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Your ref:

*Please quote the department above and
our reference: ESA/child/Nov08*

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Legal aid changes and updates

This mailshot contains information about changes to eligibility for legal assistance which recently came into force. It also contains further guidance on some other legal assistance matters. Please ensure that all staff involved in providing legal assistance are made aware of its contents.

CONTENTS

Employment and support allowance. Changes to the Act, the advice and assistance regulations and the civil legal aid regulations have been introduced through the Welfare Reform Act 2007 and the Employment and Support Allowance (Consequential Provisions) (No. 3) Regulations 2008.

When completing application forms for advice and assistance, civil legal aid or criminal legal aid, you should refer to the guidance attached if your client is receiving employment and support allowance.

Children's advice and assistance. This section contains further information about:

- payment and non-payment of people acting in a representative capacity in proceedings under Part II Chapters 2 and 3 of the Children (Scotland) Act 1995 relating to the provision of children's advice and assistance,
- when multiple grants of children's advice and assistance can and cannot be made and
- what to do where you are directly instructed to act for a child who is under 12 years of age.

Assessing capital in advice and assistance applications. Some applicants are failing to declare capital assets, and our Audit, Compliance & Quality Assurance Department has issued a reminder about capital your client should be declaring.

Updates to the Civil and Criminal Legal Assistance Registers. You should address future changes to our Receipts and Payments Department.

Our office will be closed on 1 December 2008 for the St Andrew's Day public holiday. Contacts for urgent requests are listed in the letter.

INCOME-RELATED EMPLOYMENT AND SUPPORT ALLOWANCE (ESA)

Income-related employment and support allowance (ESA) is a new benefit that came into force on 27 October 2008 and is paid to someone whose ability to work is limited by ill health or disability. It replaces both incapacity benefit and income support paid on the grounds of incapacity. The current legal aid arrangements for any clients who receive this new benefit are as follows:

Civil legal aid

Paragraph 5 of schedule 2 of the Civil Legal Aid (Scotland) Regulations 2002 has been amended to include authority to disregard income-related employment and support allowance in full when calculating financial eligibility for civil legal aid. This means that we can treat the income-based form of the new benefit the same as income support and income-based jobseeker's allowance.

We are not amending financial eligibility forms CIV/FIN/1 and CIV/FIN/2 immediately and so you should continue to use the existing forms for now.

Form CIV/FIN/1

In line with the current procedure for clients receiving income-based and contribution-based jobseeker's allowance, you should ask clients receiving income-related employment and support allowance to complete form CIV/FIN/1.

At question 1 of section C on page 3 they should put a cross in the Yes box. At question 2, they should write ESA, rather than marking either of the boxes.

Form CIV/FIN/2

Clients entitled to contributory ESA need to complete form CIV/FIN/2. They should inform us that they are receiving this benefit at question 15 of section G on page 10.

Advice and assistance

Regulation 4 of the Advice and Assistance (Scotland) Regulations 1996 has been amended to include authority to disregard income-related employment and support allowance in full when calculating financial eligibility for advice and assistance. This means that you can treat the income-related ESA the same as income support and income-based jobseeker's allowance.

We are not amending any of the current A&A forms immediately, so if your client is receiving income-related ESA please record this on the relevant A&A form as shown below.

Form AA/APP/CRIM

This form was recently redesigned and there is a box for income-related ESA at page 5, section G, question 1.

Form AA/APP/CIV

Place a cross in the income-based jobseeker's allowance box at page 3, section F, question 1, delete the word *Jobseeker's* and replace it with *Employment and Support*.

Form AA/APP/CHL

Place a cross in the *Yes* box at page 3, section F, question 1, delete the word *Jobseeker's* and replace with *Employment and Support*.

Summary criminal legal aid

If you are applying for criminal legal aid in summary proceedings using form CRIM/SUMMARY, you should record income-related employment and support at page 6, section H, question 2.

For any queries about this guidance on the new employment and support allowance, please contact Margaret Russell, on 0131 240 2067 or David Mackay on 0131 240 2068.

This section is directed at solicitors carrying out children's advice and assistance. It is to remind you of the changes made to the Children's Legal Assistance Handbook in May 2008 and referred to in our previous mailshot of 24 July 2008.

It concerns payment and non-payment of people acting in a representative capacity in proceedings under Part II Chapters 2 and 3 of the Children (Scotland) Act 1995 relating to the provision of children's advice and assistance.

This section also explains when multiple grants of children's advice and assistance can and cannot be made and explains what to do where you are directly instructed to act for a child who is under 12 years of age.

This section concerns children's advice and assistance only - that is, advice and assistance provided to a client regarding Part II Chapters 2 and 3 of the Children (Scotland) Act only. It does not concern civil or criminal advice and assistance.

1. Appointed to act as a safeguarder in terms of section 41 of the Children (Scotland) Act 1995

A safeguarder, even if they so happen to be a practising solicitor, cannot provide advice and assistance to a child. In terms of section 6 of the Legal Aid (Scotland) Act 1986 advice and assistance can only be provided by a solicitor acting as a solicitor. A safeguarder appointed under section 41 (1) of the 1995 Act can receive payment from the relevant local authority for work carried out in terms of section 41 (4) of the 1995 Act.

Unlike someone appointed to act as a curator *ad litem*, a safeguarder cannot carry out a dual function and act as both a safeguarder to the child and a solicitor to the child.

Rule 3.9 of the Act of Sederunt (Child Care and Maintenance Rules) 1997 states:

- (1) A safeguarder may appear personally in the proceedings or instruct an advocate or solicitor to appear on his behalf.
- (2) Where an advocate or a solicitor is appointed to act as a safeguarder, he shall not act also as an advocate or solicitor for the child.

A separate solicitor can therefore be instructed by the safeguarder to act for the child. However, in this circumstance, the safeguarder cannot apply for advice and assistance on the child's behalf unless the child has sufficient capacity to authorise a safeguarder to do so in terms of regulation 6(1)(a) of the Advice and Assistance (Scotland) Regulations 1996. In this situation the child, on cause shown, must not be able to sign the application himself or herself in terms of regulation 4 of the 1996 regulations.

In the absence of the child's authorisation and in terms of regulation 6(2) of the 1996 regulations an application for advice and assistance on behalf of the child can only be made by:

- a person having parental responsibilities in relation to the child; or
- any person in whose care the child is; or
- a person acting as the child's tutor or curator *ad litem*.

If a safeguarder, whether or not they are a practising solicitor, instructs a solicitor to appear on their own behalf, as opposed to the child's behalf, then the solicitor instructed can provide advice and assistance to the safeguarder assuming that the safeguarder is financially eligible to receive advice and assistance. In this circumstance it is the safeguarder's personal resources that must be taken into account when the solicitor determines eligibility. In addition, if the solicitor grants advice and assistance to the safeguarder then it is the solicitor who can receive payment from the Fund for all reasonable and necessary work carried out. The safeguarder, even if a practising solicitor, cannot make a claim against the Fund in this circumstance.

2. Appointed to act as a common law curator *ad litem* in proceedings under Part II, Chapters 2 And 3 of the Children (Scotland) Act 1995

A curator *ad litem*, even if they so happen to be a practising solicitor, cannot provide advice and assistance to a child. In terms of section 6 of the 1986 Act advice and assistance can only be provided by a solicitor acting as a solicitor.

At present there are no statutory provisions, unlike those for safeguarders, concerning remuneration of curators *ad litem* in children's proceedings. Any charges made by a curator for work carried out solely in that capacity cannot be paid from the Legal Aid Fund or indeed by the relevant local authority.

Unlike the position for safeguarders, however, a curator *ad litem* is entitled to act in a dual capacity as both curator to the child and solicitor to the child. The curator can apply for advice and assistance on behalf of the child in terms of regulation 6(2) of the 1996 regulations unlike the position for safeguarders who are not listed in this regulation.

Where such a curator carries out this dual capacity, however, the Fund can only pay for those charges applicable to the provision of legal services by that person acting as a solicitor under advice and assistance. No charges can be made to the Fund for work that is carried out in that person's sole capacity as a curator *ad litem*.

The curator *ad litem* can instruct a separate solicitor to act for the child even where that curator so happens to be a practising solicitor.

As stated above, the curator can, in terms of regulation 6(2), apply for advice and assistance on the child's behalf. In this circumstance the solicitor instructed by the curator to act for the child must take into consideration the child's resources. If a solicitor grants advice and assistance to the child then it is the solicitor who can receive payment from the Fund for all reasonable and necessary work carried out. The curator *ad litem*, even if they so happen to be a

practising solicitor, cannot in this circumstance claim against the Fund.

If the curator *ad litem*, whether or not they are a practising solicitor, instructs a solicitor to appear on their behalf, as opposed to the child's behalf, then the solicitor instructed can provide advice and assistance to the curator assuming that the curator is financially eligible to receive advice and assistance. In this circumstance it is the curator's personal resources that must be taken into account when the solicitor determines eligibility. In addition, if the solicitor grants advice and assistance to the curator *ad litem* then it is the solicitor who can receive payment from the Fund for the work carried out. The curator *ad litem*, even if a practising solicitor, cannot claim against the Fund in this circumstance.

3. Single and multiple grants of children's advice and assistance

If you are acting for a relevant person who has more than one child that is the subject of proceedings or anticipated proceedings under Part II, Chapters 2 and 3 of the 1995 Act then in general you only need to make one grant of advice and assistance to your one client. You must charge for all justified and reasonable work carried out for your client in respect of their children under one advice and assistance account only. You are providing advice and assistance to your one client and do not therefore have to make separate grants of advice and assistance to your client for each of the children concerned even where, for example, proceedings are discontinued in respect of one child but not another. In this situation, you will still be providing advice and assistance to your client and can continue to charge for this work under the single grant of advice and assistance made to your client at the outset. Occasionally, there can be some exceptions to this general rule - for example, where a client's children attend entirely separate hearings on separate dates and have different care concerns.

Where:

- you have been appointed as a curator *ad litem* to more than one child and have decided to act in a dual capacity as both curator and nominated solicitor; or
- you have been appointed as a curator *ad litem* to more than one child and you have instructed a nominated solicitor to act for the children; or
- you have been appointed as a safeguarder to more than one child and the children have authorised you to instruct a separate nominated solicitor to apply for advice and assistance on their behalf; or
- a person with parental responsibilities to more than one child, or in whose care more than one child is, instructs you as nominated solicitor to make an application on behalf of the children

the nominated solicitor giving the advice and assistance, must make separate grants of advice and assistance in respect of each child as each separate child will be the solicitor's client and therefore the named applicant.

4. Direct advice to children under 12 years of age

The Children's Legal Assistance Handbook gives full guidance (at paragraphs 4.13 and 5.17) on giving direct advice to children aged under 12, and you should refer to it if you are asked to give such advice.

When the applicant is a child (defined in regulation 2 of the 1996 regulations as a person under the age of 16 years), an application for advice and assistance may be made on their behalf by

- any person having parental responsibilities within the meaning of section 1(3) of the Children (Scotland) Act 1995 in relation to the child, or
- any person in whose care they are, or
- a person acting for the purpose of any proceedings as their tutor or curator.

This provision is without prejudice to any right of a child to apply on their own behalf or to authorise some other person to apply on their behalf, assuming they have sufficient capacity to instruct.

If a child consults you on a children's matter, you must form a view of the child's general understanding of what it means to instruct a solicitor about that children's matter.

If you notify us of an advice and assistance grant bearing to have been made to and signed by a child aged 12 or more, we are entitled to assume that you have satisfied yourself that the child has a general understanding of what it means to directly instruct a solicitor. We will register the application in the name of the child.

If you send us an application bearing to have been made and signed by a child aged under 12, you should confirm in writing that you are satisfied that they have a general understanding of what it means to directly instruct a solicitor. Where we receive an acceptable letter, we will register the grant in the name of the child.

5. Who to contact if you have any queries about this section concerning children's advice and assistance

If you have any queries on this guidance about children's legal assistance please contact Elizabeth Cuschieri on 0131-240-2179 or Laura Thomson on 0131-240-1896.

ADVICE AND ASSISTANCE - ASSESSING DISPOSABLE CAPITAL

Our Audit, Compliance & Quality Assurance Department has a team of staff whose responsibilities include carrying out checks into the accuracy of applicants' declared financial circumstances across all aid types.

We contact third parties such as employers, banks, the Department for Work and Pensions and HM Revenues & Customs to substantiate the declared income and capital of applicants. We also search databases such as *Registers Direct*, the on-line access to Registers of Scotland which has information on the identities of owners of heritable property.

From these checks we have noticed an increasing number of applicants who do not declare they have property other than their main residence.

We have previously advised you to assess disposable capital first. It is important that your client is aware that capital does not just consist of savings but includes anything else that has a capital value such as land or property, whether in the UK or abroad. This includes the amount of money that can be borrowed against such capital assets.

Our mailshot of 1 February 2007 gave full details of how financial eligibility tests should be applied. We recommend that all solicitors make sure they follow this guidance when assessing eligibility.

For any queries about this guidance on assessing disposable capital, please Douglas Laughland on 0131 240 2044

CIVIL AND CRIMINAL REGISTERS UPDATES

Updates to both the Criminal and Civil Legal Assistance Registers are now the responsibility of the Board's Receipts and Payments Department, not the Compliance Department. Please send all future changes of details to the Receipts and Payments Department.

**PUBLIC HOLIDAY - ST ANDREW'S DAY
1 DECEMBER 2008**

The Board's office will be closed on this public holiday. However, if you need to contact us urgently we have put in place the following arrangements:

- For authorisation for urgent increases in authorised expenditure for criminal advice and assistance or ABWOR, phone our advice and assistance Helpline on 07711 424344.
- For any urgent criminal sanction matters which cannot wait until Tuesday 2 December - for example defence post mortem reports - contact us on 0131 240 2194, or 0131 240 2097.
- For any urgent civil matters, we can be contacted on 0131 240 1890.

The staff who will be on hand to deal with the urgent matters will not have access to our usual computer systems, so will not be able to deal with any routine enquiries about the progress of applications.

Our Glasgow court office will be open as usual.