

Final Business and Regulatory Impact Assessment

Title of Proposal

Children's Legal Assistance (Scotland) Regulations 2013

Purpose and intended effect

- **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.

- **Objective**

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 legal aid system contributes to the Safer and Stronger Strategic Objective. Particularly, it contributes to the National Outcome of "strong, resilient and supportive communities where people take responsibility for their own actions

and how they affect others” by ensuring that individuals can be held to account for their actions and can enforce their own legal rights through the effective functioning of our civil and criminal courts.

The Children’s Hearings System contributes to the following National Outcomes:

- Our children have the best start in life and are ready to succeed
- Our young people are successful learners, confident individuals, effective contributors and responsible citizens
- We have improved the life chances for children, young people and families at risk
- We have strong, resilient and supportive communities where people take responsibility for their own actions and how they affect others

- **Rationale for Government intervention**

The need for these provisions has come about because of the coming into force of 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.

Consultation

- **Within Government**

The Scottish Legal Aid Board (“the Board”), the Scottish Children’s Reporter Administration (SCRA) and Disclosure Scotland have been consulted in the development of these regulations. Officials from children’s hearings policy and child protection policy within the Scottish Government have also been consulted.

The Board is a non-departmental public body which administers legal aid in Scotland and is accountable to Scottish Ministers. The Board has provided information particularly in relation to the administration of the Legal Aid Fund.

SCRA is a non-departmental body which facilitates the work of Children’s Reporters, deploys and manages staff to carry out that work, and provides suitable accommodation for children’s hearings. Information provided by SCRA has included information regarding the operation of the Children’s Hearings System.

Disclosure Scotland is an executive agency of the Scottish Government which provides potential employers and voluntary sector organisations with criminal history information on individuals applying for posts. Disclosure Scotland has provided information particularly in relation to the Protecting Vulnerable Groups Scheme.

- **Public Consultation**

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

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.

There are subsequent actions outside these Regulations being taken that will address some of the other concerns raised.

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 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.

- **Business**

The representative body for solicitors in Scotland is the Law Society of Scotland (“the Society”). The Society’s work on legal aid issues is led by the criminal and civil legal aid negotiating teams, each being panels of experts in the field and responsible to the Council of the Society. The civil legal aid negotiating team has been consulted in the development of these regulations.

Options

Option 1: Do nothing

This would mean making no regulations in preparation for the implementation of the Children’s Hearings (Scotland) Act 2011. There would be no provision for legal assistance for 2011 Act proceedings in the terms that amendments that Act makes to the Legal Aid (Scotland) Act 1986 set out.

Option 2: Make regulations to provide children’s legal assistance for proceedings under the 2011 Act in line with the provisions of that Act

Regulations providing children’s legal assistance for proceedings under the 2011 Act would:

- 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.

- **Sectors and groups affected**

These measures will largely impact on the Board and those solicitors’ firms providing advice and representation to those with an interest in children’s hearings. Those firms who undertake legal aid work must be registered with SLAB to do so. There will also be an impact on applicants for children’s legal assistance.

- **Benefits**

Option 1: Do nothing

This option would have minimal impact on the Board, thereby potentially saving £0.8m in 2013/14 and £3m in 2014/15.

Option 2: Make regulations to provide children’s legal assistance for proceedings under the 2011 Act in line with the provisions of that Act

Making provision for legal assistance for 2011 Act proceedings would allow those appearing at these proceedings to receive legal assistance if eligible, providing access to justice. The agent could be remunerated for the cost of doing so.

- **Costs**

Option 1: Do nothing

There would be no significant cost to the Board. Solicitors would not be able to provide publicly funded legal assistance for these proceedings, which would mean that those appearing would either have to pay privately for representation or not be represented by a solicitor. There would be a possible reputational cost to the Scottish Government for not implementing the legal assistance provisions of the 2011 Act.

Option 2: Make regulations to provide children’s legal assistance for proceedings under the 2011 Act in line with the provisions of that Act

The Board forecasts that children's legal assistance for 2011 Act proceedings will cost an additional £0.8m in 2013/14 and £3m in 2014/15. This has been included forecasts of expenditure already provided to the Scottish Government. The Board will also have to manage and administer the new provisions within their reducing grant in aid. The Board is also providing guidance for solicitors as regards the application of the children's legal assistance provisions.

There may be some impact on solicitors' firms in familiarising themselves with the new regulations. While there is an impact on solicitors' firms in familiarising themselves with the new Children's Hearings System as a whole, the impact for the regulations themselves is expected to be relatively small as they closely reflect existing provision for civil legal aid.

Scottish Firms Impact Test

As stated in the consultation section, consultation took place with the Society, which negotiates with Government on behalf of the profession. The Society raised some points on drafting, and on delays and ambiguity in the application process. These are covered in more detail in the Public Consultation section.

The profession includes solicitors employed in firms, partners and sole practitioners. If there is any impact as a result of these proposals, the majority of providers affected is likely to be small providers (both small and micro sized businesses) due to the dominance of small legal services providers in the legal aid market. In the Board's 2010 solicitor survey¹, partners were asked how many solicitors their firm employed across Scotland. Almost half of the firms (48%) employed 2 to 4 solicitors; and a total of 43 (19%) of the partners who took part in the survey were sole practitioners.

An Equality Impact Assessment has been carried out on the proposals for children's legal assistance. The Scottish Government does not believe the regulations will give rise to any adverse impacts on groups with protected characteristics as defined in the Equality Act 2010.

- **Competition Assessment**

In our view, having applied the Office of Fair Trading competition filter, the proposal will not impact on competition within the legal aid market. The regulations do not directly or indirectly limit the number or range of suppliers. They do not limit the ability of suppliers to compete or reduce suppliers' incentives to compete vigorously.

It is anticipated that those seeking legal representation shall (in certain circumstances) be able to instruct the solicitor of their choice, as long as the solicitor/firm are registered with SLAB to provide children's legal assistance.

- **Test run of business forms**

There should be no requirement for new forms. All legal aid applications are currently submitted on line through the Board's Legal Aid Online system. Applications for children's legal assistance will also be made online.

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http://www.slab.org.uk/export/sites/default/common/documents/about_us/research/documents/FinalReporttoSLAB.pdf

Legal Aid Impact Test

The Board forecasts that children's legal assistance for 2011 Act proceedings will cost an additional £0.8m in 2013/14 and £3m in 2014/15. This has been included forecasts of expenditure already provided to the Scottish Government.

There is, however, still significant uncertainty around the financial impact on the Legal Aid Fund, particularly in relation to ABWOR volumes and the level of additional demand to undertake this work. The Board is modelling the potential impact of some areas of high uncertainty.

It is unlikely that a clearer picture will emerge until the 2011 Act commences and the Board will continue to refine its forecast going forward.

Enforcement, sanctions and monitoring

The proposals will be enforced through secondary legislation. The proposals do not create any new enforcement or monitoring mechanisms but ties into existing mechanisms. The Board will monitor the implications of these measures and has responsibility for administering the Scottish Legal Aid Fund.

Implementation and delivery plan

The policy will be implemented by the Board. It is intended that the regulations will come into force on 24 June 2013. The Board is fully aware of this timescale.

- **Post-implementation review**

The Scottish Government and the Board will review the impact of this legislation within 10 years through consideration of analysis of data which is collected routinely by the Board.

Summary and recommendation

It is recommended that regulations be made to provide children's legal assistance for proceedings under the 2011 Act in line with the provisions of that Act. This allows for implementation of the 2011 Act as intended and enables those who would not otherwise be able to afford it, to have legal advice and representation at 2011 Act proceedings where that is appropriate.

- **Summary costs and benefits table**

Option	Total benefit per annum: - economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
1	<p><u>Legal aid solicitors</u> None.</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> None.</p>	<p><u>Legal aid solicitors</u> None.</p> <p><u>Legal aid applicants</u> There would be no provision for legal assistance in 2011 Act proceedings. Those appearing would either have to pay privately for representation or not be represented by a solicitor.</p> <p><u>Scottish Government</u> Possible reputational cost to the Scottish Government for not implementing the legal assistance provisions of the 2011 Act.</p>
2	<p><u>Legal aid solicitors</u> Could receive payment for providing publicly-funded advice and representation at 2011 Act proceedings.</p> <p><u>Legal aid applicants</u> Could receive publicly-funded legal advice and representation at 2011 Act proceedings.</p> <p><u>Scottish Government</u> The provisions of the 2011 Act as regards legal assistance would be implemented.</p>	<p><u>Legal aid solicitors</u> Familiarisation with the provisions of the children's legal assistance regulations.</p> <p><u>Legal aid applicants</u> None.</p> <p><u>Scottish Government</u> Estimated cost of £3m per year on the Scottish Legal Aid Fund.</p>

Declaration and publication

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Kenny MacAskill, Cabinet Secretary for Justice

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