

CHILDREN'S HEARINGS (SCOTLAND) ACT 2011

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 19 – Legal Aid and Advice

Section 191 – Legal aid and advice

278. This section amends the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). It inserts into the 1986 Act two new Parts - Parts 5A and 5B. Part 5A provides for children’s legal aid to be made available in connection with Children’s Hearings in limited circumstances and in respect of court proceedings in connection with Children’s Hearings. Part 5B provides for the registration and quality assurance of solicitors providing children’s legal aid and assistance by way of representation in connection with Children’s Hearings.
279. The following paragraphs discuss the sections which section 191 inserts into the 1986 Act.

New Part 5a – Children’s Legal Aid

280. Part 5A makes provision for children’s legal aid. Legal aid in respect of court proceedings connected with Children’s Hearings was previously made available under section 29 of the 1986 Act. Part 5A replaces section 29. Schedule 6 of the Act provides for the consequent repeal of section 29.

Section 28B – Children’s legal aid

281. This section defines the scope of children’s legal aid. Subsection (2) defines it as representation (and such assistance as is usually incidental to representation) by a solicitor and, where appropriate, by counsel in respect of the proceedings specified in subsection (3). The proceedings specified in subsection (3) are:
- (a) proceedings before a sheriff for variation or termination of a child protection order;
 - (b) proceedings before a Children’s Hearing or Pre-Hearing Panel—
 - (i) following the making of a child protection order;
 - (ii) where the hearing or Pre-Hearing Panel considers it might be necessary to make a compulsory supervision order including a secure accommodation authorisation;
 - (iii) 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.

282. Subsection (4) defines, by reference to this Act, the terms “compulsory supervision order”, “Pre-Hearing Panel” and “secure accommodation authorisation” for the purposes of the 1986 Act as amended.

Section 28C – Circumstances where children’s legal aid automatically available

283. This section provides for children’s legal aid to be made available to a child automatically, that is without application of the merits and means tests discussed in relation to section 28D, in limited circumstances. Those circumstances are where:

- (a) there are proceedings before a sheriff for variation or termination of a child protection order;
- (b) the hearing follows the making of a child protection order;
- (c) a hearing or Pre-Hearing Panel considers it may be necessary to authorise the placement of the child in secure accommodation; or
- (d) the hearing follows the child being apprehended by the police if it has been decided that criminal proceedings are not going to be pursued.

284. Subsection (3) confers power on the Scottish Ministers to extend or restrict, by regulations, the circumstances in respect of which children’s legal aid is automatically available.

Section 28D – Availability of children’s legal aid: child

285. This section deals with court proceedings under Parts 10 and 15 of the Act. Subsection (2) provides for children’s legal aid to be available to the child in respect of proceedings before a sheriff where the Scottish Legal Aid Board (“SLAB”) is satisfied that the conditions in subsection (3) are met. The conditions in subsection (3) take account of both the merits of the application and the applicant’s means. The conditions are that it is in the child’s best interests that children’s legal aid is made available and that it is reasonable in the circumstances of the case for the child to receive children’s legal aid. The means test requires SLAB to consider whether the expenses of the case can be met by the child, without causing undue hardship to the child. The Scottish Ministers may use their existing powers under section 42(2) of the 1986 Act in relation to civil legal aid and advice and assistance in all contexts to make detailed provision in regulations setting out what is and is not to be taken into account when assessing the means of a child or relevant person in connection with an application for children’s legal aid.

286. Subsection (4) provides for children’s legal aid to be available to the child in respect of appeal proceedings before the sheriff principal or the Court of Session where the conditions in subsection (5) are met. The conditions are that SLAB is satisfied that the merits and means tests described in the preceding paragraph are met and, further, that the child has substantial grounds for making or responding to the appeal.

Section 28E – Availability of children’s legal aid: relevant person

287. This section mirrors section 28D, providing for children’s legal aid to be available to the relevant person (as opposed to the child) in respect of proceedings before a sheriff for variation or termination of a child protection order and court proceedings connected with a Children’s Hearing.

288. Subsection (2) provides for children’s legal aid to be available to the relevant person in respect of proceedings before a sheriff where SLAB is satisfied that the conditions in subsection (3) are met: that it is reasonable in the circumstances of the case for children’s legal aid to be made available to the relevant person; and that the expenses of the case cannot be met without causing undue hardship to the relevant person. These are similar to the merits and means tests set out in section 28D(3) for determining whether children’s legal aid should be made available to the child, save that section 28E does not require it to be in the best interests of the child that children’s legal aid be made available to the relevant person.

289. Subsection (4) provides for children's legal aid to be available to the relevant person in respect of appeal proceedings before the sheriff principal or the Court of Session where the conditions in subsection (5) are met. The conditions are that SLAB is satisfied that the merits and means tests described in the preceding paragraph are met and, further, that the relevant person has substantial grounds for making or responding to the appeal. Subsection (6) defines "relevant person", for the purposes of the relevant sections to be inserted into the 1986 Act, so that it has the same meaning which it is given in this Act.

Section 28F – Availability of children's legal aid: appeals relating to deemed relevant person

290. This section provides for children's legal aid to be available for court proceedings in which an individual is seeking deemed relevant person status. It also allows children's legal aid to be made available to an individual who was, but has ceased to be, deemed to be a relevant person due to a decision of a hearing under section 142. By virtue of section 142(4)(b) the individual is to continue to be treated as a relevant person for the purpose of any appeal to the court against the hearing's determination in respect of the compulsory supervision order. For the purpose of that appeal, this section allows children's legal aid to be made available to the person whose deemed relevant person status has been removed. For these limited purposes, children's legal aid will be made available to the individual concerned subject to the same eligibility criteria which are to apply in relation to relevant persons.

Section 28G – Conditions

291. This section allows SLAB to make a grant of children's legal aid, under section 28D, 28E, 28F or any provision that may be made in regulations under section 28L of the 1986 Act, subject to such conditions as it considers expedient. It allows conditions to be imposed at any time, including at the time SLAB first makes legal aid available.
292. Section 28G replicates the effect of the provision which was to become section 29(5A) of the 1986 Act. Section 29(5A) was to be inserted into the 1986 Act by section 72 of the Legal Profession and Legal Aid (Scotland) Act 2007. However, section 29 of the 1986 Act (which is the provision under which legal aid was previously made available in relation to Children's Hearings related court proceedings) is to be replaced by sections 28D and 28F. Schedule 6 of the Act therefore provides for the repeal of section 29 of the 1986 Act and the uncommenced provisions of the Legal Profession and Legal Aid (Scotland) Act 2007 which would amend it.

Section 28H – Board to establish review procedures

293. Section 28H(1) places a duty on SLAB to establish a procedure for reviewing their refusal of an application for children's legal aid. Subsection (2) obliges SLAB to establish a procedure for reviewing any conditions which it imposes in relation to a grant of children's legal aid under section 28G. Like section 28G, section 28H replicates the effect of provisions which were to be inserted into section 29 of the 1986 Act by virtue of section 72 of the Legal Profession and Legal Aid (Scotland) Act 2007.

Section 28J – Board's power to require compliance with conditions

294. This section enables SLAB to impose conditions on a person receiving children's legal aid. The conditions imposed will be for the purpose of enabling SLAB to verify that the legal aid recipient continues to be entitled to receive it throughout the duration of the case.

Section 28K – Contributions to the Fund

295. This section enables SLAB to levy contributions towards the expenses of the case on those receiving children's legal aid. Contributions received by SLAB will be paid into the Scottish Legal Aid Fund. Subsection (2) provides that it is for SLAB to determine the amount of any contribution payable.
296. Subsection (2)(a) provides that any contribution in respect of disposable income is to be levied on disposable income exceeding the prescribed statutory threshold (£3,355 per annum) and that the amount of that contribution is not to exceed one-third of the

amount by which the person's disposable income exceeds the prescribed threshold. It further provides, together with subsection (3), for the prescribed statutory threshold and the maximum contributable proportion (or amount) of disposable income to be varied by regulations. Subsection (2)(b) makes similar provision about the contribution which may be levied in respect of disposable capital. Specifically, it is only to be levied on disposable capital exceeding a prescribed statutory threshold (£7,504) and that the amount of the contribution is not to exceed the amount by which the person's disposable capital exceeds the prescribed threshold. It further provides, together with subsection (3), for the prescribed statutory threshold and the maximum contributable proportion (or amount) of disposable capital to be varied by regulations.

Section 28L – Power of Scottish Ministers to modify circumstances in which children's legal aid to be available

297. This section enables the Scottish Ministers, by regulations, to extend or restrict the proceedings before a Children's Hearing in respect of which, and the persons to whom, children's legal aid is available.
298. Subsections (2) and (3) set out the eligibility criteria which must be imposed by any regulations made under section 28L which make children's legal aid available to the child concerned for proceedings before a Children's Hearing. The conditions in subsection (3) are that representation may be made available to the child concerned in cases where either there is a possibility that the hearing might make a compulsory supervision order that contains a secure accommodation authorisation (or where such a compulsory supervision order is being reviewed) or where representation is considered necessary to ensure the child's effective participation in the proceedings.
299. Subsection (5) prescribes the eligibility criteria which must be applied by regulations extending the availability of children's legal aid to a person other than the child for proceedings before a Children's Hearing. It requires that the conditions in subsection (6) are met. The conditions in subsection (6) are that SLAB must be satisfied that the person will only be able to effectively participate in the proceedings if he or she is legally represented. When making that determination SLAB must take into account the matters specified in subsection (4). Subsection (4) provides that when determining whether the child, or as the case may be the appropriate person, is able to participate effectively in the proceedings SLAB should take into account the assistance which may be afforded by an "accompanying person". Subsection (7) defines "accompanying person" for those purposes by reference to rules made under section 177 of the Act. Subsection (8)(b) enables the Scottish Ministers, by regulations, to modify the definition of "accompanying person".
300. In addition to enabling amendment of the definition of "accompanying person" in subsection (7), subsection (8) also enables the Scottish Ministers to amend, by regulations, the list of matters prescribed in subsection (4) which SLAB is obliged to take into account when determining whether the child, or as the case may be relevant person, will be able to effectively participate in the proceedings.

New Part 5b – Children's Legal Assistance

301. Part 5B provides for the registration and quality assurance of solicitors providing children's legal assistance. Schedule 5 of the Act inserts into section 41 of the 1986 Act (the 1986 Act's interpretation section) a definition of "children's legal assistance". It is defined as comprising both children's legal aid and assistance by way of representation provided in relation to a Children's Hearing or connected court proceedings.

Section 28M – Register of solicitors and firms eligible to provide children's legal assistance

302. This section requires SLAB to establish a register of solicitors eligible to provide children's legal assistance and the firms with which those solicitors are associated. Subsection (2) provides that solicitors who operate as sole practitioners must be registered both as solicitor and firm. Subsection (3) makes registration a pre-condition

for any solicitor who wants to provide children's legal assistance. Subsection (4) provides that a registered solicitor will only be allowed to provide children's legal assistance when working in connection with a registered firm.

303. Subsection (5) deals with registration requirements in relation to solicitors directly employed by SLAB. It provides that SLAB can only employ a solicitor to provide children's legal assistance who is personally registered to do so. However SLAB is not to be regarded as a firm and, as such, need not itself be registered. Subsection (6) allows the Scottish Ministers to specify, in regulations, the qualifications to be required of solicitors seeking to be registered to provide children's legal assistance.
304. Subsection (7) provides for section 25A(5) to (15) of the 1986 Act to apply in relation to the register established under subsection (1) as those provisions apply in relation to the register established under section 25A for the purposes of criminal legal assistance. Section 25A was inserted into the 1986 Act by the Crime and Punishment (Scotland) Act 1997.
305. Section 25A(5) allows SLAB to specify the form which an application for registration must take. Section 25A(6) requires SLAB to consult the Law Society of Scotland and such other persons as it considers appropriate before determining whether to register a solicitor or firm. Section 25A(7) provides that SLAB is not to consider a solicitor's application for registration unless the firm with which he or she is connected is either already registered or has also applied for registration. If the solicitor is connected with more than one firm, section 25A(15) provides that only one of those firms needs to be registered. Section 25A(8) requires SLAB, on receipt of an application for registration, to make such enquiries as it thinks appropriate to determine whether the solicitor meets the requirements expected of a registered solicitor and authorises SLAB to use its powers under section 35A of the 1986 Act to require the solicitor or firm to produce information or documents for that purpose. Section 25A(9) provides for SLAB to enter the solicitor's name on the register where SLAB is satisfied that it is appropriate to do so. Section 25A(10) prohibits SLAB from entering the name of a solicitor on the register where the solicitor is connected with a firm which is not already entered on the register. Again, section 25A(15) provides that if the solicitor is connected with more than one firm, only one of the firms needs to be registered. Section 25A(11) provides that the name of any registered firm with which the solicitor is connected should appear next to his or her name on the register. Section 25A(12) requires that where a solicitor's application for registration is refused SLAB must notify the unsuccessful applicant and give reasons for its refusal. Section 25A(13) allows an unsuccessful applicant for registration 21 days within which to appeal SLAB's decision to the Court of Session. Section 25A(14) clarifies that such an appeal may be on questions of fact or law and provides that, at the conclusion of the proceedings, the court may make such order as it thinks fit.
306. Subsection (8) sets out the modifications which will apply to sections 25A(5) to (15) of the 1986 Act in relation to the register for children's legal assistance. In essence it ensures that terms relevant to the quality assurance regime for criminal legal assistance are construed as if they were references to the equivalent aspects of the quality assurance regime for children's legal assistance.

Section 28N – Code of practice

307. This section requires SLAB to establish a code of practice which solicitors will be required to abide by when providing children's legal assistance.
308. Subsection (3) applies section 25B(3) to (8) of the 1986 Act, which deals with the code of practice for providers of criminal legal assistance, to the code of practice which will be established under section 28N. Section 25B(3) requires SLAB to consult the Law Society of Scotland and such other persons as it considers appropriate on a draft of the code of practice. Section 25B(4) requires SLAB to send the draft code to the Secretary of State for approval. The function of the Secretary of State in this regard now rests with the Scottish Ministers. Section 25B(5) allows the Scottish Ministers to approve the draft

code with or without modification. Section 25B(6) provides that the Scottish Ministers, having approved the draft code, must return it to SLAB and give SLAB instruction on when it is to come into force and the manner of its publication. Section 25B(7) requires SLAB to carry out the Scottish Ministers instructions under section 25B(6) and also obliges SLAB to make copies of the code available on request (SLAB may charge for doing so). Section 25B(8) requires SLAB to keep the code under review and to revise it as necessary. The same procedures apply to revisions of the code as apply to preparing the code for the first time.

Section 28P – Duty to comply with code of practice

309. This section requires registered solicitors and firms to adhere to the code of practice which is established under section 28N. Subsection (2) requires SLAB to monitor the compliance of solicitors and firms with the code of practice. Subsection (3) authorises SLAB to use its powers under sections 35A and 35B of the 1986 Act in doing so. Sections 35A and 35B were inserted into the 1986 Act by the Crime and Punishment (Scotland) Act 1997.
310. The powers conferred under section 35A of the 1986 Act include the power to require a solicitor to provide information and documents relating to the provision of children's legal assistance. Any person who fails to comply with the requirement shall be guilty of an offence and liable to a fine. The powers conferred under section 35B of the 1986 Act provide for SLAB to apply for a warrant to search premises or take possession of documents. Any person who intentionally obstructs such a warrant shall be guilty of an offence and liable to a fine.

Section 28Q – Non-compliance with code of practice

311. This section applies section 25D of the 1986 Act in relation to the quality assurance regime for children's legal assistance as it applies in relation to the quality assurance regime for criminal legal assistance.
312. Section 25D of the 1986 Act requires SLAB to investigate registered solicitors or firms where it suspects they are not complying with the code of practice. It authorises for that purpose use of the powers in sections 35A and 35B of the 1986 Act (discussed in relation to section 28P). Where SLAB finds a solicitor or firm has not been complying with the code of practice it may set a deadline for them to resolve the defect in their practice. If SLAB is still not satisfied as to compliance it may remove the solicitor or firm from the register and the solicitor will be required to allocate any live children's legal assistance work to another solicitor who is registered. SLAB must give reasons for its decision to remove a solicitor or firm from the register and that decision is subject to appeal to the Court of Session, on points of fact or law, within 21 days.

Section 28R – Further provision as to removal of name from register

313. This section deals with situations in which a solicitor included on the register becomes connected with a firm which is not registered and, as a result, he or she is no longer connected with any registered firm. In that event, subsection (2) obliges SLAB to remove the solicitor's name from the register.
314. Subsection (3) provides for section 25D(6) to (9) of the 1986 Act to apply where a solicitor's name is removed from the register under section 28R(2) as it applies in relation to the removal of a solicitor's name from the register for criminal legal assistance. That means the solicitor will be required to transfer any children's legal assistance work to a solicitor who is registered. SLAB must give the solicitor reasons for its decision to remove his or her name from the register and the solicitor will have 21 days from the date of receiving SLAB's reasons to appeal the decision to the Court of Session.

Section 28S – Publication of register etc.

315. This section applies section 25F of the 1986 Act to the register to be established under section 28M as it applies in relation to the register for criminal legal assistance established under section 25A of the 1986 Act. Specifically, it requires SLAB to

*These notes relate to the Children's Hearings (Scotland) Act
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make available for inspection, without charge: the register of those solicitors and firms entitled to provide children's legal assistance; its decisions refusing applications for entry on the register; and its decisions to remove the names of solicitors and firms from the register. Furthermore, it requires SLAB to send a copy of the register to the Secretary of the Law Society of Scotland on an annual basis and to notify the Law Society of any changes made to the register during the course of a year.