



# Civil and Children's Legal Assistance

Issued to all civil practitioners

29 June 2012

## Civil and Children's Update June 2012

This update provides information about:

- The implementation of the Children's Hearings (Scotland) Act 2011.
- Changes to financial circumstances when civil legal aid has been granted.
- Financial assessment and verification in AWI cases.
- Policy on original personal documents being sent to the Board.
- Use of form HMF in applications for civil legal aid by members of the armed forces.
- Research work on financial assessment forms and documents.
- How to charge for taking precognitions in children's legal aid proceedings where a precognition agent is used.

### **The implementation of the Children's Hearings (Scotland) Act 2011**

We commented in earlier updates about the major changes taking place as a result of the implementation of the Children's Hearings (Scotland) Act 2011, particularly regarding the changes to children's legal assistance.

Since then we have made very good progress with the main heads of work for which we have responsibility. For example:

- We have published a draft Code of Practice and Registration scheme and invited comments. The consultation has now closed and we are assessing the responses, will make any necessary changes and send it to the Scottish Government for approval. We will then set out a timetable for solicitors to apply for registration.
- We have made good progress in developing a "duty" scheme.
- We have documented and prepared specifications for a large number of work processes which will help us to determine the organisational processes and structures we will need to effectively deliver children's legal assistance.
- We have been liaising with the other organisations and representative bodies in the legal profession and in the public sector responsible for delivery of the provisions of the 2011 Act.

You may have seen a recent a recent press release by the Scottish Government (available on our website) in which they announced that they had decided, after taking advice from experts within the sector, to extend the timetable for the planned reforms until the second quarter of 2013.

As a result of this, we extended our deadline for comments on our draft Code of Practice for a month until 18 June 2012.

### **Changes to financial circumstances when civil legal aid has been granted**

It is not unusual for a legally assisted person to obtain their share of any free proceeds from the sale of the former matrimonial home (or a jointly owned property in the case of an unmarried couple)

while Court proceedings are still ongoing. Sums received from the proceeds of sale of a jointly owned property, where that share has not been put directly at issue, are not subject to clawback.

However, if a legally assisted person receives sums from this source, they still need to be reported to us. There is a common misunderstanding that this is a requirement. The receipt of what can be substantial sums of money from such a source is a change in the applicant's financial circumstances. The duty to report any changes in financial circumstances relating to capital does not end until the case for which legal aid is granted is concluded.

If your client receives money as a result of the sale of property, you must report the receipt of these funds before the applicant uses the funds for any purpose. We have to decide if it is appropriate to re-determine an assisted person's disposable capital in the light of any change in financial circumstances and to decide if an applicant should be asked to make a contribution or a larger contribution towards the cost of the case. A private fee-paying client would be expected to budget for the cost of the legal services provided to them from such sums and those receiving legal aid should be treated no differently.

There are situations where we may consider that it is appropriate that all of the sums paid to an applicant may be used for a specific purpose. For example, if it is essential for an applicant to purchase a property to live in, we will consider several factors when deciding if it is reasonable for a client to devote all of the funds obtained for this purpose, for example:-

- Is it necessary for an applicant to use all of the free proceeds to secure alternative accommodation or can a greater proportion of the price be funded another way, such as obtaining a mortgage?
- Can the applicant service any mortgage that could be obtained if less money is paid upfront?
- Is the type and size of property dictated by factors such as the age and sex of children living with them or with whom they have residential contact?
- The relative cost of the new accommodation in relation to the previous property owned.

It is not unusual for us only to be told that the applicant has changed address and when further information is sought it becomes clear that funds that have been made available from the sale of the home have been used. If we are not told until after funds have been spent, this can lead to practical difficulties for the assisted person: they may be liable to pay a contribution which in practice is difficult for them to do.

Another common scenario is that a client will use such funds or proceeds of sale to pay off debts, particularly credit cards. Again, we must be given the opportunity to consider in advance if this is reasonable, in all the circumstances. We would expect a legally aided client to budget appropriately, and to include the cost of the legal services they have received in the list of debts to be satisfied

#### **Financial assessment and verification in AWI cases.**

We have received a number of enquiries from practitioners about whether a financial assessment is required in cases where either the applicant is someone deemed to be an incapable adult, or where an application is being made in respect of an incapable adult, when the subject matter is Adults with Incapacity (AISA). Additional guidance is provided below on this subject.

Regulation 7 (4) of the Advice and Assistance (Scotland) Regulations 1996 sets out the legislative provision for the financial assessment of these applications:

*“For the purpose of determining a client's disposable income and disposable capital, and the amount of any contribution required under section 11 of the Act, where an application for advice and assistance is made by a person and where the person is concerned as claiming or having an interest in the property, financial affairs or personal welfare of an adult under the Adults with Incapacity (Scotland) Act 2000, the personal resources of the person making an application for advice and assistance shall be disregarded and the determination shall be made by reference to the personal resources of the incapable adult”.*

Therefore, for the purposes of advice and assistance, the applicant is not the person to be assessed for financial eligibility; instead the details of the income and capital of the incapable adult require to be provided and assessed. If your client is someone who is, or will be, the subject of proceedings under the 2000 Act, it will be their own financial resources which require to be assessed.

It is appreciated that it might be difficult for some applicants; especially those who are not the incapable adult's primary carer or who do not live with the incapable adult, to obtain financial information. In these circumstances we would expect you to take reasonable steps to satisfy yourself about financial eligibility. You can do this by asking the applicant if they know for example:

- how the incapable adult meets their day to day living expenses,
- are they of pensionable age,
- do or did they live in a rented property,
- do they have any capital/savings. (For more details on what is meant by "capital" see the AA/LAO/CIV Online Advice and Assistance Client's Mandate Form, Section A – Financial Details.

By asking these general questions you should be able to gauge the likely financial circumstances of the incapable adult, for the purposes of granting advice and assistance to the applicant. A note should be taken of the questions asked and the answers given. If information subsequently comes to hand that suggests that the incapable adult would not have qualified for advice and assistance, you should inform the client that you no longer have cover under the advice and assistance scheme and that any further work they wish you to carry out would require to be covered on a private fee paying basis. When rendering your account for payment in these circumstances you should tell us about this new financial information as we may consider recovery of your fees from the incapable adult. If we are that satisfied reasonable steps were taken to obtain financial verification, then your account will be paid.

There is additional guidance available in our Handbook at Part III Chapter 2A, paragraph 12 detailing the approach you should take when income and capital can not be verified which you may also find useful.

#### **Policy on original personal documents being sent to the Board.**

Chapter IV paragraph 1.14 of the Civil Legal Assistance handbook sets out our position with regard to documents required in support of an application for civil legal aid. This confirms that except where material cannot effectively be copied, you should not send us original documents or productions in support of applications. Good quality photocopies will normally be sufficient. Marriage and birth certificates need not, in general, be produced, unless they are of particular significance to the matter at issue. Despite this guidance we still frequently receive original copies of marriage and birth certificates and have to incur time and expense in copying and returning these. Please ensure that all solicitors and staff involved in the submission of applications are aware of our guidance.

#### **Use of form HMF in applications for civil legal aid by members of the armed forces.**

If you are submitting an application for civil legal aid on behalf of a serving member of the armed forces, please use form HMF to provide details of their circumstances. This is a form specific to the armed forces. Please do not use CIV/FIN/3. This form is available on our website.

#### **Research work on financial assessment forms and documents.**

We want to better understand the ways in which people who are applying for civil legal aid understand and complete the 'Form 2' financial application forms. We have commissioned research to help us identify if there are any barriers in the structure, design and guidance that may make it difficult for people to complete the form first time. The findings from this research should be available by July this year and will feed directly into redesign of the form and guidance.

The researchers will speak with members of the public and to people who have previously applied for civil legal aid and completed a financial form. People will be asked for their views and experiences of completing the form, on their understanding of what they were being asked to provide and for their suggestions on how the form and guidance could be improved.

While the focus is on applicant views and experiences, the research will also involve speaking with a small number of solicitors who provide civil legal assistance. Solicitors will be able to provide, where they can, their professional perspectives on the financial form and guidance, on how they advise clients and on any difficulties they think their clients experience when completing the form.

For more information on this research please contact Clare Duffy [Duffycl@slab.org.uk](mailto:Duffycl@slab.org.uk)

If you have any queries about or comments on the content of this update or suggestions for matters to be covered in future editions please contact Joe Kelly, Head of Civil Legal Assistance either by email at [kellyjo@slab.org.uk](mailto:kellyjo@slab.org.uk) or by telephone on 0131 240 2031.

### **How to charge for taking precognitions in children's legal aid proceedings where a precognition agent is used**

The Regulations which cover the fees paid in proceedings under Part II of the Children (Scotland) Act 1995 ("the 1995 Act"), are the Civil Legal Aid (Scotland) (Fees) Regulations 1989 ("the 1989 Regulations"). Schedule 7 of the 1989 Regulations provides that proceedings arising out of Part II of the 1995 Act, should be charged on the basis of the detailed fees in Schedule 5 of the 1989 Regulations.

Our analysis is showing that some solicitors' firms have been charging for the work involved in taking statements in proceedings under Part II of the 1995 Act, as if they had undertaken the work 'in-house', even where a precognition agent has been used. They are including a charge in the account for an unqualified assistant doing this work at a rate of £28.72 p/hr (or equivalent rate where the fee includes travel). This practice appears to be based on the way firms' charged in criminal cases for taking criminal defence statements prior to the introduction of the Criminal Legal Aid (Scotland) (Fees) Amendment (No.2) Regulations 2010.

However, in the vast majority of cases under Part II of the 1995 Act, solicitors employ an external precognition agent to do this work on their behalf. Therefore, charging as though the work was done 'in-house' is contrary to the regulations.

Where a precognition agent is used by a solicitor, the solicitor must charge this as an outlay which is actually, necessarily and reasonably incurred. The solicitor is entitled to include in their account a reasonable charge for the perusal of any statements which are received from the precognition agent.

With effect from **1 August 2012**, all children's accounts received on or after this date must be charged on the correct basis. We will restrict any account where work done by a precognition agent is claimed as if it were done in-house at the solicitors' unqualified assistant rate. Where the work has been done in-house, you should include the name of the staff member in the account narrative. If this information is not provided, it will delay payment of the account as will have to ask for this information.

If you have any queries about this matter please contact the Accounts Specialists on 0131 226 7061 extension 245, 654, 659 or 687.