Draft Regulations laid before the Scottish Parliament under section 37(2) of the Legal Aid (Scotland) Act 1986, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2010 No.

LEGAL AID AND ADVICE

The Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 2) (Scotland) Regulations 2010

Made - - - -	*2010*
Coming into force - -	*9th June 2010*

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 9 and 13(4) of the Legal Aid (Scotland) Act 1986(**a**) and all other powers enabling them to do so.

In accordance with section 37(2) of that Act, 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 Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 2) (Scotland) Regulations 2010 and come into force on 9th June 2010.

Application

2. Regulations 3(2) and 4(2), (3) and (5)(a) apply only in relation to proceedings in relation to which civil legal aid or assistance by way of representation was made available on or after 9th June 2010.

Amendment of the Legal Aid (Scotland) Act 1986

3.—(1) Part I of Schedule 2 to the Legal Aid (Scotland) Act 1986(**b**) (courts and tribunals in which civil legal aid is available) is amended in accordance with paragraphs (2) to (4).

(2) In paragraph 1 omit "comprising an appeal to the Child Support Commissioners".

(3) At the end of paragraph 1 insert—

"before the Upper Tribunal of the type described in paragraph 3".

(**a**) 1986 c.47; section 9 was amended by the Access to Justice Act 1999 (c.22), section 32. 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).

(**b**) Schedule 2 was relevantly amended by S.S.I. 2002/532, which inserted the reference to the Child Support Commissioners.

(4) After paragraph 2 insert—

"**Proceedings for judicial review before the Upper Tribunal**

3. The proceedings before the Upper Tribunal mentioned in paragraph 1 are those arising from an application to the supervisory jurisdiction of the Court of Session that has been transferred under section 20 of the Tribunals, Courts and Enforcement Act 2007(**a**).".

Amendments to the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003

4.—(1) The Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003(**b**) are amended in accordance with paragraphs (2) to (5).

(2) In regulation 1(2) (interpretation), omit the definition of "Pensions Regulator Tribunal".

(3) In regulation 3 (application of Part II of the Legal Aid (Scotland) Act 1986 to assistance by way of representation in miscellaneous proceedings) omit paragraphs (l), (q) and (s) and "; and" immediately preceding paragraph (s).

(4) After regulation 5, insert—

"**Application of Part II of the Act to assistance by way of representation: proceedings before the First-tier Tribunal and the Upper Tribunal**

5A. Part II of the Act shall apply to assistance by way of representation in relation to proceedings before—

(a) the Immigration and Asylum Chamber of the First-tier Tribunal;

(b) the Immigration and Asylum Chamber of the Upper Tribunal;

(c) the First-tier Tribunal or the Upper Tribunal, which consist of an appeal against a penalty imposed under—

(i) section 60 of the Value Added Tax Act 1994(**c**);

(ii) section 8 of the Finance Act 1994(**d**);

(iii) Schedule 24 to the Finance Act 2007(**e**); or

(iv) Schedule 41 to the Finance Act 2008(**f**);

(d) the Upper Tribunal, which consist of an appeal against a decision made under or by virtue of—

(i) any of sections 1 to 5A of the Pensions Appeal Tribunal Act 1943(**g**) by a Pensions Appeal Tribunal or the First-tier Tribunal;

(ii) section 4 of the Vaccine Damage Payments Act 1979(**h**);

(iii) section 20 of the Child Support Act 1991(**a**);

(**a**) 2007 (c.15).

(**b**) S.S.I. 2003/179; amended by S.S.I. 2003/500, 2004/307, 2005/165 and 482, 2006/345 and 615 and 2008/251.

(**c**) 1994 c.23; section 60 was repealed by the Finance Act 2007, Schedule 24 Part 5 paragraph 29(d), subject to savings provision in S.I. 2008/568, article 4 and transitional provisions in S.I. 2009/511, article 4 and S.I. 2009/571, article 7.

(**d**) 1994 c.9; section 8 was repealed by the Finance Act 2008, Schedule 40 paragraph 21(d)(i), subject to transitional provisions in S.I. 2009/511, article 4 and S.I. 2009/571, article 6.

(**e**) 2007 c.11; Schedule 24 was amended by the Finance Act 2008, Schedule 40, by the Finance Act 2009 (c.10), Schedule 57 Part 1 and by S.I. 2009/56, Schedule 1 paragraphs 466 and 467.

(**f**) 2008 c.9; Schedule 41 was amended by the Finance Act 2009 (c.10), Schedule 57 Part 2 and by S.I. 2009/56, Schedule 1 paragraph 473.

(**g**) 1943 c.39; section 5A was inserted by the Child Support, Pensions and Social Security Act 2000 (c.19), section 57. Sections 1 to 5A were amended in relation to the transfer of tribunal functions by S.I. 2008/2883, Schedule 3 paragraphs 5 to 10.

(**h**) 1979 c.17; section 4 was substituted by the Social Security Act 1998 (c.14), section 46. It was amended by S.I. 2008/2833, Schedule 3 paragraph 32 and prospectively amended by paragraph 33 of that Order to take account of the amendments to be made by the Welfare Reform Act 2007 (c.5), section 57(2) and (3) and Schedule 7 paragraph 1(2) and (3).

(iv) section 12 of the Social Security (Recovery of Benefits) Act 1997(**b**);

(v) section 12 or 13 of the Social Security Act 1998(**c**);

(vi) paragraph 6 or 7 of Schedule 7 to the Child Support, Pensions and Social Security Act 2000(**d**);

(vii) section 39 of, or paragraph 3 of Schedule 2 to, the Tax Credits Act 2002(**e**);

(viii) section 158 of the Health and Social Care (Community Health and Standards) Act 2003(**f**);

(ix) section 23 of the Child Trust Funds Act 2004(**g**); or

(x) section 50 of the Child Maintenance and Other Payments Act 2008(**h**); and

(e) the First-tier Tribunal or the Upper Tribunal, which consist of an appeal against a decision of the Pensions Regulator.

5B.—(1) Assistance by way of representation in relation to proceedings described in regulation 5A(a) shall be provided only where the solicitor to whom application has been made is satisfied that the tribunal deciding the case will do so sitting in Scotland.

(2) Assistance by way of representation in relation to proceedings described in regulation 5A(b) shall be provided only where—

(a) the solicitor to whom application has been made is satisfied that the tribunal deciding the case will do so sitting in Scotland; and

(b) either—

(i) the First-tier Tribunal has given permission to appeal to the Upper Tribunal; or

(ii) the solicitor is satisfied as to the matters set out in regulation 13(2)(a), (b) and (taking into account the factors set out in regulation 13(3)) (c).".

(5) In regulation 13 (which specifies proceedings in relation to which the Scottish Legal Aid Board's approval is a pre-condition to the provision of assistance by way of representation)—

(a) in paragraph (1), for "(q) and 5" substitute "5 and 5A(c) to (e)";

(b) in paragraph (4)—

(i) for "3(q) and (s)" substitute "5A(c) and (e)"; and

(ii) after "satisfied that" insert "the tribunal deciding the case will do so sitting in Scotland and"; and

(c) after paragraph (5) insert—

"(6) The Board shall only approve the provision of assistance by way of representation in relation to the proceedings described in regulation 5A(d) where it is satisfied—

(a) that the tribunal deciding the case will do so sitting in Scotland; and

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(**a**) 1991 c.48; section 20 was substituted by the Social Security Act 1998 (c.14), section 42 and, for the purposes of cases specified in article 3(1) of S.I. 2003/192, by the Child Support, Pensions and Social Security Act 2000 (c.19), section 10. It was amended by the Child Maintenance and Other Payments Act 2008 (c.6), Schedule 8 and by S.I. 2008/2833, Schedule 3 paragraphs 80 and 81.

(**b**) 1997 c.27; section 12 was amended by the Social Security Act 1998, Schedule 7 paragraph 151 and Schedule 8 paragraph 1 and by S.I. 2008/2833, Schedule 3 paragraph 140.

(**c**) 1998 c. 14; sections 12 and 13 were amended by the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (c.2), Schedule 7 paragraphs 25 and 26 and by S.I. 2008/2833, Schedule 3 paragraphs 149 and (except in relation to Scotland) 150 respectively.

(**d**) 2000 c. 19; paragraphs 6 and 7 of Schedule 7 were amended by S.I. 2008/2833, Schedule 3 paragraph 190(3) and (4) respectively.

(**e**) 2002 c. 21; section 39 was amended by S.I. 2009/56, Schedule 1 paragraph 314. Paragraph 3 of Schedule 2 to the Act was amended by S.I. 2009/56, Schedule 1 paragraph 319.

(**f**) 2003 c. 43; section 158 was amended by S.I. 2008/2833, Schedule 3 paragraph 200.

(**g**) 2004 c. 6; section 23 was amended by S.I. 2009/56, Schedule 1 paragraph 416.

(**h**) 2008 c. 6; section 50 was amended by S.I. 2008/2833, Schedule 3 paragraph 226.

(b) as to the matters set out in paragraph (2)(a) to (c).”.

A member of the Scottish Executive

St Andrew’s House,
Edinburgh
Date

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations, together with the Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 1) (Scotland) Regulations 2010 amend advice and assistance and civil legal aid legislation in consequence of the transfer of tribunal functions to the First-tier Tribunal and the Upper Tribunal established under the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act").

Regulation 3 amends Schedule 2 to the Legal Aid (Scotland) Act 1986—

(a) to remove the reference to the Child Support Commissioners. The Commissioners were abolished by virtue of the Transfer of Tribunal Functions Order 2008(**a**); and

(b) to make civil legal aid available for judicial review proceedings before the Upper Tribunal where the application to the supervisory jurisdiction of the Court of Session was transferred to the Upper Tribunal under section 20 of the 2007 Act.

Regulation 4 amends the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003—

(a) to make assistance by way of representation available in relation to proceedings before the First-tier Tribunal and the Upper Tribunal for which, prior to the transfer of tribunal functions, assistance by way of representation would have been available;

(b) to make assistance by way of representation available in relation to some proceedings before the First-tier Tribunal and the Upper Tribunal for which, prior to the transfer of tribunal functions, assistance by way of representation or civil legal aid would not have been available. Specifically: appeals against penalties imposed under Schedule 24 to the Finance Act 2007 and Schedule 41 to the Finance Act 2008 and appeals against decisions made under section 5 of the Pensions Appeal Tribunal Act 1943 and section 4 of the Vaccine Damage Payments Act 1979; and

(c) to remove references to tribunals which have been abolished by virtue of the Transfer of Tribunal Functions Order 2008, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009(**b**), the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010(**c**) and the Transfer of Tribunal Functions Order 2010(**d**).

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(**a**) S.I. 2008/2833.
(**b**) S.I. 2009/56.
(**c**) S.I. 2010/21.
(**d**) S.I. 2010/22.

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