

# **Review of Children's legal aid.**

**February 2008.**

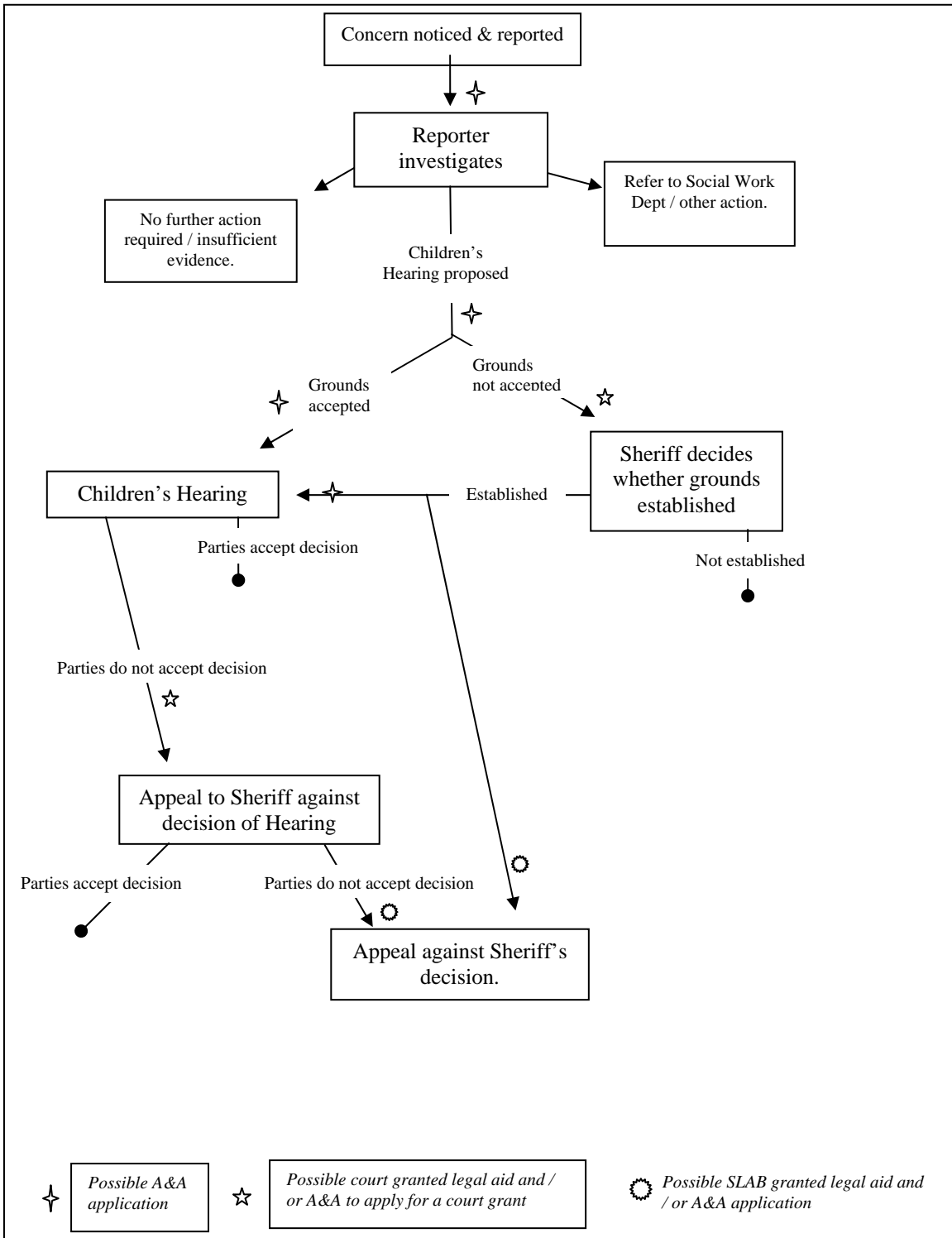
## **1. Introduction.**

1. The aim of this research was to provide an overview of the operation of the children's legal system, including identifying recent consultation or changes.

## **2. The children's legal system.**

2. The children's legal system in Scotland has a twofold purpose: protecting children suffering or likely to suffer harm, and dealing with children alleged to have committed offences. The 'children's hearings' system currently in use was introduced in the 1970s; previously children and young people automatically appeared before the courts. The new system was designed to recognise the fact that all children, whether or not they have committed an offence, require care and protection. The latest development was announced in January 2008; to establish a single national body that will bring together the various establishments involved in supporting, organising and delivering the Children's Hearings system.
3. Children's hearings are undertaken by three children's panel members. Other parties who attend can include: the child, their parents/guardians, the Reporter and a Social Worker. Other professionals who might attend include teachers, foster carers or health visitors. Children's Hearings are used to decide on what action is needed in the best interests of the child, including whether the child is in need of compulsory measures of supervision from the social work department. They are designed to be small gatherings able to proceed in a relatively informal way.
4. The courts still have a role in the children's hearing system. They are used for various proceedings, for example, the establishment of disputed grounds of referral, child protection orders, child assessment orders, appeals against a decision of the children's hearings or exclusion orders. Children (over 8 years of age) are only considered for prosecution in court for serious offences. Even so, the Procurator Fiscal (possibly with assistance from a Children's Reporter) will still decide if prosecution is in the public interest, or whether referral to a hearing is more appropriate.
5. The grounds for referring a child or young person before a hearing are set down in section 52(2) of the Children (Scotland) Act 1995 (see Appendix A). They are designed to cover a number of different circumstances where children are likely to require compulsory measures of supervision.
6. Diagram 1 overleaf gives a simplified view of the alternate routes through the children's legal system. The accompanying text in the following pages describes the workings of the process in more detail.

**Diagram 1: Operation of the Children’s Legal System.**



7. The route into the children’s legal system is via a Children’s Reporter (see Diagram 1). Scottish Reporters investigated and decided on over 65,000 cases in

2006/07<sup>1</sup>. Most referrals come from the Police (88% in 2006/07<sup>2</sup>). Social workers, educators, health workers and parents / guardians are the other four principal sources, however anyone can make one. Once a referral is received the reporter makes an initial investigation regarding the child and decides what further action, if any, is needed. Parties involved would typically be informed by letter. At this point they might wish to visit a solicitor who could admit them to legally-aided advice and assistance, if they qualified. This would allow them to gain an understanding of their rights, as well as a basic understanding of the process.

8. As shown in Diagram 1 the result of the Reporter's investigation would be either a decision that:
  - **No further action is required.** This is usually either because there is no indication of a need for compulsory measures, or because there is insufficient evidence to proceed. This route accounted for 60% of cases disposed of in 2006/07<sup>3</sup>. No further advice and assistance, nor any legal aid would be available at this stage.
  - **Further action, other than a hearing, is required.** For instance, the child should be referred to the Local Authority for support (usually from a social worker), or measures other than a Hearing are already in place or should be put in place (eg family support, referral to Procurator Fiscal). This route accounted for 31% of disposals in 2006/07<sup>3</sup>. No further children's advice and assistance, nor children's legal aid would be available (although criminal legal assistance could be available if the matter was referred to the Procurator Fiscal).
  - **a children's hearing should be arranged** (accounting for 6,744 disposals (9%) in 2006/07<sup>4</sup>).
9. Hearings can only go on to consider if the child requires compulsory measures of supervision where the child and the parents / guardians accept the grounds for referral as stated by the Reporter, or where they accept them in part and the hearing decides it is proper to proceed. In these circumstances there is no provision for advice and assistance or children's legal aid for *attendance* at children's hearings. Advice & assistance is available from a solicitor to give advice before the hearing and afterwards. This can be by way of an increase in authorised expenditure, if a grant of advice and assistance has already been made, or by a new grant if not. This will provide for advice to parties about their rights at a hearing and about acceptance of the grounds for referral.
10. Where the grounds for referral are not accepted, or the child does not understand due to age or ability, the case is referred to the Sheriff to decide whether the grounds are established. In 2006/07, 3,946 such applications were made, with

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<sup>1</sup> Scottish Children's Reporters Administration annual report 2006/07.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

87% held to be established<sup>1</sup>. An application to the courts for legal aid would be possible at this stage. A solicitor could admit an applicant to advice and assistance in order to make the application. However, the decision whether or not to grant legal aid will be that of the Sheriff. The tests used are “whether it is in the interests of the child”, “whether the expenses of the case cannot be met without undue hardship to the child, any relevant person in relation to him or the dependants of any of them” and whether the child or relevant person “has available to him rights and facilities making it unnecessary for him to obtain legal aid”<sup>2</sup>.

11. If the parties accept the grounds initially, or if they do not but the Sheriff holds that they are established, the Reporter will arrange another children’s hearing to dispose of the case. However, it is open to any of the parties to appeal against the Sheriff’s decision, whether the decision is to hold the grounds either established or not. If this is the case then the process proceeds as described in the Appeals section below.
12. Parents / guardians of the child must (by law) attend the hearing, although they can be excluded from any part of the hearing if the panel members think it necessary (for instance if the child would be upset by their presence). The child would normally also attend (they always have the right to attend, although the hearing may decide they do not have to attend all or part). The child and parents / guardians may take a representative to help them at the hearing, and each may choose a separate one. As discussed earlier advice and assistance is available prior to a children’s hearing but there is no legal aid funding for attendance at a children’s hearing. However, legal representation for the child at the hearing can be provided by the Local Authority (this is funded by the Scottish Government). A solicitor who has been appointed by the Local Authority to act as a legal representative cannot also apply for advice & assistance from the Fund for this case; this would amount to double-charging<sup>3</sup>.
13. The hearing has to decide whether compulsory measures of supervision by the Social Work Department are in the best interests of the child or young person. Reports from social workers, school, doctors and psychologists may be used to assist with the decision. Parents and children are likely to be provided with these reports at the same time as panel members, usually seven days before a hearing. As the hearing is concerned with the wider picture and the long term well-being of the child, the measures which it decides on will be based on the welfare of the child. They may not always appear to relate directly to the reasons that were the immediate cause of the child’s referral to the hearing.
14. If the hearing considers that compulsory measures of supervision are necessary, it will make a Supervision Requirement. In most cases the child will continue to live at home but will be under the supervision of a social worker. In some cases the

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<sup>1</sup> Scottish Children’s Reporters Administration annual report 2006/07

<sup>2</sup> Test contained at Reg 7(1) of the Legal Aid (Scotland) (Children) Regulations 1997

<sup>3</sup> Source: ‘Response to the Scottish Executive ‘Getting it right for every child’ consultation pack’, Scottish Legal Aid Board, (sent to the Scottish Executive August 2005), page 5.

hearing will decide that the child should live elsewhere. It may also decide who the child may have contact with, and when. The Antisocial Behaviour etc. (Scotland) Act 2004 also gave hearings the power to restrict a child or young person's movement. There is however no element of punishment in a hearing decision, so it does not for example have the power to fine the child or the parents. All final decisions made by hearings are binding, although appealable to the Sheriff.

#### *Appeals to the Sheriff*

15. If the child, or the relevant persons, do not accept the decision of the children's hearing they have 21 days to appeal to the Sheriff. Legal aid for this appeal is granted or refused by the courts, and the same statutory tests of consideration are used as described above. As above, applicants may also approach a solicitor to be admitted to advice and assistance to help them make the application. In 2005/06 71% of children's hearing decisions that were appealed to the Sheriff were upheld, from a total of 508 appeals made<sup>1</sup>. The number upheld is not provided for 2006/07, when 435 appeals to the Sheriff were made.

#### *Appeals to the Sheriff Principal or Court of Session.*

16. If one or more parties does not accept the Sheriff's decision they can appeal to either the Sheriff Principal or to the Court of Session. However the grounds for this appeal can only be on a point of law or, more unusually, procedural irregularities. It is more usual to appeal to the Sheriff Principal in the first instance, this will allow a further appeal to the Court of Session if required. Once the Court of Session has made a decision this is final. In certain circumstances, for instance where the decision might have a bearing on a number of unrelated cases, an initial appeal would be more likely to be made directly to the Court of Session.
17. Applicants seeking legal aid for appeals to either the Sheriff Principal or the Court of Session must apply to the Scottish Legal Aid Board. As with previous applications they can seek a grant of advice and assistance to allow a solicitor to advise on the application. The basis of a decision by the Board uses more stringent grounds than are used in all other areas of legal aid. Whilst "undue hardship" (as described above) is still the financial test, the solicitor has to show that there are "substantial grounds" for making or responding to the appeal. In civil legal aid the less stringent test is "probable cause" (see Appendix B).

### **3. Activity and Costs.**

18. A total of 41,891 children's hearings were held in 2006/07<sup>2</sup>. This is a far higher figure than the 6,255 investigations resulting in a decision to arrange a hearing (p 3). This is because it covers the different types of Hearings held. As well as new grounds of referral hearings these include things such as: review hearings, continued hearings and advice hearings. For instance, children who are subject to

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<sup>1</sup> Scottish Children's Reporters Administration annual report 2006/07.

<sup>2</sup> Ibid.

- a Supervision Requirement attend a review hearing at least annually, at present there are over 12,500 children with a Supervision Requirement<sup>1</sup>.
19. The Scottish Children's Reporter's Administration (SCRA) annual accounts 2006/07 show that they received £25.3 million grant-in-aid funding from the Scottish Government in 2006 (for both running costs and capital expenditure).
  20. In 2004/05 the Scottish Government provided around £850,000 for training of panel members and others involved in the children's hearings system<sup>2</sup>. The Scottish Government also meets the costs of legal representation at some children's hearings. This costs in the region of £300k per year. The Scottish Government also supports the annual national recruitment campaign and support measures for panel members to the sum of over £1m per year<sup>3</sup>. In addition, a significant cost is met by Local Authorities in supporting the operation of children's panels. These include: payment for safeguarders who may be appointed by the Panel or the Sheriff, contributing to training costs of panel members, provision of appropriate facilities for assessment & supervision and carrying out the Supervision Requirements made by hearings.
  21. In 2006/07 the Scottish Legal Aid Board registered 5,868 grants of advice and assistance for matters relating to the Children (Scotland) Act 1995<sup>4</sup>. 1,574 increases to the authorised limit of expenditure were also granted. A total of £458,000 was spent on advice and assistance for children's matters in 2006/07. This has risen by 23% since 2001/02, numbers of final accounts paid have also risen since then, by 19%. This means that the average cost of a children's advice & assistance case has risen by 4%, from £86 to £89.
  22. In 2006/07 there were 4,456 court grants of legal aid under the Children (Scotland) Act and 339 sanctions in respect of the Act were granted. In 2005/06 the number of grants was 3,984. As Figure 1 below shows there has been a steady increase in court grant numbers since 1997/98. The number in 2006/07 was 74% higher than at the start of the period (2,560). By contrast the number of appeal applications made directly to the Board (never large) has fallen over the same period from 26 to 5.

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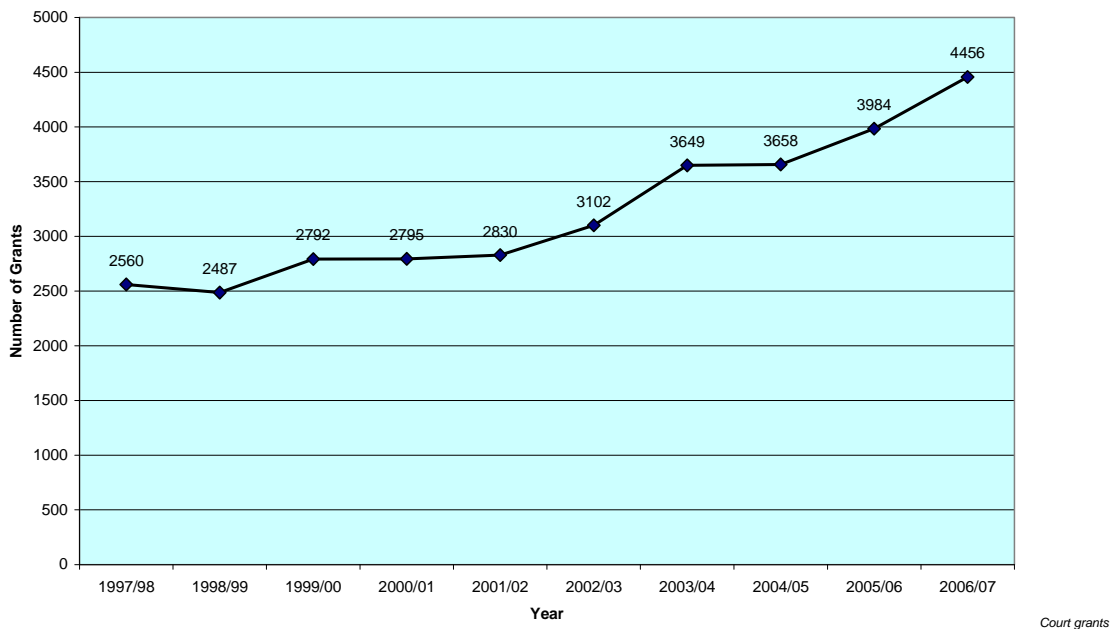
<sup>1</sup> SCRA, via email, October 2007.

<sup>2</sup> <http://www.chscotland.gov.uk/background.asp>.

<sup>3</sup> Ibid.

<sup>4</sup> These figures, and those in the following paragraphs relating to the Scottish Legal Aid Board, all came from the Scottish Legal Aid Board annual report 2006/07.

*Figure 1: Number of court grants of legal aid 1997/98 – 2006/07.*



23. The Scottish Legal Aid Board paid £3.8 million for children’s legal aid in 2006/07, including both court granted legal aid and Board granted legal aid for appeals to the Sheriff Principal and Court of Session. Fees to advocates account for 23% of this figure (£0.9 million). By comparison, in criminal legal aid in the same year, expenditure on advocates accounted for 16%.
24. Figure 2 below illustrates these trends. It shows that the total amount paid for children’s legal aid has risen by 143% since 1997/98, and that the average cost per case has increased by 39% (from £876 to £1,126).
25. Between 2002/03 and 2003/04 there was a sizeable fall in total paid and the average case cost. Whilst the total paid then increases once more (to reach its’ highest level in 2006/07, up 46% from 2003/04) average costs have remained relatively stable since then (up 5% between 2003/04 and 2006/07). It is suggested that it was from 2004/05 that the effects of a change in accounts assessment practices was felt; since the ‘James Muir’ fraud case children’s accounts have been assessed primarily by a single member of staff. Any issues identified are then discussed with a solicitor in the technical division of legal services.
26. As well as introducing increased levels of expertise and consistency in these cases this has given focus to individual case accounts. This has meant that, since 2003/04, a number of ‘nil claims’ accounts have been formally closed on the system. ‘Nil claims’ often occur in cases involving more than one child. The solicitor would commonly submit a legal aid application for each child but, almost invariably, at the conclusion of the case, submit only one account under the "principal" certificate. The ‘other’ cases would therefore be paid as nil claims.

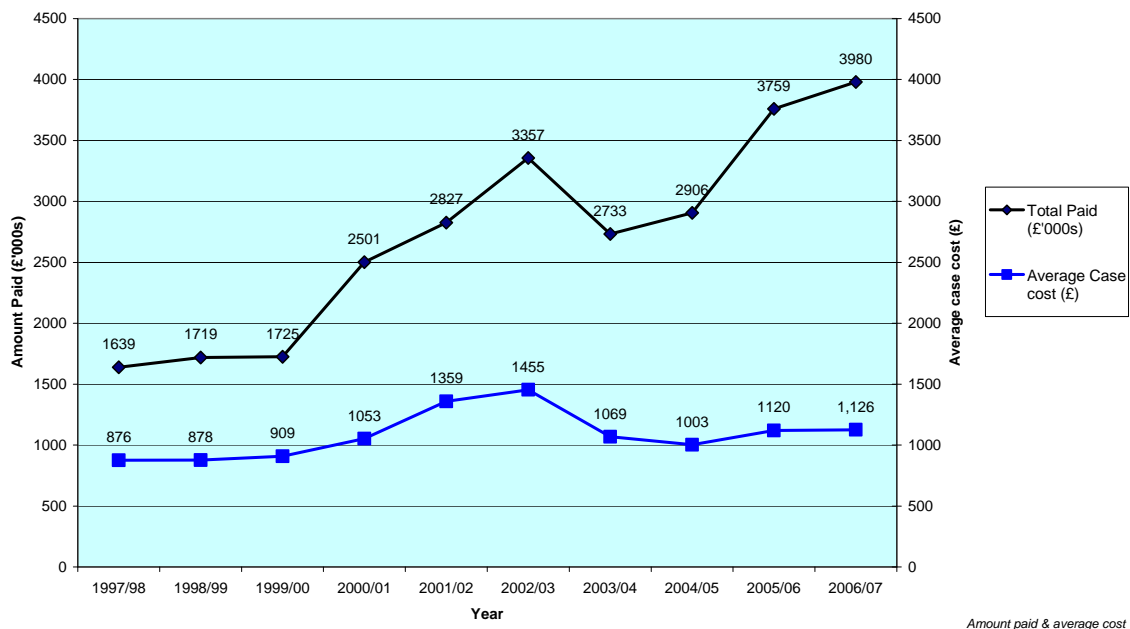
Since they would increase the number of ‘final accounts’ paid overall but not add to the total amount paid, these have the effect of keeping the average case cost low.

27. In June 2007 the Scottish Legal Aid Board issued guidance to solicitors designed to prevent them making multiple applications for different children in a case (unless there were specific grounds to do so). Solicitors appear to be following the guidance, and it is suggested that this should result in an increase in average case costs over the next few years.

28. It has been suggested that some of the current costs are due to SLAB now paying some of the higher cost counsel cases that were granted in earlier years, but which we would perhaps not now allow. However it has also been noted that there has been a large increase in high value/long running children’s cases over the past 5 years. For instance, ‘shaken baby’ cases, which were minimal 5 years ago. Given this, it is likely that, if grants continue to increase, SLAB will receive increased proportions of complex and expensive cases.

29. In light of this it is likely that costs will continue to rise, although some ways of controlling these are outlined in sections 5 and 6 of this paper.

*Figure 2: Total paid & average case costs 1997/98 – 2006/07.*



30. As noted above, five applications to the Board for children’s legal aid were granted in 2006/07. It is likely that some (even all) of these may relate to a single case, however further exploration would be needed to prove or disprove this.

#### 4. Recent consultation and proposals.

31. In February 2004 a working group was formed by the Scottish Government to develop ideas and design a recommended framework for good practice across all Children's Services in Scotland. Consultation and review relevant (but not exclusive) to the children's hearing's system has been on-going since then. The most recent proposals were outlined in the draft Children's Services (Scotland) Bill, published in 2006. This suggests changes intended to support the programme of reform to children's services (including legal services) that is underway in Scotland. Consultation on these proposals took place late 2006 and early in 2007.
32. A number of proposals are included in the draft Bill. It is intended that the changes should result in fewer children going to hearings, with those that do go being there for more serious or persistent reasons than at present. It is also proposed to streamline the establishment of grounds for referral where the child is not able to understand the grounds but the parents accept them. This should reduce the number of cases going to the Sheriff to establish grounds for referral (and therefore also reduce costs to the Fund).
33. The responses to the consultation were published in October 2007, with general support for the principles and intentions of the draft bill<sup>1</sup>.
34. The Board has commented more than once as the consultation has progressed. Comments included the necessity to clarify how various proposals would operate and how they would be funded, and notes of where legislative and regulatory change would be required.
35. Issues related to children's legal proceedings are also touched upon in the current consultation on the Scottish civil courts.
36. The Scottish Government recently tendered for expressions of interest in a 'review of the children's legal representation grant scheme'. Tendering for expressions of interest closed on 19<sup>th</sup> October 2007, with research expected to be contracted by March 2008<sup>2</sup>.
37. Most recently (18<sup>th</sup> January 2008) the Scottish Government has announced the planned establishment of a single national body that will bring together the various bodies involved in supporting, organising and delivering the Children's Hearings system. This will allow co-ordination at a national level, whilst service delivery will still be provided locally, with local links and use of Panel Members to be preserved. The next steps on this project will be to develop detailed proposals on which to consult more widely, followed by a programme of implementation, including any necessary legislative change

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<sup>1</sup> 'Report on the consultation process – the draft children's services (Scotland) bill'. October 2007, the Scottish Government.

<sup>2</sup> 'Expression of interest: review of children's legal representation grant scheme', no longer on website. Updates at <http://www.scotland.gov.uk/Topics/Research/Research/14478/713#a5>.

**Appendix A: Section 52 of the Children (Scotland) Act 1995: grounds for bringing a child or young person before a hearing.**

Children requiring compulsory measures of supervision

(1) The question of whether compulsory measures of supervision are necessary in respect of a child arises if at least one of the conditions mentioned in subsection (2) below is satisfied with respect to him.

(2) The conditions referred to in subsection (1) above are that the child—

(a) is beyond the control of any relevant person;

(b) is falling into bad associations or is exposed to moral danger;

(c) is likely—

(i) to suffer unnecessarily; or

(ii) be impaired seriously in his health or development,

due to a lack of parental care;

(d) is a child in respect of whom any of the offences mentioned in Schedule 1 to the [1975 c. 21.] Criminal Procedure (Scotland) Act 1975 (offences against children to which special provisions apply) has been committed;

(e) is, or is likely to become, a member of the same household as a child in respect of whom any of the offences referred to in paragraph (d) above has been committed;

(f) is, or is likely to become, a member of the same household as a person who has committed any of the offences referred in paragraph (d) above;

(g) is, or is likely to become, a member of the same household as a person in respect of whom an offence under sections 2A to 2C of the [1976 c. 67.] Sexual Offences (Scotland) Act 1976 (incest and intercourse with a child by step-parent or person in position of trust) has been committed by a member of that household;

(h) has failed to attend school regularly without reasonable excuse;

(i) has committed an offence;

(j) has misused alcohol or any drug, whether or not a controlled drug within the meaning of the [1971 c. 38.] Misuse of Drugs Act 1971;

(k) has misused a volatile substance by deliberately inhaling its vapour, other than for medicinal purposes;

(l) is being provided with accommodation by a local authority under section 25, or is the subject of a parental responsibilities order obtained under section 86, of this Act and, in either case, his behaviour is such that special measures are necessary for his adequate supervision in his interest or the interest of others.

(3) In this Part of this Act, “supervision” in relation to compulsory measures of supervision may include measures taken for the protection, guidance, treatment or control of the child.

## **Appendix B: Eligibility for children’s and civil legal aid.**

The grounds for eligibility for children’s legal aid are described in Section 29 (5) of the Legal Aid (Scotland) Act 1986:

“5) Legal aid shall be available under subsection (2)(d) above on an application made to the Board if it is satisfied -

- (a) after consideration of the financial circumstances of the child and any relevant person in relation to him that the expenses of the appeal cannot be met without undue hardship to the child or to any relevant person in relation to him or the dependants of any of them; and
- (b) that the child, or as the case may be the relevant person, has substantial grounds for making or responding to the appeal and it is reasonable, in the particular circumstances of the case, that legal aid should be made available accordingly.”

The merits grounds for eligibility for civil legal aid are described in Section 14 (1) of the Legal Aid (Scotland) Act 1986:

“14.(1) Subject to section 15 of this Act<sup>1</sup> and to subsection (2) below, civil legal aid shall be available to a person if, on an application made to the Board

- (a) the Board is satisfied that he has a probabilis causa litigandi; and
- (b) it appears to the Board that it is reasonable in the particular circumstances of the case that he should receive legal aid.”

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<sup>1</sup> Financial conditions.