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SCOTTISH STATUTORY INSTRUMENTS

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**2010 No. 166**

**LEGAL AID AND ADVICE**

**The Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 1) (Scotland) Regulations 2010**

<i>Made</i>	- - - -	<i>28th April 2010</i>
<i>Laid before the Scottish Parliament</i>	- - - -	<i>29th April 2010</i>
<i>Coming into force</i>	- -	<i>9th June 2010</i>

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 12(3), 17(2B), 33(2)(a) and (3) and 36(1), (2)(a), (c), (g) and (h) and (3)(e) of the Legal Aid (Scotland) Act 1986(1) and all other powers enabling them to do so.

**Citation and commencement**

1. These Regulations may be cited as the Advice and Assistance and Civil Legal Aid (Transfer of Tribunal Functions) (No. 1) (Scotland) Regulations 2010 and come into force on 9th June 2010.

**Application**

2. The following regulations 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.

**Withholding payment in First-tier Tribunal and Upper Tribunal proceedings**

- 3.—(1) Paragraphs (2) and (3) apply where, under the Legal Aid (Scotland) Act 1986—
- (a) assistance by way of representation has been provided in relation to proceedings before the First-tier Tribunal or the Upper Tribunal; and
  - (b) the Board finds that the provision—
    - (i) was not (wholly or partly) in accordance with the relevant rules applying by virtue of that Act; or

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(1) 1986 c.47; section 12(3) was amended by the Crime and Punishment (Scotland) Act 1997 (c.48), Schedule 1 paragraph 12(4) (b) and by the Legal Profession and Legal Aid (Scotland) Act 2007 (asp 5), section 67(5); section 33(2) was amended by the Legal Profession and Legal Aid (Scotland) Act 2007, section 67(7)(b). 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).

(ii) was otherwise unjustified in the circumstances of the case (including by reason of inadequate assessment or verification of any relevant factor).

(2) In considering whether or not the provision was in accordance with those rules, the Board may have regard to any relevant guidance it has issued in relation to their application.

(3) The Board may—

- (a) withhold (wholly) payment from the Fund in respect of the provision; or
- (b) if such payment has been made, fully recover it.

#### **Amendment of the Civil Legal Aid (Scotland) (Fees) Regulations 1989**

4. In regulations 5(3) and 10(2) of the Civil Legal Aid (Scotland) (Fees) Regulations 1989(2), for “Child Support Commissioners” substitute “Upper Tribunal”.

#### **Amendment of the Advice and Assistance (Scotland) Regulations 1996**

5. In regulation 16(2) of the Advice and Assistance (Scotland) Regulations 1996(3)—

- (a) in sub-paragraph (l), omit “the Child Support Commissioners or”; and
- (b) after sub-paragraph (l), insert—
  - “(m) to any payment of money in accordance with an order made by the Upper Tribunal in relation to proceedings described in regulation 5A(d) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003(4) or under any settlement arrived at to prevent or bring to an end proceedings in which such an order may be made.”.

#### **Amendment of the Civil Legal Aid (Scotland) Regulations 2002**

6.—(1) The Civil Legal Aid (Scotland) Regulations 2002(5) are amended in accordance with paragraphs (2) to (6).

- (2) In regulation 4(1)(k) omit “and the Child Support Commissioners”.
- (3) Omit regulation 18(2)(w).
- (4) In regulation 21(1)(c) for “Child Support Commissioners” substitute “Upper Tribunal”.
- (5) In regulation 33(a)(xi) omit “the Child Support Commissioners or”.
- (6) In regulation 47—
  - (a) in the heading to that regulation omit “and Child Support Commissioners”; and
  - (b) omit “or the Child Support Commissioners”.

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(2) S.I. 1989/1490; amended by S.I. 1990/473, 1991/565, 1994/1015 and 1233, 1995/1044, 1997/689, 1999/1042 and S.S.I. 2002/496, 2003/178, 2004/281, 2005/449, 2007/14, 181 and 438 and 2009/203 and 312.

(3) S.I. 1996/2447; amended by S.I. 1997/726, 1998/724, S.S.I. 2000/181, 2002/495, 2003/163 and 421, 2004/262 and 492, 2005/171 and 339, 2006/233, 2007/60, 2008/240, S.I. 2008/1879 and S.S.I. 2009/49 and 2010/57.

(4) 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.

(5) S.S.I. 2002/494; amended by the Debt Arrangement and Attachment (Scotland) Act 2002 (asp 17) schedule 3, paragraph 38 and S.S.I. 2003/49 and 486, 2004/491, 2005/112 and 448, 2006/325, 2007/59 and 425 and 2008/50, S.I. 2008/1879 and S.S.I. 2009/49, 312 and 429 and 2010/57.

St Andrew's House,  
Edinburgh  
28th April 2010

*KENNY MACASKILL*  
A member of the Scottish Executive

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

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## 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. 2) (Scotland) Regulations 2010 (“the (No. 2) Regulations”) 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<sup>(6)</sup>.

Regulation 3 provides for payments to be recovered or withheld by the Scottish Legal Aid Board where it finds that a solicitor providing assistance by way of representation in relation to proceedings before the First-tier Tribunal or the Upper Tribunal has not correctly applied the relevant tests for eligibility.

Regulation 4 replaces references to the Child Support Commissioners in the Civil Legal Aid (Scotland) (Fees) Regulations 1989 with references to the Upper Tribunal. The Child Support Commissioners were abolished by virtue of the Transfer of Tribunal Functions Order 2008<sup>(7)</sup>. By virtue of the (No. 2) Regulations, civil legal aid is to be made available for judicial review proceedings before the Upper Tribunal. It is therefore necessary for the Civil Legal Aid (Scotland) (Fees) Regulations 1989 to make provision for the fees and outlays allowable to solicitors and counsel in relation to proceedings before the Upper Tribunal.

Regulation 5(a) removes from the Advice and Assistance (Scotland) Regulations 1996 a reference to the Child Support Commissioners. Regulation 6 removes from the Civil Legal Aid (Scotland) Regulations 2002 references to the Child Support Commissioners and a reference to the Asylum and Immigration Tribunal. Those amendments are made in consequence of the abolition of the Child Support Commissioners and, by virtue of the Transfer of Functions of the Asylum and Immigration Tribunal Order 2010<sup>(8)</sup>, the abolition of the Asylum and Immigration Tribunal.

Regulation 5(b) amends the Advice and Assistance (Scotland) Regulations 1996 to provide that a solicitor’s right to prior payment of fees and outlays out of any property recovered or preserved for the client in respect of advice and assistance does not apply to any money paid in connection with proceedings described in regulation 5A(d) of the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003. Before the Transfer of Tribunal Functions Order 2008 came into force, those proceedings would have been conducted before the Social Security Commissioners or the Child Support Commissioners. Any money paid in connection with proceedings before the Commissioners was excepted from the solicitor’s right to prior payment.

Regulation 6(4) replaces the reference to the Child Support Commissioners in regulation 21(1) (c) of the Civil Legal Aid (Scotland) Regulations 2002 with a reference to the Upper Tribunal. The Scottish Legal Aid Board’s prior approval will therefore ordinarily be required for the employment of counsel in proceedings before the Upper Tribunal for which civil legal aid has been made available.

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(6) 2007 c.15.  
(7) S.I. 2008/2833.  
(8) S.I. 2010/21.