EXECUTIVE NOTE

DRAFT : THE ADVICE AND ASSISTANCE AND CIVIL LEGAL AID (TRANSFER OF TRIBUNAL FUNCTIONS) (NO. 2) (SCOTLAND) REGULATIONS 2010

The draft Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 2) (Scotland) Regulations 2010 (the "(No. 2) Regulations") will, if approved, be made in exercise of the powers conferred on the Scottish Ministers by sections 9 and 13(4) of the Legal Aid (Scotland) Act 1986 and of all other powers enabling them to do so.

The (No. 2) Regulations are subject to affirmative resolution procedure. They form part of a package of amendments together with the Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 1) (Scotland) Regulations 2010 ("the (No. 1) Regulations"). The (No. 1) Regulations are subject to the negative resolution procedure.

Policy Objective

The over-arching policy objective behind the (No. 1) and (No. 2) Regulations is to ensure that State funded legal representation continues to be available in relation to those proceedings for which it was available prior to the relevant transfers of functions to the First-tier Tribunal and the Upper Tribunal ("the Tribunals") established under the Tribunals, Courts and Enforcement Act 2007, and to harmonise the form of legal assistance.

The relevant transfers of functions are–

a.) the transfer of the Social Security Commissioners' functions and the Child Support Commissioners' functions effective from 3rd November 2008 under the Transfer of Tribunal Functions Order 2008 (S.I. 2008/2833);

b.) the transfer of the VAT and duties tribunals' functions effective from 1st April 2009 under the the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (S.I. 2009/56);

c.) the transfer of the Asylum and Immigration Tribunal's functions, effective from 15th February 2010 under the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (S.I. 2010/21); and

d.) the transfer of the Pensions Regulator Tribunal's functions, effective from 6th April 2010 under the Transfer of Tribunal Functions Order 2010 (S.I. 2010/22).

In addition, section 20 of the Tribunals, Courts and Enforcement Act 2007 provides for judicial review proceedings, in certain circumstances, to be transferred from the Court of Session to the Upper Tribunal.

Provision made

Prior to the transfers of functions, assistance by way of representation ("ABWOR") was the aid type available for proceedings before the VAT and duties tribunals, the Asylum and Immigration Tribunal and the Pensions Regulator Tribunal. Civil legal aid was available in respect of proceedings before the Social Security Commissioners, the Child Support Commissioners and for all judicial review proceedings.

Considering the character of proceedings before the Tribunals (and in particular the rapidity with which it is intended that they proceed), the Government has concluded that ABWOR is the most appropriate aid type for proceedings before the Tribunals in general. Judicial review proceedings are an exception to that generality, they will be funded under civil legal aid.

If approved, the (No. 2) Regulations will therefore ensure that civil legal aid is available for judicial review proceedings before the Upper Tribunal. And they will enable ABWOR to be made available in relation to those cases which would formerly have been dealt with by the Asylum and Immigration Tribunal, the Child Support Commissioners, the Social Security Commissioners, the VAT and duties tribunals and the Pensions Regulator Tribunal.

Further, the Regulations will extend the availability of ABWOR to proceedings before the First-tier Tribunal or the Upper Tribunal relating to penalties imposed under Schedule 24 to the Finance Act 2007 or Schedule 41 to the Finance Act 2008 and to decisions made under section 4 of the Vaccine Damages Payments Act 1979 and section 5 of the Pensions Appeal Tribunal Act 1943. The Finance Acts 2007 and 2008 have created new penalty regimes and associated appeal mechanisms to cover more than VAT and duties cases and the intention is to ensure that availability of legal assistance continues. In relation to the Vaccine Damage Payments Act, ABWOR is extended on the basis that formerly there would only have been a decision by a social security appeal tribunal and then, potentially, a judicial review. The First-tier Tribunal will now be performing the role of the social security appeal tribunal, meaning that there is a new right of appeal interposed before the judicial review stage. The extension of ABWOR to appeals against decisions under the Pensions Appeal Tribunal Act 1943 is required given that previously, an appeal lay to a Social Security Commissioner only under sections 1 to 4 and 5A of the Act. The possibility of taking an appeal to a decision taken under section 5 is new.

The (No. 2) Regulations will make further amendments to the Legal Aid (Scotland) Act 1986 and the Regulations made under it to remove references to the abolished Asylum and Immigration Tribunal, the Child Support Commissioners, the VAT and duties tribunals and the Pensions Regulator Tribunal. References to the Social Security Commissioners are not removed as they continue to exist for the limited purpose of hearing appeals under section 159 of the Health and Social Care (Community Health and Standards) Act 2003.

Consultation

The Scottish Government has been in continuous discussions with the Scottish Legal Aid Board to determine the best method of implementing the changes necessary to ensure that State funded legal representation continues to be available in relation to those proceedings for which it was available prior to the relevant transfers of functions.

The Board has consulted the Glasgow Immigration Practitioners' Group regarding the proposals following the transfer of the Asylum and Immigration Tribunal's functions. The Group represents the majority of practitioners in the field of asylum and immigration.

In relation to the change of aid type for proceedings which would formerly have been dealt with by the Social Security Commissioners and the Child Support Commissioners, the change to using ABWOR is not considered controversial as the number of cases involved is extremely small.

Financial Implications

It is not anticipated that the changes made by the (No. 2) Regulations will result in any additional cost to the Scottish Legal Aid Fund.

Scottish Government
April 2010