



# Civil Legal Assistance Update

17 February 2012

To all civil legal aid practitioners

## CIVIL AND CHILDREN'S UPDATE

FEBRUARY 2012

This update provides important information about:

- The Children's Hearings (Scotland) Act 2011 and its legal aid implications
- Changes to the stage reporting requirements
- Scanning documents - ways you can help us to process applications faster

### THE CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

The Children's Hearings (Scotland) Act 2011 (the 2011 Act) makes major changes to the operation of children's hearings and to the bodies responsible for their administration and management. It also makes significant changes to the legal aid provisions and this update addresses those aspects of the 2011 Act.

The Board is currently involved in discussions with the government about the implementation of the 2011 Act and has had a number of helpful meetings with the Law Society of Scotland, The Family Law Association, The Scottish Children's Reporter Administration (SCRA) and Children's Hearings Scotland (CHS). We intend to continue with that engagement in the lead up to the commencement of the Act's main provisions, but it is important to note that the timescales concerned are set by the Scottish Government. The Scottish Government intends that the main provisions of the 2011 Act will come into effect from 25 September 2012.

Under the current arrangements no form of legal aid or advice and assistance (including ABWOR) is available to enable a solicitor or counsel to represent a child or any relevant person at a children's hearing. The 2011 Act changes that and introduces a number of

other changes which can be summarised as follows:

- The establishment of a scheme within the legal aid and assistance scheme for legal representation to be provided, subject to certain tests, at children's hearings and associated court proceedings under the label "children's legal assistance".
- Transfer of responsibility for assessing entitlement to children's legal aid in the sheriff court from sheriffs to the Board. In some circumstances children's legal aid will be made available automatically to a child without application of the merits and means tests.
- The establishment of a contributions regime for those who can afford to contribute to the costs of children's legal aid.
- The establishment of a Registration scheme and a Code of practice and an associated scheme for quality assurance for solicitors who are paid under the children's legal assistance scheme.

As a result of this legislation, children's legal assistance will be made available as follows:

- For certain prescribed hearings the child can apply for and will automatically be granted Children's Legal Aid.
- For the same prescribed hearings a relevant person can apply for ABWOR. This will be considered and granted by the solicitor if the application meets the means and merits tests.
- For other hearings the child and any relevant person can apply for ABWOR, where it is important to note that the regulations require that the solicitor obtains the Board's prior authority. The solicitor considers the means tests and the Board applies post-grant checks to ensure it is satisfied these have been applied correctly. The Board considers the merits tests and decides if they have been met.
- Advice and Assistance will be available as is it is currently to children and relevant persons before or after a hearing and applications are considered and if appropriate granted by the solicitor.
- Children's legal aid will be available, subject to certain tests, for court proceedings. Applications will considered by SLAB.

The Scottish Government intends that the main provisions of the 2011 Act will come into effect from 25 September 2012. In order for that to happen there are a number of important and major pieces of work to be undertaken between now and then:

- Establishment of a Code of Practice which solicitors will be required to abide by when providing children's legal assistance and a registration scheme to register solicitors eligible to provide children's legal assistance. The relevant sections of the 2011 Act were commenced from 31 January 2012 to allow us to commence formal consultation with the Law Society and other appropriate bodies and we plan to commence that in early March 2012. Following that consultation the Board is empowered after 26 March 2012 to commence applications for registration, including an appeals process and development and publication of the register. We will issue further updates to inform practitioners of developments and key dates in these matters.
- Establishment of a quality assurance process to ensure compliance with the Code of Practice. This part of the Act commences on 25 September 2012. The Act does not prescribe how this should be done. There is already a scheme in place for children's work under the auspices of the civil scheme convened by the Law Society, but when this part of the Act commences in September there will be a committee under the Board's convenorship. We are working on this in consultation with the Law Society and will keep practitioners advised.

- Introduction of a Duty scheme to ensure that solicitors are available for those prescribed Children's Hearings where legal aid is automatically available. We are liaising with the SCRA, CHS and local authorities about the arrangements currently in place, particularly with a view to identifying any areas where there may be insufficient supply of solicitors available in order that we can consider how to address such issues.

Participants will generally only be expected to be available for hearings within normal office hours. If a child is kept in custody for alleged commission of an offence this will fall under the criminal duty scheme until the Crown refers the matter to a Reporter.

- Development of a methodology for contributions/means test and application of an "undue hardship" test.

We expect to receive draft regulations from the Scottish Government soon, which will allow us to further develop our proposals for the matters noted above. We will continue actively consulting with relevant bodies such as the Law Society of Scotland, The Family Law Association, SCRA and CHS and will issue further information and updates to practitioners as matters progress.

### CHANGES TO THE STAGE REPORTING PROCESS

In July 2011 we published the findings of a review undertaken of the current stage reporting process. This is available on our website at <http://www.slab.org.uk/profession/documents/ReviewofStageReportingProcess.pdf>. We have been looking at the operation of the stage reporting process in place since March 2009 when changes were made to the system to both reduce the number of time based reports you had to submit and to increase the situations where you should send an unprompted report. The findings of the review and the proposals for change to the stage reporting process were discussed with the Law Society of Scotland.

As a result of the review we are changing the stage reporting process. The review showed that the existing process was not as effective as it could be. In 50% of cases we are not receiving time based reports where these reports are required nor are we receiving unprompted reports in all situations where such reports should be sent to us. A number of firms are very effective in providing information when it is asked for but this is not yet a universal practice.

We have also been reviewing a number of high cost sheriff court family actions. This review showed that even where cases had been running for lengthy periods of time with elongated proofs and significant changes in the case being advanced stage reports that were meaningful and of real assistance to the Board were either not provided or provided only very sporadically.

It is important that the stage reporting process is developed to meet the purpose of ensuring that legal aid is available for cases that have reasonable prospects of success and continue to need funding to give appropriate access to justice. To help with this a number of changes are to be introduced to the process. These changes will come into effect at the end of February 2012.

#### Time based reports

At present time based reports are first requested in family actions 18 months after the grant of civil legal aid or, for non family actions, 24 months after the grant.

The changes to be introduced are:

- The first request for a time based report will be made six months after legal aid is granted irrespective of the nature of the action; and
- Time based reports should then be sent every twelve months after that.

In discussion with the Law Society of Scotland about the changes to be made to the stage reporting process they felt that asking for a time based report six months after civil legal aid is initially granted would be more helpful to the profession as it would assist solicitors in focussing on issues that may be causing difficulties in the case at an early stage. We were happy to agree to this request.

We will send you a message to remind you that a time based report will be due 28 days before the report is due to be lodged. If, despite two reminders, we do not receive a report the grant of legal aid will be suspended until:

- a report is sent to us and we are satisfied that legal aid should continue; or
- we decide that the case no longer meets the statutory test.

No work undertaken during a period of suspension can be paid for.

### **Unprompted Reports**

It is very important that we are told about material developments in a case which might impact on whether the grant of civil legal aid originally made is still appropriate. We are extending the range of events that require a stage report to be sent to us. Revised guidance on this is contained in the Civil Legal Assistance Handbook. It gives more detail on the types of situations that may require an unprompted report and the reasons why an unprompted report is needed. For ease of reference however you should note that from February 2012 unprompted reports should be sent when:

- A case is sisted other than for legal aid;
- Where any hearing of any sort lasting longer than 3 days is fixed. We know that where hearings take place over a number of days the cost to the Fund may be increased. Previously a report only had to be sent where a proof was adjourned but now whenever any hearing is fixed that will last longer than 3 days you need to tell us about this to allow us to look not only at the underlying issues in the case but also to consider whether it should be treated as a potential high cost case and be subject to high cost case monitoring.
- Whenever a minute of tender is lodged and has not been accepted. The report will need to explain why you have not accepted the minute of tender and the prospects for achieving a better outcome for your client from that on offer;
- When a case involves children and there are allegations of serious abuse or sexual abuse arising. Examination of high cost family cases has shown that where such allegations are made and are investigated in the court proceedings the cost to the Fund can increase significantly. Where such issues arise we want to know about this as early as possible so we can monitor cost and progress in the case;
- Whenever an expert has been instructed and their report shows a material difference from that advanced in the assisted person's position or case. This information will allow us to assess whether it is still reasonable for an assisted person to remain in receipt of civil legal aid and if the expert's report makes a material difference to the potential outcome of the case;

- Where the outcome of any debate or hearing has materially changed the nature of the assisted person's case;
- Where the prospects of success and/or the prospects of recovery have reduced from that which you told us about previously;
- Whenever it appears that the assisted person is unwilling to comply with a court order; and
- Where the total costs of the case are likely to increase significantly from any other information on costs previously given to us. Examples of different case types and situations where this may arise are given in more detail in the guidance in the Handbook.

If you do not send an unprompted stage report and a significant issue arises that may have impacted on whether or not the grant of civil legal aid continued we will look at the issue and consider whether payment should be made for any work that was undertaken from the point when the unprompted stage report should have been lodged unless you can provide good reasons to show that payment should still be made for the case.

### **WAYS YOU CAN HELP US DEAL WITH APPLICATIONS MORE QUICKLY AND EFFICIENTLY**

Now that all civil applications are submitted online we would like to ask for your assistance. How you submit documents to us can have a major impact on how long it takes for us to deal with your applications. Those applications submitted properly and in accordance with our guidance will be dealt with more promptly. The following notes set out a number of suggestions which, if implemented, would allow us to deal with applications much more quickly than at present:

- Labelling Support Papers/Documents

When scanning or creating documents it would be helpful if you would scan whole documents (all pages) as one document and provide sufficient details in the title of the document to distinguish between various other documents. We have set out some examples below.

Example 1 - Where the applicant has a bank account and we require to see three months of bank statements for each bank account held we often see bank statements being uploaded as one document per bank statement page, which can result in some cases of 20 plus documents just for bank statements alone and each document simply being labelled "bank statement". This makes it very difficult and time-consuming for our staff when they are assessing financial eligibility. We would prefer the bank statements to be uploaded as one document per bank account, and clearly labelled. *Where there is no valid attachment description to select from, then the option "other" should be selected and the free text entered.* For example - *RBS Current Account 12345678 January 2012 1-4 pages.*

Example 2 - where more than 1 supportive witness statement is being submitted. When labelling the statement we would prefer for example - Who the statement was taken from, the name of that witness and the date of statement and the type of civil legal aid application this statement is supporting - *again where there is no valid attachment description to select from, then the option "other" should be selected and the free text entered, For example - Supporting Statement Jean Brown 12 January 2012, CIVSOL.*

We may not be able to process cases which have a large number of unlabelled attachments, such as bank statements.

- Uploading Supporting Papers with the Online Application

We would encourage you to upload the supporting papers with the online civil application. We have noticed that some firms submit the application alone and shortly thereafter upload the supporting papers online to be attached to the application. This method creates additional unnecessary work for the Board and for you. Where the application is received without supporting papers, whilst the application will be registered and receive a Legal Aid Reference Number, it will have a status of “Rejected” because we cannot consider it without the supporting papers. We would not need to send messages and we would not require to process additional unnecessary tasks created when papers are uploaded separately.

- Checking the status of an application

You can check the status of an application online at any time and do not in all instances need to call the Board for this information. By accessing the View Case screen, you can see the status of the application and for those applications which require a means test as well as a merits test, the status of each of these statutory tests. Please remember that you need to check the status of both tests (means and merits).

If you have any queries regarding the legal aid aspects of The Children’s Hearings (Scotland) Act 2011 please contact Joe Kelly, Head of Civil Legal Assistance, DDI 0131 240 2031, e-mail [kellyjo@slab.org.uk](mailto:kellyjo@slab.org.uk)

If you have any queries regarding stage reporting please contact Catriona Whyte, Head of Legal Services - Civil, DDI 0131 240 2088, e-mail [whyteca@slab.org.uk](mailto:whyteca@slab.org.uk)

If you have any queries regarding improving the applications process please contact Ann Forbes-Partington, Assistant Manager, Civil Applications, DDI 0131 240 2072, e-mail [forbesan@slab.org.uk](mailto:forbesan@slab.org.uk)