

EXECUTIVE NOTE

REFORM OF LEGAL AID: TAXATION OF CIVIL CASES BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL THE CIVIL LEGAL AID (SCOTLAND) (FEES) AMENDMENT (No.2) REGULATIONS SSI/2007/181

The above instrument will be made in pursuance of the powers conferred on Scottish Ministers by sections 33(2)(a), (3)(a), (b), (c) and (f) and 36(1) and (2) (a) of the Legal Aid (Scotland) Act 1986. This instrument is subject to the negative resolution procedure.

Policy objective- Reform of legal aid and taxation of civil cases before the Judicial Committee of the Privy Council

This instrument provides for taxation in proceedings in Scottish civil cases arising before the Judicial Committee of the Privy Council (JCPC) to be resolved by the Registrar of JCPC. No provision currently exists allowing for taxations to resolve disputes or questions arising between the Scottish Legal Aid Board (SLAB) and a solicitor or counsel as to the amount of fees or outlays allowable to the solicitor or as to the amount of fees allowable to counsel from the Legal Aid Fund in relation to payments made in terms of the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ('the 1989 Regulations'). By this instrument, in cases where civil legal aid is made available in respect of proceedings in Scottish cases before the JCPC, such disputes or questions will now be referred to the Registrar of the JCPC for resolution.

This instrument also provides for a review mechanism so that any person who is dissatisfied with a taxation decision by the Registrar of the JCPC may lodge a petition with the JCPC which shall, in the first instance, be considered by a Board of the JCPC.

The instrument also provides for some consequential changes to the 1989 Regulations which include:-

- Following the commencement of section 73 of The Legal Profession and Legal Aid (Scotland) Act 2007 which amended the Legal Aid (Scotland) Act 1986 to extend the availability of civil legal aid to proceedings before the JCPC (where a devolution issue is referred by the Lord Advocate, the Advocate General or the Attorney General for Northern Ireland or the House of Lords refer such an issue to the Judicial Committee), provision is made for a solicitor's fees for such proceedings to be calculated in accordance with Schedule 5 to the 1989 Regulations:
 - Regulation 2(1A) of the 1989 Regulations is amended to provide that a solicitor-advocate shall be treated as a senior solicitor-advocate where he is undertaking work equivalent to that which would be done by a senior counsel in a case before the JCPC; and
 - Regulation 10(2A) of the 1989 Regulations is amended to provide that the fees of a solicitor-advocate for any work in relation to proceedings in the JCPC shall be 90 per cent of the amount of fees which would be allowed for the work on a taxation of expenses between solicitor and client, third party paying, as if the work done was not legally aided which is the same rate for payment as that provided for counsel in the 1989 Regulations.

Commencement

This instrument will apply in respect of all proceedings commenced on or after 29 March 2007. However, regulation 4(a) of this instrument which provides that references for taxation shall be remitted to the Registrar, applies in respect of proceedings concluded before 29 March 2007 which are referred for taxation after that date and proceedings concluded on or after that date.

The policy intention is to make provision for taxation arrangements to come into force for cases as soon as possible. This provides that from 29 March 2007 proceedings in all Scottish civil cases before the JCPC can be taxed by the Registrar of the JCPC and any questions or disputes in outstanding cases can be resolved by this means.

Consultation

In making this instrument, consultation has taken place among Executive officials, SLAB and the Registrar of the JCPC with her staff where she has confirmed that she is prepared to undertake taxations in Scottish cases. The Registrar of the JCPC and the Law Lords have provided comments which have been attended to in this instrument. In particular, the instrument provides for a review mechanism of the Registrar's decision.

There has been consultation too with both the Law Society of Scotland and the Faculty of Advocates. This advised them that provision was being made to provide for taxation in cases where disputes or questions arise in relation to the payment of fees or outlays allowable to the solicitor or as to the amount of fees allowable to counsel from the legal aid fund in relation to payments made in terms of the 1989 Regulations.

Purpose

The purpose of this instrument is to provide for taxation in proceedings in civil cases in Scotland where cases of dispute or questions arise in relation to payment of fees or outlays allowable to the solicitor or as to the amount of fees allowable to counsel from the Legal Aid Fund in relation to payments made in terms of the 1989 Regulations. Similar provisions are being made by way of separate instrument to provide for taxation in criminal cases.

Financial Implications

Following the commencement of section 73 of The Legal Profession and Legal Aid (Scotland) Act 2007 which extended the availability of civil legal aid to proceedings before the JCPC, persons in such cases can now obtain legal aid subject to the usual statutory tests. No financial implications arise directly in respect of this instrument as this instrument provides for the taxation of fees and outlays allowable to a solicitor or the amount of fees allowable to counsel in civil cases and provides a route for resolution of such disputes or questions by the Registrar of the JCPC who has the expertise in such cases in respect of English or Welsh cases.

Gillian Mawdsley
Justice Department
Access to Justice
Scottish Executive
6 March 2007