**RESPONSE TO THE SHERIFF COURT RULES COUNCIL’S CONSULTATION ON PROPOSALS FOR PROCEDURAL RULES IN THE SHERIFF COURT FOR THE CHILDREN’S HEARINGS (SCOTLAND) ACT 2011**

**BY THE SCOTTISH LEGAL AID BOARD**

**31 AUGUST 2012**

**Introduction**

The Scottish Legal Aid Board (“the Board”) was set up in 1987 to manage legal aid in Scotland. Legal aid allows people who would not be able to afford it to claim help for their legal problems. The Board is an independent non-departmental public body responsible to the Scottish Government. The Board’s main functions are to manage the Legal Aid Fund (“the Fund”) and advise Scottish Ministers on the current operation and development of legal aid provisions.

Accordingly, the Board welcomes the opportunity to respond to this Consultation. Please note however that the Board’s response is limited to a certain number of questions only which either affect the Board directly or which could have legal aid implications.

**Question 2: Should there be further provision for the role of a curator *ad litem* in applications under the 2011 Act?**

**Question 4: Are you of the view that procedures for appointing a safeguarder as set out in Rule 3.7 are sufficient?**

In terms of these Rules it appears that Rule 3.8 of the current Child Care and Maintenance Rules 1997 will remain unchanged. Therein, a safeguarder appointed shall have all the powers and duties at common law of a curator *ad litem* in respect of the child. Therefore, it is unclear why a sheriff would appoint a curator *ad litem* in respect of a child when the appropriate statutory representative to appoint would be a safeguarder. It is further noted from the draft rules that paragraph 1 of Rule 3.7 (Appointment of Safeguarder) is being amended so that a sheriff is prevented from appointing another safeguarder where the hearing has appointed one and it is understood from the Government that the safeguarder appointed by the hearing will remain in office until the conclusion of the case.

It is assumed that this is aimed at ensuring consistency of appointment and to prevent a child from being exposed to and questioned by further unfamiliar adults.

It is submitted that where amended Rule 3.7(1) is relevant and a safeguarder has been appointed by the hearing there would be nothing to prevent a sheriff, as the rules currently stand, from appointing a curator *ad litem* to represent the child also. The child would in such circumstances then have two representatives namely a safeguarder and a curator *ad litem* who would have rights to attend and make representations at court and panel hearings.

It is submitted that this would not be in the child’s best interests. The number of times a child is interviewed should be kept to a minimum and having two representatives (who would have exactly the same roles and responsibilities as per Rule 3.8) would appear unnecessary and would inevitably lead to increased court time, potential delay in the decision making process and increased costs to the Scottish Court’s administration, the Scottish Children’s Reporters administration and the Legal Aid Fund if one or all of the parties was in receipt of children’s legal aid for the proceedings.

It is suggested therefore that the rules be further amended to prevent the dual appointment of a safeguarder and a curator *ad litem* to represent a child in the proceedings.

It should also be noted that there is currently no statutory payment mechanism for curators *ad litem*. A minority number of curators *ad litem* in Scotland are not practising solicitors. If a curator *ad litem* is appointed by the sheriff to represent the child in proceedings under the 2011 Act then unless a curator appoints a separate solicitor to act for the child where they conclude that legal representation is indeed necessary for the child (and that solicitor applies for and is granted children’s legal aid) then there is no statutory payment source for such an officer.

It should be further noted in this respect that it appears from these draft rules that Rule 3.19 will remain unchanged which means that a sheriff could not make an award of these expenses to any party in the proceedings.

In terms of the Legal Aid Scheme, fees can only be paid to solicitors and, where appropriate, counsel who provide legal services to an individual.

The Government are however introducing a statutory payment scheme for safeguarders who are appointed to represent a child in these proceedings (see draft Regulation 10 of the Safeguarders Panel Regulations 2012).

In conclusion, it is accepted that a common law curator *ad litem* will be required to be appointed for an incapable adult in these proceedings and that in the absence of a statutory payment scheme being introduced by the Government payment difficulties regarding such officers will remain.

However, it is still submitted that the appropriate officer to represent a child in these proceedings should be a statutory safeguarder. It is noted that the draft rules as they currently stand would not prevent the appointment of a curator *ad litem* to the child instead of, or as well as, a statutory safeguarder. Accordingly, due to the reasons stated above, it is suggested that the rules be further amended to prevent such a dual appointment.

**Question 5: Are you of the view that the terms of Rule 3.8 of the Act of Sederunt (Child Care and Maintenance Rules) 1987 remain appropriate? If not, please provide details as to how this rule should be amended.**

The Board concludes that in order to ensure consistency of representation throughout Scotland and to avoid the need to appoint a curator *ad litem* in addition to a safeguarder already appointed if the rules are not further amended to prevent this, then paragraph (a) which states that a safeguarder appointed in an application shall have the powers and duties at common law of a curator *ad litem* in respect of the child must remain in place.

**Question 6: Should Rule 3.22 which sets out the provisions for applications for evidence of submissions by live link, also be applicable to proceedings under the 1995 Act?**

Giving evidence through a live link invariably produces cost savings to the Legal Aid Fund if the witness giving evidence in this manner is a witness of a party who is in receipt of legal aid. The Board would therefore be in favour of extending this rule to all proceedings including Exclusion Orders which will remain in force under the 1995 Act.

**Question 8: Rule 3.45 sets out the fast track procedures which may operate within the first seven days of the application being lodged. The Sheriff Court Rules Council would welcome views on the practical implications of the application of Rule 3.45.**

In terms of S191 of the 2011 Act it will be noted that children’s legal aid will be available to a child and a relevant person (by inserting a new S28D and S28E into the Legal Aid (Scotland) Act 1986). This will be subject however to a means (financial) and merits test.

It is anticipated that if a solicitor submits a legal aid application to the Board as soon as a referral has been made by the Principal Reporter to the court then due to our online application system legal aid should be in place within the seven days.

If there is however any problem such as the applicant being unable to provide the necessary financial vouching to satisfy the financial test then the anticipated legal aid regulations that are currently being drafted by the Government will allow the Board to grant legal aid in circumstances of “special urgency” which this fast track procedure could well fall under.

The Board does not anticipate therefore any delays in this expedited process due to the absence of legal aid cover. This of course assumes that the solicitor acting for the child and/or relevant person will make the correct application timeously to the Board and provide the required information and vouching to support the statutory means and merits tests laid down by statute.

**Question 10: Are any rules required in respect of leave to appeal in frivolous or vexations appeals under Section 159 of the 2011 Act?**

If a frivolous or vexatious litigant wishes to appeal a hearings decision within the 12 month period where leave to appeal to do so was required, it would still be open to such an appellant to seek children’s legal aid for the appeal proceedings (again in terms of S191 of the 2011 Act which inserts a new S28D and S28E into the Legal Aid (Scotland) Act 1986).

One of the statutory tests the applicant would require to satisfy would be that the application was “reasonable in the particular circumstances of the case”.

Unless the applicant advised the Board in their application for legal aid that their previous appeal had been held to be frivolous or vexatious by a sheriff then the Board would not be aware of this fact. This fact could have a significant bearing on deciding the reasonableness test.

Accordingly, the Board would welcome a court rule obliging the court to notify the Board of the name, date of birth and address of the appellant along with the sheriff court and date when the sheriff held the appeal to be frivolous or vexatious.

**Question 11: Should there be provision in the rules for an application to be made to the court which has jurisdiction over the child? What in your view would be the advantage and disadvantage of such a provision?**

Rules regarding jurisdiction would in the Board’s opinion provide clarity and prevent unnecessary legal aid costs being spent on transferring cases to the correct jurisdiction where applications were erroneously made to the wrong sheriff court.

**Question 12: Should there be provision in the rules for the transfer of cases from one sheriff court to another, on cause shown, and should any criteria be specified for such a transfer?**

The Board submits that there should be such provision but only on cause shown to prevent frequent and unnecessary transfers for minor convenience reasons only.

The Board would, in addition, welcome specific criteria but suggests that the criteria be non exhaustive.

A suggested criteria for inclusion would be that a transfer to another court would result in significant cost savings to any party in the proceedings (including an Assisted Party).

**Conclusion**

The Board hopes that the above response has been of assistance to the Sheriff Court Rules Council and would be happy to liaise and assist further with any of the issues raised within this response and/or regarding any other legal aid issues that may be identified by other respondees and/or the Sheriff Court Rules Council.