

# The Children's Hearings (Scotland) Act 2011 Safeguarder Panel Regulations 2012



## RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

### 1. Name/Organisation

Organisation Name

SCOTTISH LEGAL AID BOARD

Title Mr  Ms  Mrs  Miss  Dr  Please tick as appropriate

Surname

Forename

### 2. Postal Address

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### 3. Permissions - I am responding as...

Individual

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site)

Are you content for your response to be made available?

Please tick as appropriate  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes

No

RESPONSE TO THE SCOTTISH GOVERNMENT ON CONSULTATION NOTE REGARDING THE  
CHILDREN'S HEARINGS (SCOTLAND) ACT 2011 SAFEGUARDERS PANEL REGULATIONS  
2012

BY THE SCOTTISH LEGAL AID BOARD

2 DECEMBER 2011

## 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 get 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 Note. Please note, however, that the Board's Response is limited to regulation 10 and the associated Question 7 regarding the payment of fees, expenses and allowances to members and potential members of the new Safeguarder's Panel, set out here for ease of reference.

## Payment of Safeguarders

### Regulation 10

***"Payment of expenses, fees and allowances to members and potential members of the Safeguarders Panel***

*10.-(1) The Scottish Ministers must pay fees to members of the Safeguarders Panel.*

*(2) The Scottish Ministers may pay expenses and allowances, as they think fit, to members and potential members of the Safeguarders Panel.*

*(3) The Scottish Ministers must publish the rates of expenses, fees and allowances payable to members and potential members of the Safeguarders Panel".*

***"Question 7: Do you support the proposals set out at draft regulation 10 for the payment of fees, expenses and allowances to members and potential members of the Safeguarders Panel?***

*It is widely recognised at present that fees, allowances and expenses paid to safeguarders by local authorities vary considerably across Scotland. Moving to a national Safeguarders Panel will ensure that all safeguarders are paid appropriately and consistently.*

*The regulations provide that Scottish Ministers must publish a schedule of fees, allowances and expenses. This schedule will be developed in consultation with safeguarders and other key partners".*

The Board supports the proposals set out at draft regulation 10 and agrees that under the current legislation payment of safeguarders by local authorities varies across Scotland. The Board welcomes consistency of payment to these officers and hopes that a realistic level of payment will ensure adequate recruitment of suitably experienced officers to carry out this important role.

The Government will be aware that at present some safeguarders are practising solicitors and some are not.

In terms of the current section 41(4) of the Children (Scotland) Act 1995 (the 1995 Act) their expenses require to be borne by local authorities.

As the Government acknowledge there is at present inconsistencies in the level of payment in different authorities. It is also understood that the majority of safeguarders who so happen to also be practising solicitors do not accept that the level of payment rates offered by local authorities is sufficient and proportionate to the work that they carry out especially when comparing remuneration rates under the legal aid scheme.

Accordingly, this results in a number of consequences which again leads to inconsistencies of approach and payment methods across Scotland.

### Consequence 1

An appointed safeguarder who is also a practising solicitor in children's court proceedings instructs a separate solicitor to represent the child.

At present, due to Rule 3.9(2) of the Act of Sederunt (Child Care and Maintenance Rules) 1997 a solicitor appointed to act as a safeguarder to the child is explicitly prohibited from also acting as a solicitor for the child.

Despite the terms of this current court rule some sheriffs in some courts have been granting legal aid to a child where the nominated solicitor is also the named safeguarder. Needless to say this then poses payment difficulties for the Board.

Where, however, the appointed safeguarder follows Rule 3.9(2) correctly and where he concludes that representation is required on behalf of the child he will instruct a separate solicitor to so represent.

The separate solicitor can then apply for legal aid to the sheriff and, if granted will be paid from the Fund and the safeguarder (who is also a practising solicitor) can then seek payment from the local authority.

It can therefore be seen that following the secondary legislation correctly can result in two individuals having involvement with the child and in the court proceedings rather than only one. This also leads to duplication of payment from two different sources.

It is understood that this commonly occurs in the East of Scotland. These consequences require to be avoided in the new rules and regulations associated with the Children's Hearings (Scotland) Act 2011 (unless of course the safeguarder is not a practising solicitor and instructs a separate solicitor to act for the child where he concludes that legal representation for that child in the court proceedings is necessary).

### Consequence 2

In terms of the current Rule 3.8 of the 1997 Rules, a safeguarder appointed by a sheriff shall have all the powers and duties at common law of a curator *ad litem*.

There is no equivalent rule to Rule 3.9(2) pertaining to curators *ad litem* which would prevent such officers from acting as both curator *ad litem* to the child and solicitor to the child if they felt that the child required legal representation in the court proceedings.

Accordingly, this one person can then apply to the sheriff for legal aid and, if granted, will be paid from the Fund for all work amounting to representation of the child and the provision of legal services.

This frequently happens in the West of Scotland where sheriffs appoint curators *ad litem* to represent the child's interests in the proceedings rather than safeguarders.

The effect of this is to ensure that a curator who is a practising solicitor receives remuneration in terms of the legal aid scheme rather than relying on lower payment rates from the local authority.

It should be noted, however, that in terms of the current section 41(1)(a) and indeed section 31 of the 2011 Act, a sheriff is obliged to consider if it is necessary to appoint a safeguarder in these proceedings. It is therefore difficult to justify the employment of a curator instead when, in terms of Rule 3.8 of the 1997 Rules they have exactly the same powers and duties as a safeguarder.

It is submitted that a safeguarder is, in terms of the current and indeed envisaged children's hearings system, the correct statutory officer to appoint in these proceedings to safeguard the interests of the child.

Despite the provisions of section 30 and 31 of the 2011 Act it will still be open to a sheriff under common law to appoint a curator *ad litem*. It is acknowledged that such officers will always be required in respect of incapable adult relevant persons in these court proceedings.

It is further understood that a minority number of curators *ad litem* in Scotland are not practising solicitors. If such a curator *ad litem* is appointed in these proceedings, then unless they appoint a separate solicitor to act for the child where they conclude that legal representation is indeed necessary for the child or incapable adult, then at present there is no statutory payment source for them, nor will there be under the new regulations. In terms of the current section 41(4) the local authority are only obliged to remunerate safeguarders and, 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.

Accordingly, a statutory payment scheme requires to be devised by the Government and incorporated into regulations also to remunerate curators *ad litem* in such circumstances. Remuneration rates, to avoid inconsistency of payment, should mirror exactly those rates that will be paid by Central Government to safeguarders who are appointed in these proceedings and who, in terms of the current Rule 3.8, have exactly the same powers and duties.

### **Suggested Approach**

It is abundantly clear that in terms of the new children's legislation the Government is intent on achieving consistency of approach in the children's hearing system throughout Scotland which unfortunately has seen to be at times lacking in terms of the current legislation.

In order to ensure consistency of adequate payment of both safeguarders and curators *ad litem* in these proceedings the following is suggested:-

- A statutory payment scheme be introduced for curators *ad litem* who are appointed by the sheriff in these proceedings and where the curator does not deem it

necessary for the child or incapable person to receive legal representation by a solicitor (either the same or a separate person) in terms of the legal aid scheme, perhaps by extending the provisions of the proposed regulations.

Such curators could receive payment either from Central Government funds or by way of a Table of Fees in terms of the legal aid scheme. Either way payments to these officers should be identical to those payments made from central funds to safeguarders.

- Not to introduce a similar rule to the current Rule 3.9(2) which, at present, prevents a safeguarder also acting as a solicitor for the child.

The absence of such a rule would avoid the necessity of having two persons involved with the child and in the court proceedings. It will also avoid the consequence of dual payment of both persons and will therefore result in savings.

The absence of such a rule should also encourage all sheriffs across Scotland to appoint safeguarders rather than curators *ad litem* to the child resulting in consistency of approach and ensuring that sheriffs correctly apply section 31 of the 2011 Act which obliges them to consider the appointment of a safeguarder.

- To ensure that a rule equivalent to the current Rule 3.8 is maintained in the new secondary legislation to the 2011 Act. This will again ensure consistency of approach and where curators are appointed by sheriffs (as it will still be competent for them to do so) it will be clear that they have identical roles.

#### **Applications for children's legal aid - safeguarders and curators *ad litem***

In terms of the 2011 Act, the Board concludes that if a safeguarder (or indeed a curator *ad litem*) decides that legal representation is required for the child (or incapable adult) in the court proceeding then it is open to them to instruct a solicitor (themselves if they so happen to be a practising solicitor) to act for that person.

The solicitor can then make an application to the Board for children's legal aid. The Board will then consider the application and will apply the statutory tests laid down in Section 28D(3) and Section 28E(3) of the 2011 Act. If the tests are satisfied legal aid will then be granted and the solicitor will be paid from the Fund at legal aid rates which will be the same rates as a solicitor is paid if they directly represent a child who is capable of giving instructions or an adult relevant person.

The Board would appreciate confirmation from the Scottish Government that they agree with this approach.

#### **Conclusion**

The Board, as stated at the outset of this response, does support the proposal set out at draft Regulation 10 of the draft Safeguarder's Panel Regulations 2012.

However, the Board is keen to highlight to the Government that such a regulation in isolation of other suggested secondary legislation will be insufficient to avoid the current inconsistencies of approach in appointment and remuneration of both safeguarders and curators *ad litem* in these children's court proceedings.

The aim should be,

- to pay non legally qualified safeguarders and curators *ad litem* at the same rate and on the same conditions;

- to ensure, so far as is possible, that where representation is required, it is provided by the one legally qualified person.

The Board is happy to liaise and assist further with any of the issues raised within this response and regarding any other legal aid issues that may be identified.