POLICY NOTE

THE CHILDREN'S LEGAL ASSISTANCE (SCOTLAND) REGULATIONS 2013

SSI 2013/xxx

The above instrument was made in exercise of the powers conferred by sections 9(1), (2)(a), and (c) to (dd), 28K(2), 28L(1), 31(9), 36(1), 36(2)(a), (c), (d) to (h) and 42 of the Legal Aid (Scotland) Act 1986. The instrument is subject to affirmative procedure.

POLICY OBJECTIVES

Overview

The overall policy aim is to provide a permanent, sustainable national scheme for the provision of state-funded legal representation in children's hearings and their associated court proceedings. The Children's Legal Assistance (Scotland) Regulations 2013 ("the Regulations") form part of this aim, as they provide the details of how children's legal aid will operate, and make assistance by way of representation (ABWOR) available to certain persons in certain circumstances.

The need for these provisions has come about because of the coming into force of the Children's Hearings (Scotland) Act 2011 ("the 2011 Act") on 24 June 2013, which makes provision for legal aid to be available for children's hearings for children and relevant persons.

The aims of the Regulations are to:

- Make provision for the availability of advice and assistance, in the form of ABWOR, in certain circumstances at children's hearings and in court proceedings for children, relevant persons and others;
- Set out processes about how to apply for children's legal aid, reflecting the transfer of the decision-making power to grant children's legal aid from the court to the Scottish Legal Aid Board ("the Board"), and making more detailed provision for matters such as review, changes of circumstances and termination;
- Set out the definitions of disposable income and disposable capital for the purposes of contributions for children's legal aid; and
- Direct the provision by the Board of a national "duty solicitor" scheme to ensure the availability of a solicitor to a child, in certain prescribed circumstances, at children's hearings and in sheriff court proceedings throughout Scotland.

Many of the provisions in these Regulations are similar to those previously made for children's hearings prior to the 2011 Act under the Legal Aid (Scotland) (Children) Regulations 1997 and to those currently made in respect of civil legal aid in the Civil Legal Aid (Scotland) Regulations 2002.

Background

Prior to 2002 state-funded representation was not available at children's hearings. In consequence of the case of *S v Miller* the Children's Hearings (Legal Representation) (Scotland) Rules 2002 (SSI 2002/63) introduced an interim scheme to provide state-funded representation for children appearing before children's hearings. Where the need for a legal representative was identified, one would be provided by the local authority from a panel of solicitors.

In 2009 this scheme was extended, in consequence of the case of *SK v Paterson*, by the Children's Hearings (Legal Representation) (Scotland) Amendment Rules 2009 (SSI 2009/211) to provide representation, in limited circumstances, to relevant persons due to attend children's hearings. "Relevant persons" broadly meant any person with statutory parental responsibilities in respect of the child or having charge or control over the child. The full definition is set out in section 93(2)(b) of the Children (Scotland) Act 1995. Representation was again arranged by the local authority from a panel of solicitors.

The 2011 Act now provides for children's legal aid to be available for children's hearings for children and relevant persons. To do so the 2011 Act inserts a number of new sections into the 1986 Act (sections 28B to 28S and 33B) and repeals the existing provisions about children's legal aid in section 29. By means of transitional provisions (to be made in a separate Order) assistance under section 29 will, however, continue to be available for ongoing proceedings under the Children (Scotland) Act 1995.

In summary, the 1986 Act (as amended) makes children's legal aid automatically available in relation to some applications and hearings under the 2011 Act, otherwise to obtain children's legal aid a person must apply to the Board. The financial eligibility criteria for children's legal aid are set out in section 28K. The availability of children's legal aid can be extended by regulations made under section 28L.

Advice and assistance is already available in respect of children under Part 2 of the 1986 Act. By its nature, most advice and assistance does not include representation at children's hearings. However, as set out below, these regulations make ABWOR (which is a form of advice and assistance) available for such hearings and some court proceedings.

Children's ABWOR

ABWOR allows solicitors to provide representation under the advice and assistance scheme, rather than by means of the more complex and formal legal aid scheme.

As set out in the Policy Memorandum that accompanied the Children's Hearings (Scotland) Bill, the Scottish Government has concluded that for practical reasons, legal representation for children and relevant persons who have appointed a solicitor to represent them in a children's hearing will best be provided under ABWOR rather than children's legal aid. This allows solicitors to assess their client's eligibility and to decide whether a grant of ABWOR can be made immediately, subject to later checking by the Board, rather than requiring the solicitor to make a full legal aid application to the Board on behalf of the client.

Part 2 of the Regulations provides that ABWOR is available in relation to children's hearings and some proceedings in the sheriff court for the child and relevant persons, and also other specified individuals. The processes for applying for ABWOR, and how it operates once granted, are already set out as regards civil (including children's) and criminal matters in the Advice and Assistance (Scotland) Regulations 1996 ("the 1996 Regulations").

The policy is that ABWOR should be available in relation to in two broad situations for the child and relevant persons involved in the proceedings. In urgent situations ABWOR should be available and granted by solicitors. In some of those cases ABWOR is available without application of a financial eligibility test. The Board has the power under the 1996 Regulations to check later whether the solicitor has correctly applied the eligibility tests. In non-urgent situations ABWOR should be available by application in advance to the Board. A financial eligibility test applies in those cases.

Availability of ABWOR to a child

ABWOR is available to a child without a financial test and can be granted by a solicitor without prior approval from the Board in the following situations which are considered to be urgent - where:

- an application is made under section 48 of the 2011 Act for variation or termination of a child protection order (sheriff court),
- a children's hearing is arranged in relation to a child by virtue of section 45 or 46 of the 2011 Act,
- a children's hearing or a pre-hearing panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to a child,
- a children's hearing to which section 69(3) of the 2011 Act applies is arranged in relation to a child, or
- an application is made to the sheriff for a child assessment order under section 35 of the 2011 Act or a child protection order under section 38 of the 2011 Act.

For all other children's hearings, ABWOR may be available if the child meets the financial eligibility test, and where the Board is satisfied that representation is necessary to allow the child to participate effectively in the circumstances set out in the Regulations. For example, where a hearing under section 69 of the 2011 Act takes place within 8 working days of a child protection order being granted (as described at section 54 of the 2011 Act), ABWOR is available if the child meets the financial eligibility test and if the Board is satisfied that representation is necessary to allow the child to participate effectively.

Availability of ABWOR to a relevant person

ABWOR is available, subject to a financial test and only where the solicitor is satisfied that representation is necessary to allow the person to participate effectively, where:

- an application is made under section 48 of the 2011 Act for variation or termination of a child protection order (sheriff court),
- a children's hearing is arranged in relation to a child by virtue of section 45 or 46 of the 2011 Act,

- a children's hearing or a pre-hearing panel considers that it might be necessary to make a compulsory supervision order including a secure accommodation authorisation in relation to a child,
- a children's hearing to which section 69(3) of the 2011 Act applies is arranged in relation to a child, or
- an application is made to the sheriff for a child assessment order under section 35 of the 2011 Act or a child protection order under section 38 of the 2011 Act.

For all other children's hearings, ABWOR may be available subject to a financial test and with the prior approval of the Board. The Board must be satisfied that ABWOR is required to allow the person to participate effectively in the circumstances out in the Regulations. For example, where a hearing under section 69 of the 2011 Act takes place within 8 working days of a child protection order being granted (as described at section 54 of the 2011 Act), ABWOR is available if the relevant person meets the financial eligibility test and if the Board is satisfied that representation is necessary to allow the relevant person to participate effectively.

Further availability of ABWOR

ABWOR may be available to an individual to whom section 126 of the 2011 Act refers for a children's hearing at which there is a review of a contact direction, where the individual meets the financial eligibility test and if the Board approves. The Board must be satisfied that ABWOR is required to allow the individual to participate effectively in the circumstances set out in the Regulations.

ABWOR may be available to an individual to whom section 79(2)(a)(i) of the 2011 Act refers for a pre-hearing panel meeting where a determination under section 81 of that Act (of the person's claim to be a relevant person) is to be decided. To obtain ABWOR the person must meet the financial eligibility test and the Board must be satisfied that representation is necessary to allow the person to participate effectively. ABWOR is also available, provided the financial eligibility test is met and the Board approves that ABWOR is needed to allow effective participation, for a child and relevant person for such a hearing. This are the only circumstances in which ABWOR may be available for representation at a pre-hearing panel.

Effective participation test for ABWOR

The "effective participation test" is set out in regulation 3(5), which inserts regulation 14 into the Advice and Assistance (ABWOR) (Scotland) Regulations 2003 ("the 2003 Regulations"). When determining whether legal representation is required to allow a person to participate effectively, the solicitor or the Board must take account of:

- the complexity of the case, including the existence and difficulty of any points of law in issue;
- the nature of the legal issues involved;
- the ability of the person to consider and challenge any document or information in the hearings or proceedings without the assistance of a solicitor; and
- the ability of the person to present his or her views in an effective manner without the assistance of a solicitor.

Financial test for ABWOR

A "financial eligibility test" means the test set out in section 8 of the 1986 Act, which already applies to most ABWOR in civil and criminal matters. That test means a successful applicant's disposable income should not exceed £245 a week, or the applicant should receive certain benefits, and the applicant's disposable capital should not exceed £1,716. What constitutes disposable income and disposable capital are already set out in Schedule 2 to the 1996 Regulations.

All of the other provisions of the 1996 Regulations relating to ABWOR and the 2003 Regulations shall apply to children's ABWOR granted in the circumstances provided for in regulation 3.

Children's Legal Aid

Children's legal aid is the aid type for most court proceedings, for both the child and relevant persons. So, for example, children's legal aid is available for an appeal to the sheriff against a decision of a children's hearing or a grounds of referral proof before the sheriff. It is also the aid type for onwards appeals to the sheriff principal and the Court of Session.

In deciding whether children's legal aid should be available, the Board must be satisfied in accordance with the 1986 Act that it is reasonable in the circumstances of the case, and that the expenses of the case could not be met without causing undue financial hardship to the applicant or their dependents. Where the applicant is a child, the Board must also be satisfied under section 28D of the 1986 Act that the grant of legal aid is in the child's best interests. In appeal cases the Board must be satisfied that the child or relevant person has substantial grounds for taking, or responding to, the appeal.

Under section 28B of the 1986 Act (as inserted by the 2011 Act), children's legal aid is available for:

a) proceedings before a sheriff for variation or termination of a child protection order;
b) proceedings –
    i. at a children's hearing following the making of a child protection order;
    ii. at a children's hearing or pre-hearing panel where it considers it might be necessary to make a compulsory supervision order including a secure accommodation authorisation;
    iii. at a children's hearing following the arrest of a child and his or her detention in a place of safety; and
c) proceedings before a sheriff, the sheriff principal or the Court of Session in connection with a children's hearing under Part 10 or 15 of the 2011 Act.

Part 3 of the Regulations deals with issues relating to the provision of children's legal aid; setting out how to apply for it; making provision for review or changes of circumstances; and circumstances in which it can be terminated, broadly reflecting the detailed provisions in the Civil Legal Aid (Scotland) Regulations 2002 ("the 2002 Regulations"). These provisions build on those inserted into the 1986 Act by the 2011 Act about conditions which may attach to a grant of children's legal aid and review of applications.

Extending availability of children's legal aid

Regulation 5 extends the provision of children's legal aid – already available to a child, a relevant person and at appeals relating to a deemed relevant person – to individuals to whom section 126 of the 2011 Act refers for a children's hearing at which there is a review of a contact direction.

Automatic children's legal aid

It is envisaged that children or relevant persons may instruct their own legal representative ahead of a children's hearing. As set out above, this will be funded, where appropriate, through the advice and assistance scheme (which includes ABWOR).

However, if this has not happened, automatic children's legal aid is available to the child in the circumstances set out in section 28C of the 1986 Act. This is intended to ensure that representation can be made available in urgent cases where a child is due to appear at a children's hearing and the issues are such that it would be inappropriate for the hearing to proceed without the child being legally represented.

The automatic grant of children's legal aid is only available for the purpose of the immediate hearing.

Under section 28C of the 1986 Act, automatic children's legal aid can be made available to a child where:

- there are proceedings before a sheriff for variation or termination of a child protection order;
- there is a children's hearing following the making of a child protection order;
- a children's hearing or pre-hearing panel considers it may be necessary to authorise the placement of the child in secure accommodation; or
- there is a children's hearing following the child being apprehended by the police if it has been decided that criminal proceedings are not going to be pursued.

This means that, as set out in section 28C(1)(c), children's legal aid will also be automatically made available in non-urgent cases where a deprivation of the child's liberty is in prospect but the child has not secured representation ahead of the hearing. In those situations, as when providing any child children's legal aid under section 28C, the Board will arrange for a solicitor to be available to provide that assistance to the child. This is provided for in Part 4 of the Regulations.

Applications for children's legal aid

Regulation 6 lists what are treated as distinct proceedings for children's legal aid. A legal aid certificate issued for any of the specified proceedings is not transferable and separate applications will be required for any other proceedings. A provision to this effect was previously made for children's hearings under regulation 3 of the 1997 Regulations.

Regulations 7 to 15 set out the process of applications for children's legal aid, building on the transfer (by the 2011 Act amendments to the 1986 Act) of the power to make children's legal aid available from the court to the Board.

Application on behalf of a child

Under regulation 8, applying for children's legal aid on behalf of a child falls to the child's relevant person (which includes a parent or person having parental responsibilities), safeguarder or other representative (other than a solicitor). It is the Scottish Government's intention to support the consistent use of safeguarders who have a clear role throughout the children's hearing process rather than an inconsistent and disparate mix of safeguarders and curators. Therefore, regulation 8 does not enable applications on behalf of children to be made by curators. The relevant person, safeguarder or other representative may then receive legal advice from a solicitor as to how to apply.

Financial eligibility

When deciding whether a person is eligible for children's legal aid the Board has to consider under the 1986 Act whether paying for representation privately would cause the person "undue hardship." To make this assessment, the Board needs to be able to calculate the person's disposable income and disposable capital – the person's income and capital after certain things have been deducted. How to determine what is disposable income and disposable capital is set out in the Schedules to the Regulations. These Schedules repeat in most cases the provisions which apply in relation to income and capital in civil matters under the Civil Legal Aid (Scotland) Regulations 2002.

Depending on the financial circumstances of the applicant, a contribution may be payable for persons in receipt of children's legal aid under section 28K of the 1986 Act. Contributions have not previously existed for legal aid for children's matters. Contributions already exist for Advice and Assistance (A&A), including in children's matters.

The Scottish Government believe that those who can afford to pay towards their own legal advice and representation should do so. The alternative would be to provide all children's legal aid without requiring contributions. This would be inconsistent with the general approach across nearly all civil proceedings, that those who can afford to contribute to the costs of the action should do so.

Section 28K of the 1986 Act enables the Board to levy contributions towards the expenses of the case on those receiving children's legal aid. Contributions received by the Board will be paid into the Scottish Legal Aid Fund.

In accordance with section 28K, it is for the Board to determine the amount of any contribution payable. Any contribution in respect of disposable income is to be levied on disposable income exceeding the prescribed statutory threshold (currently £3,355 a year) and that the amount of that contribution must not exceed one third of the amount by which the person's disposable income exceeds the prescribed threshold. Section 28K also makes similar provision as regards disposable capital (for which the current statutory threshold is £7,504).

Regulation 16 provides that the Board must decide the amount of the contribution due by the applicant towards the cost of the legal aid provided. Those who do have to contribute can make payments over an extended period to minimise the impact of payment on them.

Matters of special urgency

Regulation 18 allows the Board to grant children's legal aid for court proceedings (not for children's hearings) in matters of special urgency, notwithstanding that the eligibility tests set out in the 1986 Act have not yet been shown to be met. Regulation 8 of the 1997 Regulations currently makes similar provision, but is restricted to the distinct proceedings of appeals to the sheriff principal and the Court of Session.

An example of where regulation 18 could be used would be where in relation to a proof on grounds of referral, a solicitor is only instructed in the sheriff court environs just before the proof is to be called. To prevent delay in the proceedings it would be open for the solicitor to contact the Board and request that his/her appearance at the proof be covered by special urgency children's legal aid. If special urgent children's legal aid is granted by the Board after the court appearance a full children's legal aid application must be submitted to the Board.

Another example of where regulation 18 could be used would be in relation to an appeal to the sheriff against a decision affecting a contact or permanence order under section 161 of the 2011 Act. This type of appeal must be heard and disposed of before the expiry of three days, beginning with the day on which the appeal is made. In this situation it may prove difficult for an application for children's legal aid to be completed, submitted and decided before the appeal to the sheriff calls. Accordingly an application for special urgency children's legal aid in these circumstances could be made.

Notification of decision

Regulation 19 requires the Board to notify the applicant and the applicant's solicitor of its decision to grant or refuse children's legal aid. The regulation sets out the information the Board must provide in doing so.

Review of a refusal of children's legal aid/condition

When children's legal aid is granted, under section 28G of the 1986 Act it may be subject to conditions which are set by the Board. Section 28H of the 1986 Act provides that where the Board refuses an application, the applicant should be able to request a review of the Board's decision. It further provides that, where the applicant has been refused legal aid due to a failure to meet a condition imposed by the Board, the applicant may request a review of this condition.

Regulation 20 makes provision for review of a refusal to grant children's legal aid or of any condition imposed by the Board in granting the children's legal aid.

Employment of counsel

Regulation 21 makes provision about when counsel and others may be employed. In most cases the prior approval of the Board is required.

Changes of circumstances

Regulations 22 to 29 set out duties on the assisted person and his/her legal representatives to report changes in circumstances or new information to the Board.

The duty in regulation 22 to report a change in circumstances in relation to a child is a little wider than the corresponding provision for civil legal aid in the Civil Legal Aid (Scotland) Regulations 2002. This is because a number of different people may be involved in assisting or supporting a child. The regulation therefore applies to a solicitor, counsel, a relevant person, the child's safeguarder (if there is one) or any other representative of the child.

Regulation 23 also allows the Board to request information about changes in circumstances from an applicant for children's legal aid, a person receiving children's legal aid or the person's solicitor or counsel.

Termination of legal aid on change of circumstances

The circumstances in which the Board can terminate a grant of children's legal aid to a person are set out in regulations 30 to 33 and reflect the respective tests which must be met in order for a person to be eligible for children's legal aid. For example, where it is no longer "reasonable in the particular circumstances of the case" that a person should receive children's legal aid – which is part of the test for a child under section 28D of the 1986 Act, a relevant person under section 28E or 28F or an individual under regulation 5 of these Regulations – the Board can terminate the children's legal aid.

Termination on request by an assisted person

Regulation 34 is an innovation on the similar regulations which apply to civil legal aid. It allows for termination of legal aid where the assisted person has requested it. Termination in these circumstances is allowed where the person has paid any contribution due in full and has provided all necessary information to the Board in accordance with regulation 9.

Duty Solicitor Scheme for certain children's hearings

Part 4 of the Regulations (regulation 35) requires the Board to introduce a "duty solicitor" scheme for any proceedings to which section 28C of the 1986 Act applies, that is the circumstances in which automatic children's legal aid is available to a child. Automatic children's legal aid is only available to a child, and only in circumstances where ABWOR has not already been made available.

Where the Board arranges for a solicitor to be provided, the children's legal aid shall only be provided by that solicitor. The ability of a person under section 31(1) the 1986 Act to choose which solicitor represents them is disapplied.

CONSULTATION

A draft of the Regulations was shared with key stakeholders at the beginning of 2013, notably: Law Society of Scotland, Scottish Legal Aid Board, Children's Hearings Scotland, Children 1st, Scottish Children's Reporter Administration and Scottish Women's Aid.

Changes to the Regulations

A number of changes were made to the draft Regulations as part of this process.

The words "under the upper age limit of compulsory school age" after the word "child" were removed from regulation 8(2) to allow the same definition for a child to be used consistently in applications for legal assistance for all 2011 Act proceedings.

While it would be extremely unusual to do so due to the emergency nature of these hearings, it is possible for a sheriff to seek to hear from a child or relevant person at a Child Protection Order (CPO) or Child Assessment Order (CAO) hearing. The Regulations have therefore been amended to provide that ABWOR is available to a child or relevant person for an application to the sheriff for a CAO or CPO.

Respondents raised that, where there is sufficient time to arrange a pre-hearing panel, there would be enough time for an application for ABWOR to be made to the Board and for the Board to apply the effective participation test. Similarly, there would be sufficient time ahead of 8th working day hearings. Where the Regulations originally allowed for solicitors to apply the effective participation test in these circumstances, they have been amended to require an application to the Board.

There was some uncertainty as to the process relating to applications made for deferred hearings following a hearing held in the circumstances set out in section 28C(1), where some believed application should be made to the Board as there would be sufficient time. In the Board's view, treating deferred hearings as separate hearings requiring an application to the Board would create significant double-handling. The Board cannot foresee a situation where they would refuse a further grant of ABWOR for a deferred hearing. Requiring an application to the Board for deferred hearings would therefore seem to add cost but no value. The draft Regulations have therefore been amended to include the circumstances set out in section 28C(2) as one of the situations where an application in advance to the Board is not required and the financial eligibility and effective participation tests are applied by the solicitor.

For proceedings that are treated as distinct for the purposes of an application for children's legal aid, an application to the sheriff to extend or vary an interim compulsory supervision order under section 98 of the 2011 Act will not be treated as distinct proceedings where the application arises as part of other proceedings under the 2011 Act and the person has already been granted children's legal aid. This means it will be treated in the same way as an application to the sheriff to further extend or vary an interim compulsory supervision order under section 99 of the 2011 Act.

In relation to applications by or on behalf of children, reference to a child's "legal representative" has been clarified to avoid confusion. The Board is also preparing guidance

for solicitors on who can apply for children's legal assistance and on who can apply on behalf of a child or adult.

The Regulations have been amended to allow the child or relevant person to apply for ABWOR at a pre-hearing panel meeting where an individual is seeking to be deemed a relevant person, so that ABWOR is available to them as well as the individual.

In response to concerns regarding the inclusion of provision about the resources of a person owing a duty of aliment to a young person being included within that young person's resources, this provision has been removed from the Regulations.

Other considerations

Some concerns did not result in a change to the draft Regulations but further action will be taken.

The Board is devising child friendly material for the new children's hearings arrangements and a child friendly Code of Practice. The Board is liaising with organisations such as the Scottish Children's Reporter Administration (SCRA) and Children's Hearings Scotland on this. Part of the rationale for a child friendly Code is so children will know what they can and cannot expect.

There was concern that vulnerable individuals might face difficulties in accessing legal representation as there can be a number of obstacles to actually accessing legal advice, even where legal aid may be available. The Board already assists members of the public who struggle to find a legal aid lawyer and can do so with regard to children's legal assistance. Where Children's Hearings Scotland think representation may be needed, that recommendation can be referred to the Board, who will then try to link a solicitor to the case. The Board cannot compel solicitors or firms to take on particular cases, however.

The Board already provides guidance on issues relating to age of capacity and the ability of a child to give instructions in its criminal, civil and children's legal assistance handbooks. Currently, a child aged twelve or over is deemed to have capacity to instruct a solicitor and, under twelve, the solicitor must be satisfied that a child is in a position to understand and give instructions. The Board may clarify the basis on which a solicitor has arrived at this conclusion.

There are certain circumstances where the normal duties of a solicitor will involve him or her providing services to children which fall within the meaning of regulated work as set out in the Protection of Vulnerable Groups (Scotland) Act 2007. Existing legislation provides that, where that happens, it would be appropriate for the solicitor to join the PVG Scheme.

The Board has a legal obligation to monitor compliance with the code of practice. Solicitors and firms on the register are required to comply with the code of practice under section 28P of the 1986 Act and there is, therefore, no need to repeat this requirement in regulations. Monitoring of the code will be undertaken through a combination of both peer review and compliance assurance by Board staff that may include on-site audits.

The Board has overall responsibility to ensure the quality of provision of children's legal assistance, including the training of solicitors. While the Board is not required to provide

training, they are currently holding a series of roadshows throughout the country along with representatives of SCRA and CHS in preparation for implementation of the new system. The Board has also been providing the profession with updates and guidance in relation to children's legal assistance and in relation to the registration process. There is nothing to prevent other bodies from providing training. A number of organisations, such as the Law Society of Scotland, are making available training courses to help practitioners demonstrate compliance with certain of the required competencies for registration and further details of these are available on the Board's website.

The Board works to published key performance indicator (KPI) targets and has produced KPI's in relation to children's legal assistance which have been discussed with SCRA and CHS and which are designed to meet the requirements of the system. There are special urgency provisions in place to provide cover, to the extent necessary, to protect the applicant's position in such circumstances. While there is potential for delay in circumstances where the Board is waiting for information from solicitors and/or applicants, the Board will do its best to minimise such delay and, so far as possible, ensure that the delay is not transferred to the proceedings.

There was a concern that the Board doing a "back-end" check where ABWOR is provided by a solicitor might lead to an applicant suddenly finding themselves paying a contribution when they least expect it. This check stems from responsibilities placed on solicitors in 2008 when considering whether to grant advice and assistance to obtain financial and other documentation for the purpose of ascertaining an applicant's disposable capital and disposable income (under paragraph 2A(2) of Schedule 2 to the 1996 Regulations). Further amendments in 2011 introduced similar requirements in civil and children's cases. The check itself relates most specifically to regulation 22 of the 1996 Regulations, which gives the Board the power to withhold payment from the Fund or, if payment has been made, to recover it where payment is unjustified by reason of inadequate assessment or verification of any relevant factor. The check is intended to ensure that a grant of legal assistance is competent and will apply to the ABWOR for 2011 Act proceedings as it would for other ABWOR provision.

Guidance was issued for such cases by the Board. This guidance was prepared by the Board after consultation with the Law Society of Scotland and individual practitioners and sets out approaches consistent with existing good practices already in place in many firms. The guidance on verification of financial eligibility is also consistent with approaches adopted by the legal aid authorities in other jurisdictions in the UK and beyond. The guidance is not intended to act as a barrier to access to justice, nor to penalise practitioners who have acted and proceeded in good faith. As a result of consultations with practitioners and the Society, the Board has attempted to identify the difficulties that practitioners may encounter in certain circumstances or types of cases and to set out how such situations should be addressed.

In general terms, the Board seeks to support practitioners providing publicly-funded legal assistance by issuing guidance. This is intended to assist practitioners in all cases but especially where there may be issues of complexity, for example in the types of legal assistance that may be available in certain circumstances and where a solicitor is required to act at short notice.

IMPACT ASSESSMENTS

An equality impact assessment on the policy is being finalised and will be published once complete.

FINANCIAL EFFECTS

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that those appearing at 2011 Act proceedings could receive legal assistance if eligible and the agent could be remunerated for doing so. There may be some impact on solicitors' firms in familiarising themselves with the new regulations.

The estimated cost to the Scottish Legal Aid Fund is an additional £0.8m in 2013/14 and £3m in 2014/15. This has already been included in forecasts of expenditure for the Fund. There is uncertainty around the financial impact on the Fund, particularly in relation to ABWOR volumes and the level of additional demand to undertake this work. The Board will therefore continue to refine its forecast going forward.

Scottish Government
Justice Directorate

May 2013