

SCOTTISH LEGAL AID BOARD

Response to 'Blood Testing following criminal incidents where there is a risk of infection – Proposals for legislation'

The Scottish Legal Aid Board ("The Board") welcomes the opportunity to comment on the Scottish Executive's consultation on proposals for legislation. The Board's response is limited to the legal aid implications of the proposals.

1. Applicants for legal aid

- 1.1 The proposals allow those at risk of infection from HIV or hepatitis B or C as a result of a criminal incident only, to seek information on whether their assailant was carrying any of these infections. The Board believes that those involved in a criminal incident in the course of their employment, for example, a police officer or a health care worker, are unlikely to qualify financially for legal aid and will have other rights and facilities available to them to pursue the information and court procedure as required.
- 1.2 It is more likely that those who are victims of crime or who assist the police or a suspect in a criminal incident will apply and qualify for legal aid.
- 1.3 If the proposals were extended to include those people who could be infected as a result of an accident and non-criminal act, then the numbers of those who could qualify for legal aid would increase.

2. Availability of civil legal assistance

- 2.1 The consultation paper states that civil legal aid will be available to pursue a mandatory testing order.
- 2.2 When initially instructed by a client, a solicitor will also be able to grant advice and assistance, if they qualify financially.
- 2.3 If there is a possibility that infection has occurred, treatment must begin urgently and any application to the court for a mandatory testing order will be made very quickly. While the application for civil legal aid is assessed, the solicitor will be able to represent the applicant in any court procedure by using special urgency cover under Regulation 18 of the Civil Legal Aid (Scotland) Regulations 2002 and advice and assistance.

However a risk could occur, as the solicitor may have incorrectly calculated that the applicant was financially eligible for legal aid or the application could be refused. This could mean that the applicant would be liable for expenses.

Instead of using civil legal aid for this procedure, ABWOR (Assistance by way of representation) could be used. This is a form of advice and assistance. The procedure for granting ABWOR and obtaining increases in authorised expenditure can be followed more quickly than making an application for civil legal aid. The Scottish Executive would have to decide whether a solicitor should grant ABWOR or whether the Board should assess specific tests as to the reasonableness of the application as we do for employment tribunal applications.

However, a person in receipt of ABWOR is not a "legally aided person" and therefore could not benefit from the rules on modification of expenses, unlike a person who has been granted civil legal aid.

The ABWOR Regulations would have to be amended to include this court procedure. Part II, Schedule 2 of the Legal Aid (Scotland) Act 1986 would have to be amended to make the proceedings for a mandatory testing order exempted proceedings under the Act.

- 2.4 The consultation paper states that "*any grant of legal aid would not cover the costs of taking the sample or analysing it*". It is unclear why the Scottish Executive wishes to make the applicant responsible for the costs. If it is reasonable to grant an applicant civil legal aid, it is unclear why it would not be reasonable to allow cover for the costs of taking the sample or analysing it. Having granted legal aid to pursue a remedy, by refusing to pay for the costs of the taking the sample and analysing it, the remedy would be withdrawn from the applicant. The applicant would be given a mechanism to obtain a remedy but not the remedy itself. This is contrary to the Board's policy in other areas.

At present, advice and assistance or sanction under civil legal aid can be applied to carry out DNA testing in disputes over paternity. This is similar process to testing for blood/fluid borne infections. If it is the Scottish Executive's intention that legal aid should not cover the costs of taking the sample or analysing it, the legislation will have to specify this and the legal aid regulations amended.

- 2.5 No mention is made in the proposals for legislation of whether there will be an appeals process and how this will operate. It is assumed that advice and assistance and civil legal aid would be available for any appeals process.

2.6 *Cost to the Fund*

As the estimated volume of cases is very low, it is likely that the court process will be short and straightforward and counsel will not be required. Therefore, it is unlikely that the average case costs of advice and assistance and civil legal aid would be exceeded. (£158 and £1939 in 2003/04 respectively.) In 2003/04, the average cost of a civil appeal case in the Sheriff Court was £3039 and £6010 in the Court of Session.

3. Criminal Legal Assistance

- 3.1 The consequence of a refusal to comply with a mandatory testing order would be the prescribed criminal penalty of level 4 (£2500) or a maximum of 28 days imprisonment. Advice and assistance and criminal legal aid would be available for any criminal case raised.

3.2 *Cost to the Fund*

In criminal legal aid, it is more likely that the average case costs will apply as the case will follow normal criminal procedure. The average case cost for criminal advice and assistance in 2003/04 was £83. In Sheriff Court cases, the fixed payment for criminal legal aid is £500. In 2003/04 the average case cost was £687 for fixed payment cases (which includes payment of outlays). If an accused wishes to make a plea, ABWOR would apply. The average case cost of a criminal ABWOR case is £180.

4. As these are all new situations in which advice and assistance, civil and criminal legal aid can be granted, there will be a corresponding relatively small increase in expenditure in legal aid. The number of cases, as estimated by the Scottish Executive, is likely to be low and not all of those applicants will qualify for legal aid. It is unlikely that the total cost to the Fund will be more than £50,000 - £70,000.