

POLICY NOTE

THE CHILDREN'S LEGAL ASSISTANCE (FEES) (MISCELLANEOUS AMENDMENTS) (SCOTLAND) REGULATIONS 2013

SSI 2013/144

The above instrument was made in exercise of the powers conferred by section 33(2)(a) and (b) and (3) of the Legal Aid (Scotland) Act 1986 and all other powers enabling them. The instrument is subject to negative procedure.

Policy Objectives

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 (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2013 ("the Regulations") form part of this aim, as they provide details of the fees allowable to solicitors for providing children's legal aid and children's assistance by way of representation ("ABWOR") as described in relevant sections of the Legal Aid (Scotland) Act 1986 ("the 1986 Act") and the Children's Legal Assistance (Scotland) Regulations 2013.

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. In addition, the Children's Legal Assistance (Scotland) Regulations 2013 will come into force on the same day and make children's ABWOR available in relation to various hearings and proceedings under the 2011 Act.

The aims of the Regulations are to provide that, in general:

- the fees allowable to solicitors for ABWOR and advice and assistance work in relation to children's hearings and proceedings are the same as the fees allowable for ABWOR and advice and assistance in civil matters;
- the fees allowable to solicitors for work in relation to automatic children's legal aid under section 28C of the 1986 Act are the same as the fees allowable for children's ABWOR;
- other than in relation to automatic children's legal aid, the fees allowable to solicitors for children's legal aid work are the same as those allowable for other civil legal aid work; and
- the fees allowable to junior and senior counsel for work in relation to proceedings under the 2011 Act are, in most cases, the same as the fees currently allowable for equivalent proceedings under the Children (Scotland) Act 1995 ("the 1995 Act").

Children's ABWOR and advice and assistance

Regulation 2 makes amendments to Schedule 3 to the Advice and Assistance (Scotland) Regulations 1996 ("the 1996 Regulations").

In respect of children's ABWOR, regulation 2(2) adds a new column, which applies to children's matters, to the table of fees in Part 1 of Schedule 3. Children matters are defined as work in connection with hearings or proceedings under the 2011 Act. At present ABWOR in

relation to hearings and proceedings under the 1995 Act falls within the civil matters column in the table of fees. The hearings and proceedings under the 1995 are being replaced by those under the 2011 Act. The new children's matters column, prescribes the fees which apply in respect of children's matters under the 2011 Act. The fees are prescribed in the Regulations to be the same as those payable for the equivalent ABWOR work in relation to the 1995 Act.

Regulation 2(3) amends Part 2 of Schedule 3 to the 1996 Regulations. The amendment means that the table of fees set out in Part 2, which currently applies to advice and assistance (other than ABWOR) in relation to the 1995 Act, also applies to advice and assistance (other than children's ABWOR) in relation to the 2011 Act.

Children's legal aid – solicitors

Regulation 3 amends the Civil Legal Aid (Scotland) Regulations 1989 ("the 1989 Regulations").

Legal aid work in relation to the 1995 Act is referred to in Schedule 7 to the 1989 Regulations. The Schedule lists the proceedings to which Schedule 5 to the 1989 Regulations applies, and Schedule 5 prescribes the fees allowable to solicitor for providing that legal aid. Regulation 3(6) of the Regulations amends Schedule 7 to insert reference to proceedings under the 2011 Act. The effect of this is that the fees allowable to solicitors for children's legal aid work in relation to the 2011 Act are those set out in Schedule 5 to the 1989 Regulations.

Regulation 3(3) is an exception to the effect of regulation 3(6). It provides that where solicitors are providing automatic children's legal aid under section 28C of the 1986 Act, the fees allowable are not those prescribed in Schedule 5 to the 1989 Regulations but instead are those prescribed in Part 1 of Schedule 3 to the 1996 Regulations – the fees allowable for children's ABWOR. This exception ensures that solicitors doing this legal aid work, which may also be provided by means of a children's ABWOR certificate, will not receive higher fees for doing the same work under a different certificate.

Children's legal aid – Counsel

Regulation 3(4) amends table of fees A in Schedule 4 to the 1989 Regulations to insert reference in the relevant provisions to proceedings under the 2011 Act in relation to the fees allowable for junior and senior counsel fees in the Court of Session. These proceedings include: appeals relating to children's hearings, relevant persons, and contact and permanence orders. The amendments to the table of fees seek to put beyond doubt that the relevant provisions of the table apply to 2011 Act proceedings.

Regulation 3(5)(a) to (d) amends table of fees B in Schedule 4 to the 1989 Regulations to provide for the fees allowable to junior counsel fees in relation to 2011 Act proceedings to be the same as those for proceedings in relation to the 1995 Act.

Regulations 3(5)(a) and (b) amends the table of fees to provide fees for various applications under the 2011 Act: these are:

- to review grounds of determination;
- to vary or terminate a child protection order;
- to extend or vary an interim compulsory supervision order;

- to further extend or vary an interim compulsory supervision order; and
- to review a decision or determination to impose a duty on a local authority.

Regulation 3(5)(c) amends the table of fees to provide fees for junior counsel for hearings or appeals to the sheriff under the 2011 Act. These are:

- hearing of an application to establish grounds;
- application for a review of the grounds for a sheriff's determination;
- appeal to the sheriff against the decision of a children's hearing;
- appeal to the sheriff against a relevant person determination;
- appeal to the sheriff against a decision affecting a contact or permanence order; and
- appeal to the sheriff against a decision to implement secure accommodation authorisation.

The fees for these hearings and appeals are the same as currently prescribed for a hearing or appeal to the sheriff in relation to proceedings under the 1995 Act.

Regulations 3(5)(d) amends the table of fees to provide fees for junior counsel fees for appeals to the Sheriff Principal in relation to proceedings under the 2011 Act. These appeals include appeals in relation to children's hearings, relevant persons, contact and permanence orders, and the review of a requirement imposed on a local authority.

The fees for these appeals will be the same as for appeals to the Sheriff Principal in relation to proceedings under the 1995 Act.

Regulation 3(5)(e) to (g) amends table of fees B in Schedule 4 to the 1989 Regulations to provide for the fees allowable to senior counsel in relation to 2011 Act proceedings in the sheriff court to be, in most cases, the same as those allowable for 1995 Act proceedings.

Regulation 3(5)(e) amends table of fees B to provide fees for various applications under the 2011 Act. These are:

- to vary or terminate a child protection order;
- to extend or vary an interim compulsory supervision order;
- to further extend or vary an interim compulsory supervision order; and
- to review a decision or determination to impose a duty on a local authority.

The table of fees does not prescribe specific fees for senior counsel for applications to the sheriff under the 1995 Act. The fee for the new applications under the 2011 Act has, therefore, been set at 150% of the equivalent junior counsel fee at the recommendation of the Scottish Legal Aid Board.

Regulation 3(5)(f) amends table of fees B to provide for the fees allowable to senior counsel for hearings or appeals to the sheriff under the 2011 Act. These are the same as for an appeal against a decision by a children's hearing or sheriff under the 1995 Act, specifically for:

- hearing of an application to establish grounds
- application for a review of the grounds for a sheriff's determination
- appeal to the sheriff against the decision of a children's hearing
- appeal to the sheriff against a relevant person determination
- appeal to the sheriff against a decision affecting a contact or permanence order
- appeal to the sheriff against a decision to implement secure accommodation authorisation

The fees are the same as those currently prescribed for a hearing or appeal to the sheriff in relation to proceedings under the 1995 Act.

Regulations 3(5)(g) amends the table of fees B to provide for the fees allowable to senior counsel fees for appeals to the sheriff principal under the 2011 Act. These include appeals in relation to children's hearings, relevant persons, contact and permanence orders, and the review of a requirement imposed on a local authority. The fees are the same as those currently prescribed for appeal to the Sheriff Principal in relation to proceedings under the 1995 Act.

Consultation

Drafts of the Regulations were shared with the Scottish Legal Aid Board, the Law Society of Scotland and the Faculty of Advocates for comment.

The Law Society of Scotland suggested that it would be preferable for there to be a fixed fee for children's legal assistance work. There is, however, no historical data which could be used to meaningfully develop a block fee structure. This could be considered once the system has bedded in but a minimum of 2 years of data on which to base such a structure would be required.

Impact Assessments

Equality impacts for the policy were considered as part of the equality impact assessment for the Children's Legal Assistance (Scotland) Regulations 2013, which is attached. No negative impacts were identified.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The impact of this policy on business is that it provides a clear framework for agents and counsel to be remunerated for providing publicly funded legal assistance in respect of 2011 Act hearings and proceedings.

The estimated cost to the Scottish Legal Aid Fund is an additional £0.8m in 2013/14 and £3m in 2014/15. This is the same money as identified in the cost of the Children's Legal Assistance (Scotland) Regulations 2013 and 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
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