

EXECUTIVE NOTE

LEGAL AID REGULATIONS

The Advice and Assistance (Scotland) Amendment Regulations 2007 SSI/2007/60

The above instrument will be made in exercise of the powers conferred on the Scottish Ministers by section 12(3), 33(2)(b), 3(a), (c) and (f) and 36(1), 2(a), (c), (ca) and (d) of the Legal Aid (Scotland) Act 1986. The instrument is subject to the negative resolution procedure.

Policy Objectives

Civil Advice and Assistance

The purpose of the instrument is to introduce a new system for civil advice and assistance. It forms part of a package of regulations. It amends the Advice and Assistance (Scotland) Regulations 1996 as regards the advice and assistance scheme for civil matters and the procedures by which some such applications are made. The regulations will come into effect on different dates. They will, in the main, come into force and apply to applications for advice and assistance made in relation to civil matters on or after 1 May 2007.

Civil advice and assistance is available to persons in relation to matters of Scots law where the financial eligibility criteria are met. These matters are determined by the solicitor and this will not change by the reforms under the package of regulations. There are a number of changes being introduced to give effect to the new scheme.

The minimum fee arrangement is taken away under the new scheme. Advice and assistance can continue to be given for such matters through the introduction of a diagnostic interview as a stage in the application process. The diagnostic interview will allow a solicitor to determine whether the subject matter is a distinct category as agreed with the Law Society of Scotland and appearing on a list in which case it shall be passported into the advice and assistance scheme (subject to the standard initial authorised limit of expenditure provided by the Advice and Assistance (Financial Limit) (Scotland) Regulations 1993).

In a case where the subject matter is not a distinct matter and where, following the diagnostic interview, the applicant and the solicitor consider that it should be treated as if it were on the list of distinct matters the Board can at its discretion, following application made to it, determine that it may be passported into the advice and assistance scheme. In cases where the work undertaken by the solicitor only relates to work done by way of a diagnostic interview the solicitor will only be paid the initial limit of expenditure for the diagnostic interview. No application can be made by a solicitor seeking an increase to this initial limit.

Regulation 5 of this instrument, where it introduces new regulation 8A and B in the Advice and Assistance (Scotland) Regulations 1996, provides the detail of the new scheme. Under the scheme, SLAB shall determine and issue as guidance the subject matters for civil advice and assistance which shall be treated as distinct matters. The list as currently agreed is attached as Annex A. SLAB shall only be able to determine the matters that are or are not to be treated as distinct matters following consultation with the Law Society of Scotland (LSS).

Matters that are determined as being distinct may not be treated by SLAB as no longer being distinct without the Scottish Ministers' consent.

Approval of any application for civil advice and assistance for a matter which is a distinct matter includes all matters reasonably ancillary thereto. Such ancillary matters may comprise distinct matters or matters which are not distinct. Where the subject matter of a case is not determined to be distinct, a diagnostic interview is introduced as a stage in the application process for the solicitor to identify the subject matter in question and to provide advice as appropriate. Where an applicant seeks advice and assistance for more than one subject matter, none of which are determined to be distinct, the solicitor shall approve one grant of advice and assistance for all such matters. Where a solicitor considers that a case, the subject matter of which is not determined to be distinct, should be treated as if it were then application may be made to SLAB for the subject matter to be so treated. Where the applicant seeks advice and assistance for more than one subject matter relating to distinct matters and to matters which are neither distinct nor reasonably ancillary to the distinct matters, then a separate record of the advice and assistance provided by way of a diagnostic interview is required to be kept by the solicitor.

Regulation 6 of this instrument provides that no second or further diagnostic interview is allowable during the period of three months immediately following the approval of advice and assistance for the purpose of a diagnostic interview unless exceptional circumstances exist and on cause shown in which case application may be made to SLAB for consideration.

Regulation 8 of this instrument provides where a diagnostic interview has taken place, a separate account for this work must be submitted to SLAB within three months of the date when the giving of the advice and assistance was completed. No supplementary account for advice and assistance given in connection with diagnostic interviews is allowable.

Regulation 9 of this instrument provides that the minimum fee under paragraph 2 of Part II of the Table of Fees in Schedule 3 to the Advice and Assistance (Scotland) Regulations 1996 shall not be allowable in respect of advice and assistance given for civil matters.

Capital disregard limit in matrimonial cases

This instrument also, by regulation 7, makes an increase to the capital disregard in respect of a solicitor's right to prior payment of fees and outlays out of any property recovered or preserved for an applicant in respect of advice and assistance by virtue of certain family proceedings. It increases the capital disregard limit by the Retail Price Index 3.6% from £4,653 to **£4,821**. This increase is broadly in line with inflation. This regulation will apply only in relation to any case where any application for advice and assistance, including those not relating to civil matters, is made on or after 9 April 2007.

Consultation

The Scottish Executive conducted a consultation in relation to the civil advice and assistance reforms in late 2005/06 since when the scheme has been fully discussed with the Law Society of Scotland and received approval. The changes to the capital disregard limit in matrimonial cases is part of the annual uplifting of financial eligibility where no consultation is normally carried to this detailed secondary legislation.

Financial Implications

The uprating is only keeping the disposable income and disposable capital limit up-to date and therefore it is expected that the expenditure on the Legal Aid Fund will remain unchanged. The changes in the civil advice and assistance system are being introduced to make the system more transparent and efficient.

Gillian Mawdsley
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ANNEX A

A Family/Matrimonial Related

- Divorce;
- Separation;
- Variation;
- Contact;
- Aliment/Child Support Agency;
- Residence;
- Adoption (including Freeing Order for Adoption);
- Matrimonial Homes;
- Child Abduction/Hague Convention applications;
- Co-habitee rights under family law
- Civil Partnerships

Other Processes

- Interdict (including interdicts under Matrimonial Homes (Family Protection) (Scotland) Act 1981);
- Interdict (to include "other", "matrimonial" and "protection from abuse" interdicts and including non-harassment orders);
- Reparation;
- Breach of Contract;
- Contempt of Court (including minutes for failure to obey);
- Fatal Accident Inquiry;
- Judicial Review;
- Reduction;
- Declarator;
- Bankruptcy/Petition by Debtor;
- Implement;
- Delivery;
- Summary Application;
- General Defence to any Action (i.e. where a client is in receipt of a writ);
- Criminal Injuries Compensation Agency;
- Appeals to Courts and Tribunals;
- Statutory Discrimination;
- Restoration of driving licence.
- Anti Social Behaviour Orders
- Sexual Offences Prevention Orders
- Proceeds of Crime

Executry Related

- Wills;
- Executries;

Housing Related

- Recovery of Heritable Property (including Eviction and Mortgage Rights Acts);
- Conveyancing;
- Division & Sale;
- Landlord and Tenant;
- Heritable Rights;
- Homelessness.

Children's Related

- Parts I, Chapter 1 of Part 11 and III of the Children's (Scotland) Act 1995;
- Part II of the Children's Scotland Act 1995;

Social Welfare Related

- Immigration! Asylum;
- Mental Health;
- Adults with incapacity;
- Benefit Appeals/Reviews;
- Employment;
- Education;
- Debt (where debts exceed £500, and the advice does not include debt rescheduling and re payment plans);
- Community Care - assessment of need, eligibility/charging for services and direct payments.