

# **CIVIL LEGAL AID MERITS GUIDELINES**



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## **INTRODUCTION**

These guidelines have been issued primarily for the use of Board staff considering applications for civil legal aid.

They cover a range of topics and types of application. They are designed to give a basic background to the factors that will be considered in considering probable cause and reasonableness, and the evidential requirements for applications.

The guidelines are designed as a loose leaf publication that can be updated as appropriate.

- Each individual guideline is dated and indexed in the bottom right hand corner.
- The contents page at the beginning of the document shows the date of issue.
- As new guidelines are issued, new contents pages will also be issued, so that you can ensure that you are using the most up-to-date version.

The guidelines are also being issued to solicitors to show what information the Board needs to see in civil legal aid applications, and how it reaches its decisions.



## **SECTION A**

# **INFORMATION REQUIRED TO ESTABLISH PROBABLE CAUSE AND REASONABLENESS IN ALL APPLICATIONS**

## **PROBABLE CAUSE AND REASONABLENESS**

It is the Board's responsibility to assess whether the applicant has probable cause and whether it is reasonable to make legal aid available. Each case is considered on its own merits taking into account all of the relevant factors involved. The Board will not prejudge issues that are really matters for the court to decide.

All applications must meet the tests for probable cause and reasonableness set out in this guideline and in CIVIL/GUIDE/A/2.

### **Probable cause**

To establish probable cause

- the applicant must show that there is a sound legal basis for the proposed action
- we will expect to be given information to establish jurisdiction and right, title and interest to raise proceedings.

Details of the evidential requirements for different types of case are set out in the remainder of this guidance.

### **Reasonableness**

See CIVIL/GUIDE/A/2

## **REASONABLENESS**

Section 14(1)(b) of the Legal Aid (Scotland) Act 1986 (“the Act”) requires us to be satisfied that it is reasonable in the particular circumstances of the case that the applicant should receive civil legal aid. The reasonableness test provides us with a very wide discretion. It is impossible to give an exhaustive list of circumstances in which questions of reasonableness may apply. However, it is possible to identify a number of categories where it would be unreasonable to grant legal aid, which are discussed in more detail below.

The following general issues of reasonableness have been identified.

**(a) The nature of the proceedings appears unreasonable**

Something about the case itself may be objectively unreasonable.

**(b) Application is premature**

It would generally be considered unreasonable to make legal aid available where no or insufficient attempt has been made to resolve a dispute before litigation. We would expect to see evidence that negotiations have been attempted and failed, and that the position being adopted by the applicant in relation to those negotiations is a reasonable one.

**(c) The proceedings are frivolous or vexatious**

Cases of this nature should certainly not be encouraged at public expense. Privately paying clients would not be reasonably advised to prosecute such actions.

**(d) The issues involved do not appear to be in dispute and the proposed action is unnecessary**

It would not be reasonable to expend public funds litigating a matter where there is no active dispute between the parties.

**(e) The order sought is not necessary**

The order might be unnecessary if, for example, the existing situation between the parties was unlikely to change and a court order was not needed to prevent it changing.

**(f) A reasonable offer has been made in settlement**

It is for us to reach our own view on the reasonableness of an offer or tender. We might wish to consider factors such as:

- the likelihood of a finding of contributory negligence
- the likely cost of the proceedings
- the prospects of recovery
- the likelihood of additional sums being clawed back under section 17(2B) of the Act (particularly in consistorial cases) and

- whether the offer appears reasonable having regard to the sum which is likely to be awarded by the court.

**(g) The order sought will not cause significant disadvantage or prejudice**

This is most likely to arise in defender applications, particularly for interdict. It could also arise where the applicant is a pursuer wishing to oppose a counterclaim. If the applicant is not going to be disadvantaged by an order, it would be unreasonable to use public funds to resist the order.

**(h) The matter could be resolved in other existing proceedings**

It would be unreasonable to make legal aid available for separate proceedings when a claim or dispute could be resolved within an existing action, either as it stands or by way of an additional crave/conclusion/defence/claim in the defence being amended into the existing pleadings. It may be more appropriate for an applicant to seek an extension to an existing grant of civil legal aid.

**(i) Undue delay in seeking a remedy**

Where an applicant has failed to avail himself of a remedy at the appropriate time, it may be unreasonable to make legal aid available at, perhaps, some considerably later date. This could arise, for example, where:

- an interdict is sought many months or years after the incident complained of
- the applicant seeks to petition for judicial review in respect of a decision taken considerably earlier
- the original decision has been supplanted by a later decision
- legal aid has already been made available to obtain the same remedy at some earlier stage.

**(j) Applicant is not in a position to utilise the remedy sought**

If the applicant cannot utilise the remedy sought, the cost of proceedings at public expense seems somewhat pointless. For example, a spouse may demand an order transferring title in the matrimonial home, but not be in a position to meet mortgage payments, or the lender may refuse consent to the transfer from joint names on the mortgage. Whilst the remedy sought might be valid, the applicant could not utilise it.

**(k) Where the state of the evidence may make it unreasonable to make legal aid available**

The Civil Evidence (Scotland) Act 1988 means that, legally, someone may be able to rely in court upon uncorroborated evidence and hearsay evidence. However, the courts would normally expect a solicitor to lead corroborative evidence and non-hearsay evidence if it is available.

We expect supporting evidence, if available, to be produced with the civil legal aid application, unless it could not be obtained without unreasonable difficulty or delay (for example, if witnesses are failing to respond to requests to give statements, or are living abroad or in inaccessible localities). If it is not produced, an explanation must be provided at Appendix A on form CIV/SOL. Applications that do not include this information may be refused as unreasonable. A statement by the solicitor that the Act makes it competent for

the court to deal with a case on the basis of hearsay evidence or without corroboration is not adequate.

If, however, an applicant will have to lead technical evidence in order to satisfy the court, this must be produced with the application to establish probable cause, and we may refuse the application if it is not produced. Similarly, a copy of any document that is material to an application, such as a contract or a title deed, must also be produced.

Where an applicant is asking the court to rely on hearsay evidence, we will have to be satisfied that the court would be likely to accept it as evidence. (To take a perhaps extreme example, a witness stating that the pursuer had told her last week that he had been separated from his spouse for five years would not establish five years' non-cohabitation.)

### **(l) Applications by corporate or unincorporated bodies**

Civil legal aid is not available to corporate or unincorporated bodies. Legal aid is not available to partnerships or to the individual partners of a firm to pursue or defend actions brought by or against the partnership. The effect of giving legal aid to a partner would be to give legal aid to the partnership itself.

However, legal aid may be available to an individual partner of a firm if he or she can indicate an interest distinct from that of the partnership (for example, upon dissolution). Where a partnership has been dissolved, we should be satisfied that the dissolution was not a device by the partners to obtain civil legal aid.

Sole traders are not corporate or unincorporated bodies, and may therefore apply for civil legal aid. There is no prohibition on sole traders seeking legal aid to pursue or defend proceedings relating to 'business matters' (for example, sums not paid under a contract).

### **(m) Applications by persons with joint interest**

In terms of regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002, we can only grant legal aid to a person who is jointly concerned with, or has the same interest in the matter as, other people if we are satisfied that

- the applicant would be seriously prejudiced in his/her own right if legal aid were not granted or
- it would not be reasonable and proper for the other people concerned to pay the expenses that would be paid under legal aid if it was granted.

An example of 'serious prejudice' would be

- an owner of a flat in a tenement faced with litigation over a bill for common repairs.

Examples of cases where an applicant will not suffer 'serious prejudice' include

- closure of a school, community centre, swimming pool, or other cultural or leisure institution.

Where a number of people each have a claim for damages, say, arising out of a common calamity and each individual has his or her own distinct claim, this would not be a joint interest situation. Whilst the parties have similar interests, they are not the same.

### **(n) Shadow applications**

Applications may be received in the name of a child or impecunious relative in cases where other family members, who would not qualify for civil legal aid, have a direct and identical

interest in the matter. Indeed, the other family members may be the true client in the case, providing the solicitor with instructions. It would be unreasonable to make civil legal aid available to them, in effect, through the device of granting it to an impecunious relative, thereby allowing them to avoid paying towards the litigation.

**(o) Other rights and facilities**

In terms of regulation 16 of the Civil Legal Aid (Scotland) Regulations 2002, we cannot grant legal aid to someone who has other rights and facilities that make it unnecessary for him/her to obtain legal aid, or a reasonable expectation of obtaining financial or other help from a body of which he or she is a member. We may, however, grant legal aid if the applicant has not succeeded in enforcing or obtaining such rights, facilities or help after having taken, in our opinion, all reasonable steps to enforce or obtain them (short of taking proceedings by way of declarator).

Other rights or facilities may include rights to indemnity under an insurance policy (legal expenses insurance, home insurance, motor insurance) or membership of a professional association or trade union.

- If an applicant is a member of a trade union or professional body that provides legal assistance to its members, the applicant must explain why he or she is not using its services.
- If the union is refusing to assist, the reason must be ascertained. It may have a bearing on probable cause and/or reasonableness.
- If the applicant has not applied to his/her union or has decided to stop taking their advice, the reason should be ascertained. The applicant might be able to satisfy us that he or she has good reasons to be dissatisfied with the past or present performance of the union-nominated solicitors. However, remember that trade unions nominate specialist firms to deal with personal injury claims.
- It would not be reasonable to make legal aid available because the applicant prefers to instruct his or her own solicitor, rather than a union-nominated solicitor.

**(p) Matters de minimis**

It would be unreasonable to grant legal aid where the amount at stake does not justify the cost of proceedings. This is obviously a variable factor that depends on the circumstances of the individual case, including the strength or otherwise of the merits of the case. You should take into account, in assessing the value of a claim, any deduction likely to be made in respect of contributory negligence.

**(q) Applicant convicted of a criminal offence arising from subject matter of application**

If civil litigation arises as a consequence of a criminal offence of which an applicant has been convicted, it would be unreasonable to grant legal aid to oppose the merits of the action.

However, it would not necessarily be unreasonable to oppose the claim on quantum, depending on the whole circumstances of the case. You may also need to consider the prospects of success, where substantial questions may arise bearing upon the reliability and credibility of evidence led at proof.

**(r) Insufficient interest**

Every applicant must show that he or she has a right, title and interest to be a party to the proceedings. Even where such an interest is demonstrated, the amount of interest the applicant has may not justify the expenditure of public funds. As a general proposition, litigation that would have little or no material benefit to the applicant or is brought simply to satisfy vague demands for justice or principle should not be encouraged.

**(s) Cost benefit analysis**

Where the potential benefit to the applicant is equalled or exceeded by the likely cost of prosecuting the action, the application may fail the cost benefit test. Thus, if the likely benefit to the applicant is £10,000, and the cost of the action is likely to be £12,000, there may be no cost benefit.

Our approach to cost benefit was upheld by the court in the case of *McTear -v- Scottish Legal Aid Board 1997 SLT 108*. Whilst cost alone cannot justify a refusal on reasonableness, the court was satisfied that it could be a very important factor. In balancing up the cost of the litigation, the possible benefit to the applicant, and the prospects of success, Lord Kirkwood saw no reason in principle why, if the case would be likely to involve heavy expenditure of public funds, the cost of the litigation could not effectively be the deciding factor in favour of refusal. The cost benefit analysis applies to any value of financial claim. If the applicant fails to fully recover judicial expenses, property recovered or preserved by the applicant may be subject to clawback, potentially leading to little or no material benefit to the applicant.

**(t) Prospects of success**

*McTear* re-affirmed that it is perfectly appropriate for us to assess the prospects of success when considering the reasonableness of granting legal aid.

It is for us to assess prospects of success having regard to all the information before us including, where appropriate,

- the solicitor's own opinion as to the prospects of success
- comments by the solicitor and counsel.

Experience shows that assertions of good prospects of success may be over-optimistic.

In looking at the prospects of success, factors to be considered include, for example

- volenti and contributory negligence
- evidential difficulties arising from the fading memories of witnesses
- unsuccessful litigation of a similar nature in Scotland or elsewhere in the UK
- evidential discrepancies
- unsupportive opinions of the applicant's own legal advisers.

There may be some classes of case where less emphasis would be placed on the prospects of success, but a greater emphasis placed on other factors. We are not looking for a guaranteed successful outcome, but rather – all things being equal – a reasonable prospect of success.

**(u) Private client reality**

Legal aid does not exist to place assisted persons in any better position than privately paying clients. We consider whether a privately paying client would reasonably be advised to litigate in the same circumstances.

In *Venter -v- Scottish Legal Aid Board 1993 SLT 147*, the Inner House agreed that we were perfectly entitled to take into account what a private client would do on being told that part of his or her case was likely to involve unusually large expenditure.

**(v) Claim likely to be within the small claims limit**

Do not take statements in an application about the value of a claim at face value. We have to assess whether, in our view, the claim lies above the small claims limit. Civil legal aid is not available for small claims actions. If the claim really lies below £750, it should be raised as a small claim. Take care to note contemporary levels of damages awarded and check the current edition of the Judicial Studies Board Guidelines for personal injuries cases (in particular, for psychiatric injury).

**(w) The prospects of recovery do not justify the use of public funds**

Where there are insufficient prospects of recovering both the principal sum and expenses, it would be unreasonable to waste public money obtaining an unenforceable decree. The solicitor's comments on the CIV/SOL form as to the prospects of recovery should be noted, but we must reach our own view, having regard to all the circumstances. Experience indicates that forms invariably suggest there are good prospects of recovery. We should consider whether the opponent

- is insured
- has substantial capital assets or income to satisfy a decree
- has been sequestrated or is in liquidation
- is not indemnified by the insurer for the particular risk or claim
- is furth of Scotland with no employer or capital in Scotland
- has unreachable assets (for example, individual placing property behind the corporate veil) or
- is receiving civil legal aid.

**(x) Proceedings in a court outwith Scotland are more appropriate**

There may be cases where both the Scottish and foreign courts have jurisdiction. Factors that might be relevant in assessing which country is more appropriate include, for example,

- place of accident
- place of business/residence of opponent
- location of witnesses
- whether there are existing related proceedings in the other jurisdiction
- existence of a statutory remedy in Scotland although incident occurred abroad (for example, under domestic legislation implementing an EU Directive).

## **SECTION B**

### **DIVORCE AND FAMILY MATTERS**

## **COURT OF SESSION CONSISTORIAL CASES**

### **Reasonableness**

Only occasionally will it be reasonable to grant civil legal aid for consistorial proceedings in the Court of Session. These cases can generally be dealt with in the sheriff court. The fact that a case includes a large financial claim does not necessarily mean that it has sufficient complexity for the Court of Session. Given the volume of case law that has developed under the Family Law (Scotland) Act 1985, cases justifying Court of Session proceedings should be rare. Factors that may be taken into account will include

- whether the Court of Session will necessarily be more expensive than litigation in the sheriff court.
- whether the Court of Session is a more reasonable venue because of factors such as the effect of local publicity on the parties, local court policy or jurisdictional issues.

## **CROSS ACTIONS OF DIVORCE, RESIDENCE, ETC**

### **Reasonableness**

Where the parties to a marriage agree that the marriage has irretrievably broken down, but are only disputing the cause, defences on the merits and/or cross actions should not be encouraged. You should not grant legal aid for a cross action of divorce where the applicant is not defending the other party's action on the merits. There may be cases where a cross action might be considered reasonable, if the outcome of ancillary matters is affected.

## **DIVORCE ACTIONS – APPLICATIONS TO PURSUE**

***This section applies to all divorce actions where the applicant is the pursuer.***

### **Evidential requirements**

Section 8(3) of the Civil Evidence (Scotland) Act 1998 requires that evidence establishing the grounds of an action of divorce must consist of or include evidence other than that of a party to the marriage. This is subject to the terms of section 8(4), which lists circumstances where these rules of evidence do not apply.

We would always expect to see a statement of the applicant that speaks to the breakdown of the marriage, as well as appropriate evidence from a person or persons who are not a party to the marriage. If no such supporting evidence is available, a full explanation should be given.

## **DIVORCE ACTIONS – APPLICATIONS TO DEFEND**

***This section applies to all divorce actions where the applicant is the defender.***

### **The Board's approach to probable cause and reasonableness**

A bare denial of the pursuer's averments is rarely satisfactory. If the pursuer's averments are specific, the applicant should be able to answer them in detail.

A partial denial, even if well supported, is not sufficient to establish probable cause for a defence on the merits if the applicant admits, or at least fails to deny, averments that would still give grounds for divorce.

- If an applicant admits that the marriage has broken down irretrievably, it may be unreasonable to finance a defence on the merits merely to give the applicant an opportunity of refuting certain allegations he or she finds objectionable.
- If the conduct is admitted, it may similarly be unreasonable to give legal aid for the applicant to argue that the conduct did not contribute to the breakdown of the marriage or that the marriage has not broken down.

### **Evidential requirements**

We require

- a statement from the applicant refuting the factual averments made within the pleadings
- a witness statement that provides some measure of support for the applicant's version of the marriage, if available. If no such supporting evidence is available, then the solicitor should give full reasons why not.

**DIVORCE – FAULT-BASED ACTIONS WHERE THERE ARE NO ANCILLARY CRAVES  
– PURSUER**

See also CIVIL/GUIDE/B/3.

**The Board’s approach to reasonableness and probable cause**

Our approach is that it must be shown that

- an immediate divorce would bring some direct benefit to the applicant
- it is reasonable to make legal aid available immediately rather than waiting for the appropriate period of separation to elapse.

Examples of situations where there may be a benefit to an applicant from obtaining a divorce on a fault-based ground, notwithstanding the absence of ancillary craves, might include the following:

- Where all ancillary contentious matters have been settled by agreement and both parties wish to proceed with a divorce to completely resolve matters as soon as possible.
- Where the applicant wishes to remarry following the divorce and there may be a benefit for the applicant in obtaining a divorce without any further period of separation.
- Where the applicant is suffering from harassment or emotional pressure from the estranged spouse, particularly where the estranged spouse refuses to accept that the marriage is over. The harassment does not need to be grave enough to justify interdict proceedings. If divorce would result in ending the pressure from the other party, it may be appropriate to make legal aid available immediately.
- If the applicant has some good reason to believe that the opponent will not consent to divorce even after two years’ separation, this may justify a divorce on a fault-based ground at an earlier stage. We do not expect individuals in such situations to wait for five years’ separation before seeking a divorce.

These are examples only and are not in any way exhaustive of the circumstances where it would be appropriate to make legal aid available. We will consider any reason put forward by an applicant who wishes to proceed with an immediate divorce.

## **DIVORCE – TWO YEARS' SEPARATION – APPLICATIONS TO PURSUE**

See also CIVIL/GUIDE/B/3.

### **The Board's approach to probable cause and reasonableness**

It should be made clear in the application that the applicant is not able to raise an action of divorce under the simplified procedure.

### **Evidential requirements**

- (a) A statement from the applicant showing that the marriage has broken down irretrievably by reason of non-cohabitation for two years or more. Non-cohabitation is held to mean that the parties are not living together as man and wife. They may be leading separate lives under the one roof. If this is the case, evidence of this should be provided in the application.
- (b) Evidence of consent to the divorce from the opponent in the form of a letter or other document.
- (c) A statement from a person who is not a party to the marriage confirming that the marriage has broken down irretrievably and providing details of the date and duration of the separation.

**DIVORCE – TWO YEARS' SEPARATION – APPLICATIONS TO DEFEND**

Since it is incompetent for the court to pronounce decree of divorce where the defender withdraws his/her consent, we will not consider any such applications.

## **DIVORCE – FIVE YEARS' SEPARATION – APPLICATIONS TO PURSUE**

See also CIVIL/GUIDE/B/3.

### **The Board's approach to probable cause and reasonableness**

It should be made clear in the application that the applicant is not able to raise an action of divorce under the simplified procedure.

### **Evidential requirements**

- (a) A statement by the applicant showing that there has been no cohabitation for five years or more. Non cohabitation is held to mean that the parties are not living together as man and wife. They may be leading separate lives under the one roof. If this is the case, evidence of this should be provided in the application,
- (b) A statement from a person other than a party to the marriage that provides evidence of the date and duration of the separation.

**DIVORCE – FIVE YEARS' SEPARATION – APPLICATIONS TO DEFEND**

See also CIVIL/GUIDE/B/4.

**Evidential requirements**

A defence can be taken on two grounds:

- (a) The parties have not been separated for a period of five years. A supporting statement confirming the actual date and duration of separation should be provided.
- (b) Where the statutory defence of “grave financial hardship” applies, the applicant should provide details of the financial hardship together with a supporting witness statement, where available, which confirms this.

## **DIVORCE – UNREASONABLE BEHAVIOUR – APPLICATIONS TO PURSUE**

See also CIVIL/GUIDE/B/3.

### **The Board’s approach to probable cause and reasonableness**

Irretrievable breakdown is established if, since the marriage, the defender has at any time behaved in such a way that the pursuer cannot reasonably be expected to cohabit with him or her. The behaviour may be active or passive.

If no ancillary craves are being sought by the applicant, the applicant will need to demonstrate that there is a direct benefit from an immediate action of divorce proceeding as opposed to waiting for the relevant period of separation to elapse. This issue of reasonableness is covered in full in CIVIL/GUIDE/B/5.

### **Evidential requirements**

- (a) A statement from the applicant showing that the marriage has broken down as a direct result of the opponent’s behaviour, and that the opponent has acted in such a way that no reasonable person should be expected to continue to live with them.
- (b) Evidence of unreasonable behaviour from a person other than a party to the marriage.
  - A statement of a witness that speaks to the behaviour complained of directly.
  - A statement of a witness that lends colour to a detailed statement of the applicant may be acceptable, even if it does not corroborate the “worst” part of the behaviour complained of.
- (c) In cases involving domestic violence, a statement from someone who can speak to the applicant’s allegations of violence or can speak to seeing bruising on the applicant or other evidence of violence, is acceptable.
- (d) A medical report is optional, but may be essential if there is no other evidence available. To be of evidential value, it should speak to some treatment required by the applicant, for either physical or mental health, attributed to the behaviour of the opponent.

**DIVORCE – UNREASONABLE BEHAVIOUR – APPLICATIONS TO DEFEND**

**The Board's approach to probable cause and reasonableness**

See also CIVIL/GUIDE/B/4.

**Evidential requirements**

A statement from the applicant dealing in detail with the pursuer's specific averments of behaviour, together with a supporting statement, if available, should be provided.

## **DIVORCE – ADULTERY – APPLICATIONS TO PURSUE**

### **The Board's approach to probable cause and reasonableness**

See also CIVIL/GUIDE/B/3.

### **Evidential requirements**

A statement from the applicant showing that the marriage has broken down irretrievably because of adultery.

Evidence of adultery, from someone not a party to the marriage, must also be provided. Examples of such evidence are:

- (a) A report by an enquiry agent on observations maintained indicating familiarities, association, cohabitation, overnight visiting, etc. (A single enquiry agent's evidence will normally be sufficient for the court. Where more than one is employed, any additional costs will have to be justified at the accounts stage. Depending on the circumstances, the solicitor may need prior Board authority for work likely to involve unusually large expenditure.)
- (b) Evidence of witnesses speaking to affectionate familiarity between the defender and paramour, association between them and opportunity to commit adultery.
- (c) Evidence of children of the parties on contact visits, if the children seem to be aware of what is going on or can give a clear factual account of the defender's domestic situation.
- (d) The wife having a child by another man. Because the husband is presumed to be the father of any child conceived by his wife during the marriage, this would have to be associated with evidence that the husband was not or could not be the father.
- (e) Another woman having a child by the husband. A birth certificate of the child in question showing the defender's name as father, if the birth is spoken to by someone knowing the circumstances or the certificate is signed by the father.
- (f) Admissions (in the form of statements or letters) by both the opponent and the paramour.

**DIVORCE – ADULTERY – APPLICATIONS TO DEFEND**

**The Board's approach to probable cause and reasonableness**

See also CIVIL/GUIDE/B/4.

**Evidential requirements**

A statement from the applicant answering the averments contained in the writ and a supporting statement, if available, from a witness should be provided. If no supporting evidence is available then a full and detailed explanation should be given for this. If the adultery is alleged to have taken place with a named individual, a statement from that person which supports the applicant's denials should be produced.

## **DIVORCE – DESERTION – APPLICATIONS TO PURSUE**

### **The Board's approach to probable cause and reasonableness**

See also CIVIL/GUIDE/B/3.

### **Evidential requirements**

- (a) A statement from the applicant, together with evidence from someone other than a party to the marriage, should be provided, confirming that the opponent wilfully deserted the applicant without reasonable cause.
- (b) The date and duration of the separation should be provided, showing that for a continuous period of two years or more immediately following the desertion there was no cohabitation between the parties. Whilst there is no requirement to show that the deserted spouse was willing to adhere throughout the period of desertion, it should be demonstrated that he or she was willing to adhere at the date of desertion and has not refused a genuine and reasonable offer to adhere.

## **DIVORCE – DESERTION – APPLICATIONS TO DEFEND**

### **The Board's approach to probable cause and reasonableness**

See also CIVIL/GUIDE/B/4.

### **Evidential requirements**

Defence of such actions can be on several grounds, as follows:

- (a) denial of the length and duration of the separation;
- (b) denial that the pursuer was willing to adhere at the date of desertion – this may be demonstrated by the pursuer's conduct at the time of the desertion;
- (c) denial that the separation amounts to desertion, in that it was involuntary;
- (d) the defender had reasonable cause for leaving.

The applicant's statement must speak to one or more of these and should be accompanied by a supporting statement, if available, or an explanation why there is no supporting evidence.

## **ORDERS FOR FINANCIAL PROVISION**

### **The Board's approach to probable cause and reasonableness**

Before a grant of civil legal aid can be made, we need to be satisfied that matrimonial property exists to satisfy the orders for financial provision sought. All such applications should therefore include:

- information on the orders being sought
- any details the applicant knows about the matrimonial property and debts
- any vouching that may be available in respect of the matrimonial property and debts or such other readily available supporting documentation to show the existence/value of the matrimonial property and debts.

Where no such information is available, the applicant's statement should contain an explanation for this.

### **Evidential requirements**

This section gives information about the general evidential requirements for applications in relation to orders for financial provision. You should also refer to the individual guidelines covering specific orders. Applications should include:

- A copy of any schedule of matrimonial assets and debts which has been prepared.
- Sufficient information to show that the claim for financial provision is being made in relation to an action of divorce or an action of declarator of nullity of marriage.
- Any vouching that is available. The applicant does not have to produce property valuations, mortgage statements, bank account statements and pension plan valuations in respect of every item of matrimonial property or every matrimonial debt. However, where the item is in the joint names of the parties or the sole name of the applicant
  - this information should be available to an applicant and produced with the application
  - if there is insufficient time to obtain vouching or information is not available because the applicant cannot readily access documents, for example where he or she has had to leave the matrimonial home, an explanation should be provided.
- Details of the relevant date (the date on which the parties ceased to cohabit together as man and wife).
- Where orders are to be opposed, a copy of the writ showing the orders sought by the opponent.
- Details of the nature and value of the matrimonial property at the relevant date together with details of the relevant debt.
- An explanation to show that the order being sought is reasonable having regard to the relevant resources of each party.

**(a) Capital sum order**

An order for payment of a capital sum will relate to a specified sum of money that can be paid either by instalments or in a lump sum. Additional information that should be provided in support of such a claim includes:

- Where the applicant seeks to vary the date or method of payment of a capital sum order, a copy of the order to be varied. The applicant should identify the change of circumstances justifying the variation.
- Details of the property from which the order will be satisfied.

**(b) Transfer of property order**

Additional information that should be provided in support of an application for a transfer of property order includes:

- In situations where the consent of a third party to the transfer is needed, details of that consent or the likelihood of obtaining it.
- Details of the property in respect of which the order is sought.
- Supporting information showing that there is property in respect of which an order can be sought.

**(c) Periodical allowance order**

Additional information that should be provided in support of a periodical allowance order includes:

- Information showing that the order is justified by one of the principles set out in the Family Law (Scotland) Act 1985.
- Details of the applicant's financial position together with details of the financial position of the opponent, so far as is known.
- Where an applicant is seeking to have an existing periodical allowance order varied, recalled or converted,
  - a copy of the order,
  - an explanation of the material change of circumstances
  - full details of the applicant's financial situation and, so far as it is known, the opponent's financial situation.
- Supporting information from a third party concerning the opponent's financial position if available.

**(d) Earmarking order**

Additional information that should be provided in support of any request for an earmarking order includes:

- Details of the capital sum in respect of which legal aid is being sought or a statement that the applicant is already receiving legal aid to pursue a capital sum order.

- Details of the rights or interests that the opponent has, or may have, in benefits in the pension.
- A statement that those benefits include a lump sum payable to the opponent on retirement or on his death.
- Supporting information, if available, showing the existence of the opponent's pension interests.

**(e) *Incidental order in terms of section 14(2) of the Family Law (Scotland) Act 1985***

An incidental order is defined as being one or more of those orders set out in sub-sections a-k of section 14(2) of the 1985 Act. These include orders:

- for sale of the matrimonial home;
- for the valuation of property;
- determining any dispute between the parties to the marriage as to their respective property rights by means of a declarator; and
- to give effect to the principles set out in section 9 of the 1985 Act or any order being made for financial provision.

Additional information that needs to be produced in support of such an order includes:

- information about the nature of the incidental order being sought
- information showing that there is a requirement for such an incidental order
- information to show that the incidental order is reasonable having regard to the relative resources of the parties
- Any other appropriate supporting information that is available.

## **PENSION SHARING ORDERS**

Part IV of the Welfare Reform and Pensions Act 1999 introduced the concept of pension sharing into financial provision on divorce. The provisions, which apply to divorce actions commenced on or after 1 December 2000, can result in a pension scheme member's spouse having their own independent pension rights created.

### **The Board's approach to probable cause and reasonableness**

- i) As a request for a pension sharing order is made by way of a separate crave in the pleadings, the applicant must submit a request for legal aid to pursue or defend such an order.
- ii) The applicant's statement and the intimation document should refer to a pension sharing order.
- iii) The applicant should explain why a pension sharing order is required and produce vouching of the value of the pension, where available.
- iv) If no vouching is available, enough information about the potential value of the rights that can be apportioned to the period of the marriage should be provided, to satisfy us that the sums involved are substantial enough to justify seeking a pension sharing order.
- v) Where the value of a pension is low, for example, £5,000 or less, it is unlikely that it would be reasonable to grant legal aid to pursue an order because the overall costs involved would be disproportionate to any benefit to be gained.

If the decision to seek a pension sharing order is taken after legal aid has already been made available for other matrimonial matters, a formal request to amend the legal aid certificate should be submitted.

### ***The employment of expert witnesses***

- i) For a solicitor, the first stage of advising on pension sharing is to gather information about the value of all the matrimonial assets, including any pensions. The guidance in relation to the requirements of the financial services legislation that was given to the Judicial Procedure Committee of the Law Society is clear that the first stage is not of itself investment business and can be undertaken by a solicitor.
- ii) The second stage involves giving advice to a client to determine whether the pension should be shared, an earmarking order sought or the value of the pension offset against other matrimonial property. Unless the nominated solicitor is licensed to carry on incidental investment business or has FSA authorisation, his or her role is restricted to commenting on advice from independent financial advisers on how best to deal with matrimonial investment assets. Our approval should be obtained before instructing an independent financial adviser to provide advice at this stage.

If legal aid has been made available in connection with financial craves, it would not be necessary to extend the certificate before submitting a request for sanction for this expert report.

- iii) The third stage of advice only applies if the client has decided on pension sharing. Advice on how to implement pension sharing and, in particular, whether to leave the relevant share in the existing pension scheme or to take it out to put into a separate scheme, is specialist advice requiring input from an expert. Our approval should be obtained before instructing an independent financial adviser to provide advice at this stage.

Sanction can only be granted for a report advising on implementation if legal aid has been granted for a pension sharing order.

***Implementation of a pension sharing order***

If neither party is able or willing to meet the costs of the pension fund administrators for setting up and implementing a pension sharing order, the costs can be deducted from the fund itself. In the light of that, we will only meet the administrators' costs in exceptional circumstances, that is, where an entire settlement would collapse because neither party is able to meet the costs.

## **ADOPTION ORDERS/FREEING FOR ADOPTION ORDERS**

When considering applications for legal aid for adoption orders, or to oppose adoption orders or freeing for adoption orders, the child's welfare is the paramount consideration.

Information that should be provided in support of an application includes:

- the applicant's statement addressing –
  - the arrangements made for the child's care and wellbeing
  - short term as well as long term benefits for the child
  - the child's wishes and whether it is appropriate to take them into account
  - the child's racial origin and the child's cultural, linguistic and religious background, if appropriate.
- supporting information if available and, if not, an explanation for this
- copies of any reports that may have been obtained including any medical or social work reports.

If the application is to obtain an adoption order and the natural parent's consent is to be dispensed with, information should be provided to show that grounds for dispensation exist, for example, that consent has been unreasonably withheld.

Applications for legal aid to oppose either an adoption order or a freeing order for adoption will usually be granted because of the importance of the matter to both the child and the natural parents. These orders change a child's status for the whole of his or her life.

In cases of adoption by a step-parent where there has been re-marriage, the court no longer requires joint applications by husband and wife, only applications from the step-parent. If, however, both parents are adoptive parents then applications from both parties are still required. Separate applications for each child to be adopted are needed.

If the person to be adopted is of or over the age of 12 years, his or her consent to the order is necessary and direct evidence of this should be included in the legal aid application.

## **ORDERS RELATING TO PARENTAL RESPONSIBILITIES AND PARENTAL RIGHTS**

### **Background**

A child's mother automatically has parental responsibilities and parental rights in relation to the child. The child's father has these responsibilities and rights only if he was married to the child's mother when, or after, the child was conceived. If he was not, he has no parental responsibilities or parental rights until

- he acquires them under a parental responsibilities and parental rights agreement made with the mother, or
- they are conferred upon him by order of the court.

Section 11 of the Children (Scotland) Act 1995 permits the Court of Session and the sheriff court to make orders in relation to parental responsibilities and parental rights.

The court may make

- an order depriving a person of some or all of his or her parental responsibilities or parental rights in relation to a child
- an order imposing parental responsibilities and giving parental rights to any person.
- a residence order regulating the arrangements as to with whom, and during what periods, a child under the age of 16 years is to live
- a contact order regulating the arrangements for maintaining personal relations and direct contact between a child under 16 and a person with whom the child is not, or will not be, living
- a specific issue order, regulating any specific question that has arisen, or may arise, concerning parental responsibilities or parental rights.

The 1995 Act gives guidance to the court in considering whether to make a section 11 order. It must have regard to the three principles set out in section 11 (7): the welfare principle, the no-order presumption and the views of the child.

### **The Board's approach to probable cause and reasonableness**

The guidance here applies equally if the applicant is proposing to seek an order by way of a counterclaim.

All legal aid applications for orders relating to parental responsibilities and rights must address the principles, referred to above, which the court will have regard to when considering whether or not to make a section 11 order

- to meet the reasonableness test, address the extent to which there have been negotiations to resolve the subject matter of dispute, or attempts to limit the scope of the dispute between the parties, and provide details of why these negotiations have failed
- if the child is subject to a supervision requirement, explain this and any conditions attached
  - if the terms of the order for which legal aid is sought will be inconsistent with the terms of the supervision requirement, the application must address the practical effect of the order, and why it is reasonable to grant legal aid
  - the same applies if the proposed court order conflicts with other types of order, for example, a child protection order or a parental responsibilities order transferring parental rights and responsibilities to a local authority.

## **Evidential requirements**

As the welfare of the child is the court's paramount consideration, the applicant's statement should provide detailed information about

- the proposed arrangements for looking after the child
- how the proposed proceedings will safeguard or promote the child's welfare
- why it is necessary to bring proceedings, since the court will only make an order where it considers that this would be better for the child than not making an order
- whether any views have been expressed by the child on the matter concerned, as the court may obtain and have regard to the views of the child, depending on the his or her age and maturity.

Supporting evidence should be produced where it is available and will normally consist of

- at least, a statement from an independent witness speaking to the child's welfare
- additional information in the form of reports from the Social Work Department, medical practitioner etc.

If no supporting evidence is produced, the solicitor should explain why not.

Although the welfare of the child is the court's paramount consideration, the case of *White v White* established that a father with parental rights (through marriage, agreement or a court order) should have a right to contact.

- This does not subvert the welfare principle, but that principle must be balanced against the rights of the father in all applications involving fathers with parental rights.
- If there is nothing to show that contact would be against the child's best interests, applications by fathers with parental rights can be assessed without the need for detailed information.

The evidential requirements set out above apply to all applications relating to parental responsibilities and rights. Additional information is needed for some types of order, and this is shown below.

### **(a) Residence order**

If a child is already in the care of the applicant, supporting evidence of the arrangements for looking after the child or other details about the child's welfare is not necessary. Where, however, the applicant's care of the child is recent or tenuous, or where it is sought to alter the status quo, the solicitor should provide supporting evidence, or explain why it is not available.

### **(b) Defending a residence order**

The applicant's statement should

- provide details of the current arrangements for the care of the child and,
  - if the child is living with the pursuer, what criticisms are made of the pursuer's care and control of the child
  - if the child is not living with the pursuer, comment on the pursuer's proposals for caring for the child.
- draw attention to any factors making it appropriate for the court to make no order at all
- disclose the child's views, if known and likely to carry weight.

### **(c) Contact order**

The applicant's statement should

- provide details of the arrangements for the welfare of the child during contact periods

- indicate whether any contact is being granted and whether the contact sought is residential or non-residential
- indicate what attempts have been made to negotiate contact and with what result
- give the child's views, if known and likely to carry weight.

The applicant should provide supporting evidence of the proposed arrangements for the child's welfare during contact. This is particularly important if it appears that the applicant may have difficulty in looking after the child – for example, if the child is very young or contact has not been exercised for a considerable time.

**(d) Defending a contact order**

The applicant's statement should

- explain why the pursuer's proposals should be opposed, either on the basis that they may adversely affect the child's welfare, or on the basis that no court order is required
- give the child's views, if known and likely to carry weight
- give details of any existing contact arrangement.

**(e) An order removing parental responsibilities or parental rights**

The applicant's statement must explain exactly which responsibilities and rights are to be removed. This should be supported by other evidence, such as a statement from an independent witness or a report from the Social Work Department, medical practitioner etc.

**(f) Defending an order removing parental responsibilities and parental rights**

The applicant's statement should address why the order sought by the pursuer should be opposed. The statement should show to what extent parental responsibilities and rights have been exercised until now.

**(g) An order imposing parental responsibilities and parental rights**

When sought in conjunction with other orders – for example, residence or contact – the applicant's statement should address why this order is necessary in addition to the other(s).

**(h) Defending an order imposing parental responsibilities and parental rights**

The applicant's statement should

- explain why the order should be opposed
- comment specifically on the pursuer's averments as to why the order should be granted
- highlight factors showing why it would be appropriate for the court to make no order
- give the child's views, if appropriate.

**(i) Specific issue order**

The applicant's statement should

- detail the order sought
- address why such an order should be granted with reference to the three principles mentioned above
- show that the matter in question cannot be dealt with by any other statutory provision – for example, exclusion of a person from the child's home.

**(j) Defending a specific issue order**

The applicant's statement should show why the order sought should be opposed with reference to the welfare of the child, the fact that no such order is required and/or the child's views, if appropriate.



## **DIVISION AND SALE**

### **Background**

Any one of the proprietors of common property may insist on a division of it, even against the wishes of the other proprietor. The right must, however, be exercised with due regard to the interests of the other proprietor. If the property cannot be divided in practical terms or where it would be appreciably to the detriment of the parties' interests, the court may order a sale of the whole property and the division of the price.

### **Evidential requirements**

The applicant's statement should give details of

- the reasons for seeking division or sale
- the property concerned
- co-proprietors
- how the applicant will benefit if the order sought is granted.

Supporting information should include:

- evidence of joint ownership – for example, a copy of the title deeds or mortgage statement
- evidence of the opponent's unwillingness to agree division or sale.

In actions involving spouses, consideration should be given to the Matrimonial Homes (Family Protection) (Scotland) Act 1981. Under the Act, the court may refuse to grant an order for division and sale or may postpone an order for as long as it considers reasonable. These provisions cannot be invoked after the dissolution of the marriage. In such cases the information provided must:

- show that the marriage is still in existence and
- provide details of
  - the conduct of the spouses and their needs and resources
  - the needs of any child of the family
  - any business use made of the home and
  - whether suitable alternative accommodation has been offered.

**SECTION C**

**INTERDICTS**  
**POWER OF ARREST**  
**NON-HARASSMENT ORDERS**

## **NON-MATRIMONIAL INTERDICTS (INCLUDING NON-MOLESTATION ORDERS) – APPLICATIONS TO PURSUE**

### **The Board's approach to probable cause and reasonableness**

#### ***Probable cause***

To establish probable cause there must be evidence:

- of a continuing or threatened wrong capable of being the subject of an interdict
- that the applicant has a reasonable apprehension of a repetition of the conduct complained of.

#### ***Reasonableness***

It should not be assumed that we would be bound to grant the application just because:

- a sheriff has, on the balance of convenience, granted an interim interdict – the existence of a sound legal basis for court action will not necessarily mean that it is reasonable to grant the full application (the court is applying a different test from that laid down for us in the Legal Aid (Scotland) Act 1986, and it will still be necessary therefore to address the test of reasonableness for a full interdict)
- the police have been involved and have advised the applicant to see a solicitor about going to court for an interdict.

In considering whether it is reasonable to make legal aid available in the circumstances of the case:

- One of the factors we will take into account is whether a privately funded litigant of moderate but not abundant means would raise such an action.  
An example would be where the interdict relates to a dispute between neighbours, the basis of which is a series of relatively minor incidents or conduct that is insulting but not violent. In such a case, the application must specifically address why it is considered reasonable to make public funds available in a situation where, on the face of it, a private litigant would not take court action. If threats are uttered which, on the face of it, appear to be no more than vulgar abuse, the application must address in detail the basis of the applicant's fear that some physical action will follow on the threats.
- The involvement of the police in a dispute will be relevant to the test of reasonableness.
  - If the applicant did not involve the police, then an explanation must be provided as to why not. If the applicant considered the matter was too minor to trouble the police, there will need to be a strong argument for seeking public funds to finance an action of interdict.
  - Where police have attended and have taken no action, this might on the face of it indicate that the conduct is minor in nature and the applicant must address why legal aid should be granted for an action in the civil court. Where criminal proceedings have been taken, the applicant will have to address the question of why a civil remedy is still required.
- If an opponent has been arrested and bailed, this should be stated including what the applicant knows about the bail conditions. If the bail conditions include a prohibition on approaching the applicant, the application must address why the additional protection of an interdict is still thought necessary.
- The applicant should try any other avenues of dispute resolution, for example reference to a landlord, before applying for legal aid. Even where the applicant owns the property, he or she should investigate alternative methods of settling the dispute. We will look at the individual circumstances, but if alternatives have not been investigated, the applicant must show why it is thought reasonable to proceed at this stage with a court action.
- Where a continuing course of conduct is to be the subject of an interdict, except where immediate action is needed to preserve the applicant's safety, we would expect the

applicant's solicitor to attempt a negotiated resolution of the problem before considering a court action.

We will be extremely reluctant to commit public funds to minor disputes where the conduct is of a non-violent nature, particularly in relation to disputes between neighbours arising out of nuisance or name-calling.

### **Evidential requirements**

- (a) The applicant's statement must deal in detail with
- the conduct in connection with which the interdict is sought and why it is believed that it will be repeated if interdict is not obtained
  - the actual or anticipated effect of the conduct on the applicant
  - the terms of the interdict sought, unless this is set out in detail in the legal aid memorandum
  - the date of any specific incidents
  - the possible involvement of other parties in resolving the dispute. In particular, there should be specific reference to the question of police involvement and, if the police have not been contacted, an explanation should be given as to why not. Likewise, in disputes between neighbours of tenanted property, the question of whether the common landlord has been approached should be covered.

It should also be shown that all other steps have been taken or are inappropriate in the particular circumstances of the case and that court action is therefore necessary. Other steps can include solicitors' warning letters and involvement of the police. Whether or not it is reasonable to take steps before initiating court action will depend on the circumstances of each individual case.

- (b) Supporting evidence should be produced, if available. If no supporting evidence is available, the solicitor should specifically indicate this and explain why not. Supporting evidence can include, for example,
- a statement from another individual who has witnessed some or all of the conduct complained of or who has witnessed the applicant's distress and/or injuries soon after the conduct complained of, or
  - a statement from an agency such as a Social Work Department or police confirming the existence of the conduct complained of and supporting such an application
  - if the applicant has consulted a doctor, a report by the doctor.
- (c) If relevant, copies of correspondence from solicitors concerning the conduct complained of should be produced together with any responses from the opponent or their agent.

## NON MATRIMONIAL INTERDICTS (INCLUDING NON-MOLESTATION ORDERS) – APPLICATIONS TO DEFEND

### The Board's approach to probable cause and reasonableness

#### **Probable cause**

To be satisfied on probable cause, we will expect the applicant to provide a full and frank answer to all the pursuer's averments, with a clear explanation as to why the interdict must be resisted.

#### **Reasonableness**

Where the applicant denies particularly serious conduct (for example abuse directed at children or personal violence), the test of reasonableness may readily be satisfied.

Where, however, the conduct complained of is relatively minor, or the terms of the interdict so narrow that it would not hinder the applicant's normal routine, the question of reasonableness must be addressed in some detail – would a private client of moderate but not abundant means incur the cost of a defence in these circumstances?

If the applicant fears that the terms of an interdict would unreasonably interfere with the exercise of parental responsibilities, such as contact, it may be reasonable to allow legal aid for a defence.

If the applicant believes that the pursuer, once they have an interim, or permanent, interdict, is likely through malice to misuse the decree by bringing unwarranted actions for breach of interdict, this should be addressed and the reasons for the applicant's belief set out in detail.

In some cases, the applicant may not believe that the interdict sought is justified, but would be prepared to live with its terms were it not for the prospect of incurring unrestricted liability for the pursuer's expenses. If, in these circumstances, he or she is seeking to defend the interdict, we should be given details of the steps that have been taken to reach agreement about expenses.

#### **Evidential requirements**

- (a) The applicant's statement should
  - make it clear whether the applicant denies the pursuer's allegations in whole or in part and explain the nature and extent of the defence
  - if the defence is to be based on the terms in which the interdict is sought – for example, it is too wide or oppressive in its terms or will prevent the applicant going about his or her normal business – explain fully how the applicant will be affected by an order in the terms sought.
- (b) Supporting evidence should be produced, if available, especially in relation to any assertion made that there is a real likelihood that the opponent will abuse the terms of the order sought. If it is not available, the solicitor should indicate this and explain why not.
- (c) A copy of the initial writ seeking the interdict(s) should be provided.

## **MATRIMONIAL INTERDICTS – APPLICATIONS TO PURSUE**

### **General**

This section refers to interdicts sought in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 Section 14.

You should also refer to CIVIL/GUIDE/C/1, on applications for legal aid in respect of non-matrimonial interdicts.

### **Evidential requirements**

- (a) The applicant's statement should
- provide specific details of the conduct complained of and indicate that, unless interdict is granted, the applicant is likely to be exposed to conduct which would put him or her at risk or in fear, alarm or distress.
  - give the date of any specific incidents.

It should also be shown that all other steps have been taken or are inappropriate in the particular circumstances and that court action is therefore necessary. Other steps can include –

- solicitors' warning letters
  - involvement of the police
- (b) Supporting evidence should be produced, if available. If no supporting evidence is available the solicitor should specifically indicate this, and explain why. Supporting evidence can include, for example,
- a statement from another individual who has witnessed some or all of the conduct complained of or who has witnessed the applicant's distress and/or injuries soon after the conduct complained of, or
  - a statement from an agency such as a Social Work Department or police confirming the existence of the conduct complained of and supporting such an application
  - if the applicant has consulted a doctor, a report by the doctor.

## **MATRIMONIAL INTERDICTS – APPLICATIONS TO DEFEND**

### **General**

These refer to the defence of interdicts sought in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 Section 14.

You should also refer to CIVIL/GUIDE/C/2, on applications for legal aid to defend non-matrimonial interdicts.

### **Evidential requirements**

- (a) The applicant's statement should explain in detail why it is considered necessary to oppose the order(s) in question. If the order(s) sought would not prevent any lawful act by the applicant, we are unlikely to grant legal aid to defend it unless some other good reason is shown.
  - Good reasons may include a real likelihood that the opponent is likely to abuse the terms of the order to the detriment of the applicant.
  - The fact that the applicant has been charged with related criminal offences and the consequent assertion that the order(s) will prejudice his or her defence is not considered a good reason.
- (b) Supporting evidence should be produced, if available, especially in relation to any assertion made that there is a real likelihood that the opponent will abuse the terms of the order sought. If no supporting evidence is available, the solicitor should specifically indicate this and explain why not.
- (c) A copy of the initial writ seeking the matrimonial interdict should be provided.

## **BREACH OF INTERIM INTERDICTS – APPLICATIONS TO PURSUE**

### **General**

Such actions should be fresh proceedings and accordingly a fresh civil application will be required.

Some courts, however, allow the applicant to minute in the original process. If so, an “Application for amendment or extension by solicitor” form must be submitted to us.

### **The Board’s approach to probable cause and reasonableness**

To establish probable cause, the applicant must show that there is a sound legal basis for the proposed action.

In considering whether it is reasonable to make legal aid available, factors we will take into account include

- the seriousness/degree of the breach – if it is trivial we will be unlikely to grant legal aid
- the result of the alleged breach and the likelihood of re-occurrence.

### **Evidential requirements**

- (a) The applicant’s statement must
  - deal in detail with the nature of the alleged breach and its practical result
  - specify the date of the breach and
  - comment on the likelihood of the interdict being breached again.
- (b) Supporting evidence should be produced if available. If no supporting evidence is available, the solicitor should specifically indicate this and explain why not. Supporting evidence can include, for example, a statement from another individual who has witnessed the breach or the applicant’s distress and/or injuries soon after.
- (c) A copy of the interim interdict should be produced.

## **BREACH OF INTERIM INTERDICTS – APPLICATIONS TO DEFEND**

### **General**

If the pursuer has instigated fresh proceedings, a fresh civil application will be required to defend the proceedings. Some courts, however, allow a pursuer to minute in the original process. If so, and the defender has legal aid to defend the proceedings in the original process, then an “Application for amendment or extension by solicitor” form must be submitted to us.

### **The Board’s approach to probable cause and reasonableness**

To establish probable cause, we will expect the applicant to provide a full and frank answer to the pursuer’s averments with a clear explanation as to why the breach of interdict must be defended. Sufficient information must be produced to show that the alleged breach did not take place and that it would therefore be reasonable to defend the action.

### **Evidential requirements**

- (a) The applicant’s statement should make it clear whether the applicant denies the pursuer’s allegations in whole or in part and explain the nature and extent of the defence to be advanced.
- (b) Supporting evidence should be produced if available. If no supporting evidence is available, the solicitor should specifically indicate this and explain why not.
- (c) A copy of the interim interdict should be produced.
- (d) A copy of the initial writ or minute should be produced.

## **POWER OF ARREST – APPLICATIONS TO PURSUE**

### **General**

The Protection from Abuse (Scotland) Act 2001 makes it possible for a person (not simply a spouse/cohabitee) who is applying for or who has obtained an interdict to protect them from abuse, to apply to the court to attach a power of arrest to that interdict.

### **The Board's approach to probable cause and reasonableness**

A power of arrest can only be attached where it is necessary to protect the applicant from the risk of abuse (Section 1(2)(c) 2001 Act). This must therefore be clearly shown in the application. The degree of likely harm will be considered.

### **Evidential requirements**

Even where the applicant is applying for a matrimonial interdict, the applicant must specify in the memorandum for legal aid that he or she is also seeking a power of arrest.

## **POWER OF ARREST – APPLICATIONS TO DEFEND**

### **General**

The Protection from Abuse (Scotland) Act 2001 makes it possible for a person (not simply a spouse/cohabitee) who is applying for or who has obtained an interdict to protect them from abuse, to apply to the court to attach a power of arrest to that interdict.

### **The Board's approach to probable cause and reasonableness**

If the applicant

- wishes to defend an initial writ seeking an interdict and power of arrest simultaneously, and
- has shown probable cause to defend the interdict and that it is reasonable to grant legal aid to do so

this demonstrates that there is probable cause and that it is reasonable to defend the power of arrest. The applicant's statement does not, therefore, need to address this further.

However, if an interdict has already been granted and a power of arrest is now sought, then the applicant will have to address why it is necessary and reasonable to defend such an order.

### **Evidential requirements**

- (a) If an interdict is being sought simultaneously then the applicant is expected to state in his/her memorandum that he/she seeks to defend the power of arrest in addition to the interdict sought.
- (b) If a power of arrest is being sought in relation to an interdict previously granted:
  - the applicant's statement should address in detail why it is necessary and reasonable to defend the power of arrest – it may be considered reasonable to defend the action where there is a real likelihood that the opponent will abuse the power of arrest to the detriment of the applicant.
  - supporting evidence should be produced, if available, especially in relation to any assertion made that there is a real likelihood that the opponent will abuse any power of arrest now sought. If no supporting evidence is available, the solicitor should specifically indicate this and explain why not.
- (c) A copy of the initial writ seeking the power of arrest (and interdict – if applicable) should be produced.

## NON-HARASSMENT ORDERS – APPLICATIONS TO PURSUE

### General

The Protection from Harassment Act 1997 (“the 1997 Act”) makes provision for protecting people from harassment and similar conduct. It:

- gives a wider scope of provision than that normally available in an action of interdict where the conduct apprehended involved violence, abuse or threats
- makes provision for granting non-harassment orders, breach of which may have significant penal consequences. Breach of a non-harassment order is a criminal offence and so does not fall within the scope of civil legal aid.

Section 8(1) of the 1997 Act provides that every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which

- amounts to and is intended to amount to harassment of another, or
- occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that other person.

“Conduct” is defined as including speech. “Harassment” of a person is defined as including the person’s alarm or distress. “Course of conduct” must involve conduct on at least two occasions.

An actual or apprehended breach of Section 8(1) of the 1997 Act may be the subject of an “action of harassment” claim in civil proceedings by a person who is, or may be, a victim of the course of conduct in question.

The remedy sought in an action of harassment may include

- an award of damages;
- grant of an interdict or interim interdict; and
- a “non-harassment order” requiring the defender to refrain from such conduct in relation to the pursuer.

While the court may not grant an interdict (or interim interdict) and a non-harassment order in relation to the same matter at the same time, an applicant may seek legal aid to apply for (or defend) both interdict (or interim interdict) and a non-harassment order in the same terms, so as to allow the court to grant whichever seems appropriate.

Where an action of harassment includes a claim for an award of damages, it may only be brought if it is commenced within a period of three years after

- (a) the date on which the alleged harassment ceased or
- (b) the date, if later, on which the pursuer became aware or, in the opinion of the court, it would have been reasonably practicable for him/her in all of the circumstances to have become aware, that the defender was the person responsible for the alleged harassment, or the employer or principal of such a person.

This three-year period does not include any time during which the victim of the alleged harassment was under legal disability because of non-age or unsoundness of mind. Further, where the three-year period has expired without an action having been raised it is open to the court, if it seems equitable to do so, to allow the action to be brought.

**Evidential requirements**

- (a) The applicant's statement should give
- specific details of the nature of the conduct complained of
  - detailed confirmation that the course of conduct complained of occurred on at least two occasions
  - the date of any specific incidents.

Details must be given of the remedies sought in the action for harassment (for example, damages, interdict, anti-harassment order).

Where an award of damages is sought, full details showing that the action was raised within the time limit or that the time limit has not yet expired must be provided. If the time limit has expired, the applicant must provide full details of the information that will be presented to the court to persuade it that allowing the action to proceed would be equitable.

- (b) Supporting evidence should be produced regarding the course of conduct – if this is not available, the solicitor should specifically indicate this and explain why not. Supporting evidence can include, for example,
- a statement from another individual who has witnessed some or all of the conduct complained of or who has witnessed the applicant's distress and/or injuries soon after the course of conduct complained of, or
  - a statement from an agency such as a Social Work Department or police confirming the existence of the course of conduct complained of and supporting such an application
  - if the applicant has consulted a doctor, a report by the doctor.

## **NON HARASSMENT ORDERS – APPLICATIONS TO DEFEND**

### **General**

Refer to General section of CIVIL/GUIDE/C/9 (Applications to pursue non harassment orders).

### **Evidential requirements**

- (a) The applicant's statement should make it clear whether the applicant denies the pursuer's allegations in whole or in part and explain the nature and extent of the defence to be advanced.

As well as a defence on the merits of the application, that is, that the conduct is denied, Section 8(4) of the 1997 Act lays down three statutory defences. These are that the course of conduct complained of was:

- (a) authorised by, under or by virtue of any enactment or rule of law
- (b) pursued for the purpose of preventing or detecting crime or
- (c) in the particular circumstances, reasonable.

Accordingly the proposed defence to the action should be made clear in the applicant's statement and the applicant should provide detailed information to support this.

- (b) Supporting evidence from a third party should also be produced in respect of the defence or an explanation as to why this is not available should be provided.
- (c) A copy of the initial writ seeking the non-harassment order should be provided.

## **APPLICATIONS TO REVOKE OR VARY AN EXISTING NON-HARASSMENT ORDER**

### **General**

The person against whom a non-harassment order has been made, or the person for whose protection the order was made, may apply to the court which made the order for revocation or variation of the order. A fresh civil application must be made.

### **Evidential requirements**

The minuter must produce –

- (a) full details of the justification for revocation or variation;
- (b) supporting evidence in respect of this or an explanation as to why it is not available;  
and
- (c) a copy of the interlocutor granting the non-harassment order.

The defender must produce –

- (a) full details and reasons why it is appropriate to defend such an application;
- (b) supporting evidence in respect of this or an explanation as to why it is not available;
- (c) a copy of the minute to revoke or vary the existing order;
- (d) a copy of the Interlocutor granting the non-harassment order.

**SECTION D**

**REPARATION**

## **REPARATION**

### **The Board's approach to probable cause and reasonableness**

In assessing reasonableness a number of factors will be taken into account including

- the value of the claim;
- the prospects of recovery; and
- attempts made to negotiate settlement of the claim without referral to court.

### **Evidential requirements – pursuer applications**

This section gives information about the general evidential requirements for an application to raise reparation proceedings. Reference should also be made to the individual guidelines covering specific types of reparation claims. Applications should include:

- A statement by the applicant detailing the circumstances that resulted in the injury or loss sustained. This should
  - give a clear, unambiguous and adequately detailed picture of what happened, where and when
  - include details of the applicant's title to sue and describe any duties of care owed by the opponent whether in common law or by statute
  - give full details of any prior complaints about the practices or hazards that led to the injury
  - give details of the loss or injury suffered, with an estimation of the amount of the damages sought
  - in cases involving injury or losses sustained as a result of prolonged acts or omissions on the part of the opponent, give information about when the applicant became aware that these losses or injuries justified raising the action
  - contain information about any earnings before and after the accident with details of time spent off work, with vouching to support this, if available
  - supply any information about the applicant's future employability, restrictions on his or her domestic or social life and details of dependency on, or services received from, others.
- Any photographs and/or sketches of the hazard that may be available.
- Supporting information if it is available. If supporting information is not available, an explanation should be given.
- A medical report in cases involving personal injuries, particularly if the injuries are of a more modest nature where careful consideration needs to be given to the level of damages being sought.
- Any expert reports that have been obtained demonstrating liability and/or causation.
- All relevant ancillary documents such as wage certificates, contracts, police reports or receipts where appropriate to vouch any alleged losses or breach of duties.
- Information about the steps taken to negotiate the claim and to settle without raising court proceedings. Details of any response received from the opponent should be provided together with information about any offers of settlement made and reasons why these are not acceptable.
- Details about the prospects of recovery in the case.

### **Evidential requirements – defender applications**

Applications for civil legal aid to defend reparation proceedings are far less usual than applications to pursue proceedings. However, from time to time such applications are received and while the information that can be provided in support of each application will vary, certain information should always be provided.

- A bare denial of the claims being made is generally insufficient. Where the applicant is opposing an action on the grounds that there is no liability and/or that the sum sought is excessive, each line of defence should be adequately specified. The statement provided in support of the application should
  - answer the averments in detail particularly where liability is being denied
  - if the level of damages sought is being challenged, explain why
  - where the claim arises from a road traffic accident, set out why the applicant is not covered by third party insurance.
- Any available photographs or sketches of the locus should be supplied.
- Supporting information should be provided if available. If not, an explanation should be given.
- If the applicant wishes to make a counterclaim, the evidential requirements for the counterclaim will be the same as those in pursuer applications.

## **REPARATION – ROAD TRAFFIC ACCIDENTS**

See also CIVIL/GUIDE/D/1.

Additional information that should be provided for claims arising from road traffic accidents includes:

- Information about any police investigations and the final outcome of these, including the outcome of any criminal proceedings.
- A report from a road traffic reconstruction expert where appropriate. Whether the expert is required at the time of applying for legal aid will depend on the circumstances of each individual case but if the witness statements do not adequately identify the cause of the accident, a report from a road traffic reconstruction expert may help.

### ***Uninsured drivers***

An application to defend a reparation action arising from a road traffic accident where the defender was an uninsured driver raises several issues on reasonableness. The defender was under a legal obligation to carry, at the very least, third party, fire and theft insurance and it may be unreasonable to support a defence at public expense when the applicant deliberately failed to avail him/herself of an insurance policy which could have supported him or her.

- We need information about any involvement of the Motor Insurers' Bureau (MIB) in the claim. If the MIB are fully dealing with the matter, it may not be reasonable to fund a separate defence by the applicant. In addition, if the applicant has withheld consent to the claim being dealt with by the MIB, we may consider it unreasonable to fund a defence.
- Where the claim against the applicant relates to matters outwith the MIB scheme (for example, recovery of the insured driver's excess), he or she needs to demonstrate both a valid defence on quantum and that the value of those heads of claim justify the cost of a defence.

## **REPARATION – ACCIDENTS AT WORK**

See also CIVIL/GUIDE/D/1.

Additional information that should be provided where an accident has occurred at work includes:

- Information about any contractors, sub-contractors, employers or other persons who gave instructions, to show that the correct defenders have been identified.
- Precise information about the opponent's duties and whether they arise from common law or statutory duties and how these were breached.
- Information about whether the applicant is a member of a trade union and, if so, why trade union funding is not available for the action.
- In certain situations, an expert opinion on the cause of the accident. If the action relies on some complex technical failure, it is likely that an expert opinion will be needed at the stage of applying for legal aid. If, however, witnesses to the accident have adequately set out what happened and why, an expert report may not be needed.

## **REPARATION – INDUSTRIAL DISEASE**

See also CIVIL/GUIDE/D/1.

In these cases, it must be shown that the opponents knew or ought to have known of the hazard at the relevant time and had failed to take steps to protect the applicant (or deceased) from the hazard. The specific information that should be provided includes:

- the employment history of the applicant (or deceased) including written confirmation from the Department for Work and Pensions
- full details of the conditions in which the person worked
- information about any steps taken by the opponents to prevent hazards arising
- in applications about less well known industrial diseases, details of the state of knowledge about the hazard in the industry at the material time
- medical evidence showing a causal link between exposure to the hazard and any disease suffered
- information about whether the applicant or deceased was a member of a trade union and, if so, why the trade union is not funding the case
- information on possible time bar issues if this may be a factor in the case.

## **REPARATION – TRIPPING CASES**

See also CIVIL/GUIDE/D/1.

In order to show that the opponents knew or ought to have known of any hazard that resulted in the accident, information that needs to be provided includes:

- a full description of the place the accident occurred and the defect that caused the accident
- information showing the opponents were responsible for maintenance of the area where the accident occurred or had caused the defect
- information about how long the defect had existed and whether the opponents knew, or ought to have known, about it and ought to have taken steps to remedy the defect
- details of the opponents' duties of care and how these were breached
- in cases where the evidence from witnesses or other sources is not enough to take a view on fault, an expert report on liability may be needed.

## **REPARATION – PROFESSIONAL NEGLIGENCE CASES**

See also CIVIL/GUIDE/D/1.

Where professional negligence is being claimed it must be shown that the tests set out in the case of *Hunter v. Hanley* (1955 SC200) have been met.

- An expert report on liability addressing the tests set out in *Hunter v. Hanley* is usually needed unless the negligence is very obvious, for example the failure of a solicitor to raise an action within the triennium.
- An expert opinion showing loss may also be necessary. Even where negligence is obvious it may not be possible to establish that the negligence caused any loss without a report addressing this matter.

## **REPARATION – CONDENSATION OR DAMPNES CLAIMS**

See also CIVIL/GUIDE/D/1.

Landlords are under a common law obligation to put property let into a habitable or tenable condition at entry and thereafter to maintain it in habitable or tenable condition during the course of the lease. Most landlords are also now under the statutory implied obligation that rented houses be “ fit for human habitation” (as the provisions of the Housing (Scotland) Act 1987 have now been widened by the Housing (Scotland) Act 1988).

### **Evidential requirements**

- A statement from the applicant providing:
  - confirmation that he or she is the tenant of the property alleged to be suffering from condensation or dampness
  - details of the nature of the problem, including details of when it first arose
  - details of when the landlord was told about the problem , his or her response and details of any steps he or she has taken, or proposes to take, to remedy the situation, and
  - details of the orders that the applicant seeks.
- A report from an architect, or other suitably qualified expert speaking to the condition of the property.
- Where the applicant wishes to make a claim for damages for loss of, or damage to, property, vouching.
- Where the applicant wishes to make a claim for damages for ill health, a medical report dealing with this.
- Supporting evidence or, if not, an explanation why not .

## **REPARATION – CRIMINAL INJURIES**

Where the applicant has the option of pursuing a claim through the Criminal Injuries Compensation Agency (CICA), involving simpler procedures and minimal cost, it may be unreasonable for civil legal aid to be granted to raise civil proceedings. Claims for damages arising from criminal injuries can involve substantial questions on matters such as prospects of recovery and the applicant's own conduct. These issues need to be taken into account in assessing the reasonableness test.

## **REPARATION – COURT OF SESSION CASES**

Where it is intended to raise proceedings in the Court of Session, evidence needs to be provided to show that

- the claim is worth more than £75,000,
- the issues to be considered by the court are so novel, complex or unusual as to justify Court of Session proceedings, notwithstanding the fact that the value of the claim is less than £75,000.

As the Court of Session may not necessarily be a more expensive forum for litigation than the sheriff court, details of costs must be included in the application to allow us to assess whether it would be reasonable to grant for Court of Session proceedings.

If there are any jurisdictional complexities, information needs to be provided addressing this.

If the case has already been raised in the Court of Session under regulation 18 and legal aid is refused for Court of Session proceedings, it will need to be remitted to the sheriff court.



## **SECTION E**

### **MISCELLANEOUS OTHER CASES**

## **CASES OF A WIDER PUBLIC INTEREST**

### **The Board's approach to reasonableness and probable cause**

When considering the reasonableness test, a relevant factor may be that a case demonstrates a wider public interest. A wider interest may be presented in an application for matters such as judicial review, appeals or reparation where a number of cases arise out of the same incident, or where the outcome of the case may have a direct tangible benefit to the applicant and to others.

It may be unreasonable to make legal aid available to a person to litigate, as a private citizen, at public expense, about something that is obviously not exclusive to him or her. Examples could be fluoridation of public water supplies, noise generated by a large social or cultural event, closure of public leisure facilities. Any applications of this nature should be referred to the Legal Services Sub-Committee.

If we are satisfied that the case does demonstrate a wider public interest, we may, in the particular circumstances, be prepared to accept that this is a determining factor, even if the value of the claim is relatively modest. However, we will also have regard to questions such as prospects of success and cost benefit.

### **Evidential requirements**

Full and accurate information about the value of the claim and the likely case costs must be provided. Civil legal aid will not be granted where there is little prospect of any worthwhile financial benefit to the applicant, even if successful.

Full information should be provided about the nature of the wider interest in the case. Our criteria for a wider public interest will not be met:

- by simply asserting that such an interest exists, without material to back it up
- just because other people may find the nature of the proceedings interesting, or there may be some hypothetical interest
- where we consider that the interest is, in fact, a private interest.

Any application must address the tests in regulation 15 of the Civil Legal Aid (Scotland) Regulations 2002. That regulation requires the Board to refuse applications for civil legal aid where the applicant has a joint or the same interest with others if we are satisfied that

- the applicant would not be seriously prejudiced in his or her own right if legal aid were not granted, or
- it would be reasonable for the other people concerned to meet the expenses of the action.

If the applicant is part of a group bringing similar claims, or similar claims have already been brought by others, whether legally aided or not

- full information will need to be provided regarding the funding of the other claims
- the applicant will need to clearly explain the prejudice that would arise if legal aid were to be refused.

The Board will be required to refuse the application if the tests in regulation 15 are met.

The solicitor's views on wider public interest and regulation 15 should be contained in a note provided by the solicitor, and not in a statement.

## **HOUSE OF LORDS AND JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**

In what will invariably be extremely expensive proceedings, where the Fund is at considerable risk of bearing the high costs of both sides, the standard that is applied to the application is relatively high. Although accounts have typically been claimed at around £50,000 (inclusive of counsel), the total bill claimed by both parties in one recent case was in the region of £200,000.

- The sum involved, after making appropriate allowances for any element of contributory negligence, or the importance of the point at issue, must justify the cost of proceedings.
- An applicant who has been successful in the court at first instance but not before the Inner House is on relatively stronger ground than one who has failed both at first instance and on appeal.
- In any application for proceedings before the House of Lords, or JCPC, we should be satisfied that there are not only significant prospects of success, but also significant points of law to be argued.

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