the Legal Aid Fund of approximately £60,000 per year.

Access to Justice Unit
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