



## Legal Services update and guidance

# NEW STRUCTURE FOR HANDLING CIVIL APPLICATIONS

In the last Recorder, we gave you information about a new structure in our Legal Services and Applications Department. This has been put in place to improve our efficiency and the quality of our decision making, and was influenced by comments from the profession.

We want to find out if the new structure for handling civil cases is achieving these aims. To that end, we shall be phoning a small sample of solicitors to find out whether they are aware of the changes, what their experience of the new system has been, and whether they are finding it easier to get better information about cases and decisions. In addition, we shall be asking for any other comments or suggestions for improvements in the handling of civil cases.

We shall update the profession on the outcome of these consultations in a later Recorder.

If you would like to give us your views, but do not receive a telephone call, we would be happy to discuss these issues with you. To do so, please telephone or e-mail Catriona Whyte or Derek Arthur, on 0131 226 7061 or at [whyteca@slab.org.uk](mailto:whyteca@slab.org.uk) or [arthurde@slab.org.uk](mailto:arthurde@slab.org.uk)

# ADVICE AND ASSISTANCE – PENSION SPLITTING

Part IV of the Welfare Reform and Pensions Act 1999 introduced the concept of pension sharing into financial provision on divorce. The new provisions, applying to divorce actions commenced on or after 1 December 2000, can result in a pension scheme member's spouse having their own independent pension rights created.

In advising a client about pension sharing a family law solicitor needs to take a number of matters into account including whether it would be better to off-set the value of the pension against other matrimonial property. In the June 2001 edition of the Journal of the Law Society of Scotland, a guidance note was issued identifying three separate stages of such advice. *continued >*

# CONTENTS

	Page
<b>Legal Services update and guidance</b> .....	
NEW STRUCTURE FOR HANDLING CIVIL APPLICATIONS .....	1
ADVICE AND ASSISTANCE – PENSION SPLITTING .....	1
ACTIONS FOR DECLARATOR OF PATERNITY .....	3
SUPPORTING DOCUMENTATION FOR CIVIL LEGAL AID APPLICATIONS .....	3
CORRECT BENEFITS INFORMATION .....	4
NOTIFICATION OF AN APPLICATION FOR CIVIL LEGAL AID TO AN OPPONENT .....	4
SPECIAL URGENCY PROVISIONS – REGULATION 18 .....	5
MULTIPLE GRANTS OF ADVICE AND ASSISTANCE .....	6
MEMORANDUM BY THE LORD JUSTICE GENERAL - CRIMINAL SANCTIONS .....	6
<b>Accounts guidance</b> .....	
SOLICITOR REPORTERS' ACCOUNTS .....	8
FIXED FEES .....	8
EXTRA STATUTORY CONCESSION CASES - REFUNDS OF INTERIM PAYMENTS .....	9
EXEMPTIONS FROM RECOVERY UNDER REGULATION 16(3) OF THE ADVICE AND ASSISTANCE (SCOTLAND) REGULATIONS 1996 .....	10
NON-QUALIFIED ATTENDANCES IN ADVICE AND ASSISTANCE .....	10
TAXATION DECISIONS .....	11
THIRD PARTIES AND THIRD PARTY MINUTERS .....	11
<b>Finance guidance</b> .....	
MILEAGE RATE .....	11
<b>Treasury guidance</b> .....	
IMPROVEMENTS TO THE CONTRIBUTIONS PAYMENT SYSTEM .....	12
PAYMENT OF PRINCIPAL SUMS TO MEET NET LIABILITY TO THE FUND .....	13
<b>Policy update</b> .....	
LEGAL AID IN A CHANGING WORLD .....	14
PUBLIC DEFENCE SOLICITORS' OFFICE – EVALUATION BY THE SCOTTISH EXECUTIVE .....	17
INNOVATIVE LEGAL ADVICE PILOT PROJECTS ANNOUNCED .....	17
<b>Board news</b> .....	
SCANNING OF MAIL INTRODUCED .....	19
E-BUSINESS .....	19
LEGAL AID INQUIRY – REPORT OF THE JUSTICE 1 COMMITTEE OF THE SCOTTISH PARLIAMENT .....	20
REPORTERS AND SUB-COMMITTEE MEMBERS 2000/2001 .....	20
HAVE YOU RECEIVED THIS INFORMATION? .....	21
USEFUL INFORMATION .....	21
CHECK YOUR DETAILS .....	22
IN THE NEXT RECORDER .....	22

➤ **Advice and Assistance - Pension Splitting continued from page 1**

The first stage involves gathering information about the assets individuals may have. Solicitors will regularly undertake this work and increases in authorised expenditure in advice and assistance may be made available where individual clients are financially eligible.

The second stage involves giving advice to a client to determine whether or not the pension should be split, an earmarking order sought or the value of the pension offset against other matrimonial property. Clients need advice on the most appropriate option in their particular circumstances and a family law solicitor may be restricted in the advice they can give clients about the options.

The third stage involves situations where an individual wants to proceed with a pension sharing agreement and advice is needed on this and, in particular, whether the shares should be left in the existing pension scheme or put into a different pension scheme. This needs specialist pension advice.

From time to time solicitors seek increases in authorised expenditure to obtain advice from actuaries or other professionals before advising their clients about their options. Where it is shown that pension sharing is a viable option and the matrimonial assets are of sufficient value to warrant the obtaining of reports from an expert, then an increase in authorised expenditure can be made available for this purpose especially if the issues on which advice is to be given are outwith a family law practitioner's experience or knowledge. It should be noted that where the value of a pension is low, possibly in the region of £5,000 or less, it is unlikely that it would be considered reasonable to allow an increase in authorised expenditure for such expert reports.

We will be amending the advice and assistance guidelines to show these changes.

# ACTIONS FOR DECLARATOR OF PATERNITY

From time to time we receive applications for civil legal aid where individuals want to raise proceedings for declarator of paternity but there are no material benefits to an applicant in doing so. In considering the statutory test of reasonableness varying views have been taken on whether it is appropriate to spend public money on a declarator of paternity action where there is no material benefit such as through the laws of succession or establishing an entitlement to alimentary payments.

The Board's Legal Services Committee recently decided that establishing the question of paternity was a fundamental aspect of an individual's private and family life. As such, the issue of whether or not there was to be any material benefit arising to an applicant from obtaining a declarator should not be a factor in deciding whether or not to make civil legal aid available.

## SUPPORTING DOCUMENTATION FOR CIVIL LEGAL AID APPLICATIONS

The Board has revised its approach to documentation sent in support of civil legal aid applications. In essence, this focuses on our previously stated approach to "corroboration". It has been brought to the Board's attention that in some cases its requirement for the production of "corroboration" is too burdensome and may as a result seek more by way of information and evidence than is required by the court.

For probable cause, we need sufficient information to establish that the applicant has a plausible case. This may require more than a simple acceptance of a bald assertion made by the applicant. If supporting information is required to that end then this is not corroboration in the technical sense and we will not be using that terminology.

However, as the current guidance indicates, provision would have to be made for those cases where there are special evidential requirements such as those relating to evidence from a party other than a party to a marriage in a divorce case.

Likewise, in determining whether it is reasonable to make legal aid available we require sufficient information to make sure that there is adequate evidence to litigate and that there are reasonable prospects of success and recovery. Again, if this requires supporting information or vouching to be produced either initially or at some later stage then that is not corroboration in the technical sense.

In either case, as our existing guidance indicates, if the information in support is unavailable an explanation should nonetheless be given by the solicitor for its absence.

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# CORRECT BENEFITS INFORMATION

It is important that the correct benefit information is declared on legal aid application forms. We conduct checks to verify the benefits received by applicants for all types of legal aid. Quite often, these checks confirm that the applicant is in receipt of benefits, but not those which have been declared on the application form.

It is particularly important to ensure that the correct benefits are declared on advice and assistance intimations. In these cases, receipt of *income support*, *income-based jobseeker's allowance*, *working families' tax credit* or *disabled person's tax credit* results in the applicant being automatically eligible on income, with no contribution.

Our checks have revealed that many solicitors and applicants confuse some of these benefits with other state benefits that must be assessed like any other income such as earnings. The most commonly confused benefits are *incapacity benefit* and *contribution-based jobseeker's allowance*. Whilst these benefits may not always generate a contribution, they must be taken into account as income. If you are not sure which benefit is being claimed, the applicant will be able to obtain documentation from the Benefits Agency confirming the name of the benefit.

In the case of asylum seekers we have noticed that there can be confusion over the *National Asylum Seeker Support* scheme, or *NASS* vouchers. These too must be declared as income and should not be regarded as a form of income support.

Finally, we have come across several cases where prisoners have been assessed by solicitors on the benefit they would have been receiving had they been at liberty. Some prisoner applications are not assessed at all with the words *in prison* written across the financial statement. A prisoner must be assessed in the usual way, including details of any capital held or income received in the seven days up to and including the date advice and assistance is granted.

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# NOTIFICATION OF AN APPLICATION FOR CIVIL LEGAL AID TO AN OPPONENT

In terms of Regulation 7 of the Civil Legal Aid (Scotland) Regulations 1996, it is our duty to send to any opponent or the solicitor acting for an opponent, notification that a civil legal aid application has been made together with a copy of the legal aid memorandum and notice of an opponent's right to make representations to us about the application.

However, in terms of Regulation 7(2), this notification can be dispensed with if we do not know the addresses of the opponent and his solicitor and these could not reasonably be ascertained by the solicitor acting for the applicant or if, on the application of the solicitor acting for the applicant, we decide that notification should be dispensed with or postponed.

If you wish us to dispense with intimation, please ensure that this is clearly stated in a covering letter with the application. **You should not send us an intimation form.** If you wish us to postpone intimation, please ensure that this is clearly stated in a covering letter with the application. You **should** provide us with an intimation form.

Examples of situations where notification might be dispensed with include cases where it is feared that an opponent may try to dispose of assets or where there has been violence between the parties. We consider each request on an individual basis and where we are satisfied that good reasons are put forward to dispense with notification we will do so and notify the solicitors acting of our decision.

# SPECIAL URGENCY PROVISIONS – REGULATION 18

For some time we have been concerned about the availability of civil legal aid in cases of special urgency as, in a relatively small but important number of cases, vulnerable people face severe difficulties in accessing the services provided under the special urgency provisions.

The special urgency provisions (contained in Regulation 18 of the Civil Legal Aid (Scotland) Regulations 1996), allow solicitors to act for clients in a range of pre-specified situations without our first determining an application for civil legal aid, and in other circumstances where we certify that steps require to be taken as a matter of special urgency.

An application for civil legal aid must be submitted within 28 days of starting the urgent work; otherwise the solicitor will not be paid for the work done. If legal aid is subsequently granted, the urgent work is covered by that grant. Where legal aid is refused, we can only pay the solicitor under the terms of a determination made by the Secretary of State for Scotland. However, under the terms of that determination, we take account of any legal aid contribution for which the applicant *would have been* assessed as liable had legal aid been granted. In practical terms, this means that we deduct from any payment the amount calculated by the solicitor as the likely contribution.

As this sum is deducted from all 'determination accounts' received, we have always suggested that a solicitor consider whether to seek a payment from a client who appears likely to have to pay a contribution before doing any urgent work. This 'notional contribution' is also the solicitor's only source of payment where the client does not return to make a civil legal aid application at all. The majority of concerns about the operation of the special urgency provisions stem from this need for solicitors to consider an applicant's eligibility and likely contribution, if any.

We recently put forward a number of proposals to the Scottish Executive to alter the special urgency provisions to improve access to legal aid. These have now been agreed. The changes are:

- Before undertaking any work for a client the solicitor will use a detailed pro-forma to calculate as precisely as possible the contribution that the client might be liable for. At this stage the solicitor will also need to ensure that the client has signed a statement to the effect that (1) the financial information provided to the solicitor is complete and accurate (to the best of the client's knowledge) and (2) the client agrees to pay us the amount of the contribution.
- Clients will be able to pay by instalments, with all payments to be made to us. The instalment period will be the same as those operating in the civil legal aid system.
- If the application is subsequently granted and we assess a different level of contribution, the client will be offered civil legal aid based on our assessment, as is the case for non Regulation 18 civil legal aid cases. However, the higher assessment will not be applied retrospectively to the work done under special urgency.
- If the application is subsequently refused, the client will remain liable for any contributions outstanding, to the extent that the amount paid to date did not cover the solicitor's account for the urgent work. If the amount paid to date exceeds the solicitor's account, the balance will be returned to the client.

The changes mean that applicants under special urgency will be given the same payment options as non-urgent applicants. It is expected that this will be of particular benefit to those at risk of or suffering domestic violence. For those who do currently find the money to pay the notional contribution up-front, the proposed changes will make payment easier and may prevent hardship to these people and their families.

We are of the view that these proposals will improve access to justice for those applying in cases of special urgency, by bringing the system more closely into line with that of civil legal aid in non-urgent circumstances. This will assist all special urgency applicants with a contribution, with the most significant benefits felt by those who are most severely disadvantaged by the current system. We also believe it will help solicitors deal effectively with urgent situations without having to take financial risks.

While a number of these changes need further detailed consideration by the Board and the Scottish Executive they will be put in place as soon as is possible.

# MULTIPLE GRANTS OF ADVICE AND ASSISTANCE

A solicitor may be consulted by a client about a number of different matters, either at the time of the initial grant or subsequently. In terms of the definition contained in section 6 of the 1986 Act, in most circumstances a solicitor should deal with these under one grant of advice and assistance, by obtaining increases in authorised expenditure if necessary. This will be the preferred option in many cases for the client where a contribution is payable in respect of each grant made.

Guidance on multiple grants of advice and assistance is contained in the Scottish Legal Aid Handbook on pages A11 and A12.

We are now conducting more checks on advice and assistance grants submitted for the same client over given periods. We will be looking for more detailed information about the various intimations and in particular, why separate grants were made in each situation. We will also be looking for confirmation of the distinct work that was done in relation to each intimation.

## MEMORANDUM BY THE LORD JUSTICE GENERAL - CRIMINAL SANCTIONS

It is understood that a memorandum of guidance designed to supplement the existing statutory procedures for dealing with preliminary matters before High Court trial diets will shortly be published, and will apply to all High Court diets on and after 25 February 2002, regardless of the location in which the Court is sitting. The purpose of the memorandum, which will be required to be followed as a matter of good practice by those conducting business before the Court, will provide a framework for communication prior to the trial diet between the defence and the Crown regarding basic information such as the identity of defence solicitor and counsel and, importantly, any matter which may prevent the case proceeding to trial at some point during the sitting.

The memorandum will, for example, require the defence solicitor no later than the Monday of the week before the commencement of the sitting to advise the Procurator Fiscal Manager of any matter which may prevent the case proceeding at that sitting. Also, the Procurator Fiscal Manager should, by the Thursday before the commencement of the sitting, where either side has given notification of any matter which may prevent a case proceeding to trial at the sitting, discuss with the defence solicitor the possibility of scheduling the case in such a way as to enable it to proceed within the sitting.

There are, of course, a number of other matters dealt with by the memorandum but the above points are particularly relevant to the issue of the availability of legal aid cover for the employment of counsel or an expert witness, or to carry out work which is unusual or likely to incur unusually high expenditure. As the Board has stated on previous occasions, *it is essential that solicitors seek sanction for these matters in any criminal case at the earliest opportunity*. In matters proceeding to trial in the High Court, to avoid disruption of the court, solicitors should ideally, in line with these provisions, aim to have all necessary sanctions in place for such work at the latest by the Monday of the week before the commencement of the sitting. However, any sanction request, for whatever matter, still outstanding for any reason should specifically be drawn to the attention of one of the undernoted members of staff who will seek to ensure that the request is dealt with prior to the Thursday before the commencement of the sitting, in order that the defence solicitor and the Procurator Fiscal Manager are aware of the situation regarding such sanctions at the stage where decisions are being made as to the scheduling of the case. Any new requests necessarily made at this late stage should be clearly drawn to the attention of one of these individuals and marked "Urgent. High Court commencing....." or similar wording.

Where the decision is to refuse the request, written reasons will be given to be produced to the Court. Every attempt will be made to avoid continuations e.g. by obtaining further information over the telephone, but where information which cannot be immediately provided is required the Board will, again, commit the request for further information to writing in order that this may be produced to the court. In what is anticipated to be the unusual event of the Board being unable to deal with a sanction request, after discussions, without further information which is not readily available, every attempt will be made to set timescales in order that the Court may be aware when sanction may be granted and the case can proceed.

Contacts: To ensure a prompt response it would be helpful if you could ensure that any e-mails are sent to each of

Kingsley Thomas	thomaski@slab.org.uk
Janet Cathcart	cathcartja@slab.org.uk
Corrine Anderson	andersonco@slab.org.uk

to ensure that all three are aware of the situation. (You may be able to set up a common postal address for this purpose.)

Alternatively, fax or telephone and ask for one of these named individuals.

# ACCOUNTS FOR REPORTERS TO THE COURT

Since the change in procedure affecting the submission of accounts for reporters to the court effective from 21 May 2001, published in issue 32 of the Recorder, we have received feedback from some reporters who have been experiencing difficulty in receiving payment of their accounts from the nominated solicitor. To ensure the reporter does not experience any undue delay in receiving payment of his/her account the following procedure should be adopted when applying for reimbursement of the reporter's fees:

- The account should be submitted with the reimbursement application form (SLA/ROL/1). The reporter's account does not have to be settled in advance of making the application.
- A copy of the sheriff's interlocutor should accompany the account, as we require this to confirm who is responsible for payment of the reporter's account.

## FIXED FEES

The Fixed Fees Accounts Team processes around 1400 accounts each week. Of these, around 10% are returned to solicitors with requests for further information. This delays payment for solicitors and causes additional work for the solicitor and the Board. The Board's 30 day turnaround target relates only to accounts which have been properly prepared and vouched.

Below are the most common causes of delays in processing or accounts being returned to solicitors by the Fixed Fees team.

**Completion of synopsis forms** – the parts of the form most commonly missed out are details on bail appeals and case results. We cannot pay a main account without details of the final result and the stage concluded. If you are unsure about how to complete this, please contact us.

**Solemn reduced to summary** – to help us process these accounts more quickly, it would be helpful if you could mark clearly on the front of your account "solemn reduced to summary", as this is not apparent from the synopsis form.

**Solicitors' outlays** – any unusual expenditure for travel or accommodation must be explained, either on the synopsis form or in a covering letter. If they are not, we have to return the account requesting an explanation. Explanations are required for all travel and accommodation claims except trial dates.

**Bail appeals** – if a claim is made for a bail appeal fee, this must be accompanied by the relevant advocate's or solicitor-advocate's fee note and the 'Advocate's fee notes' section on form ASM/1/A must be completed.

**Supplementary accounts** – these should only be used for sentences which have been deferred for more than six months. A lot of time is wasted dealing with supplementary accounts for outlays which either have been omitted from the main account or for which vouchers were not available at the time of submission. All supporting documentation should be submitted with the main account.

**Medical reports** – if sanction has been obtained to employ a medical expert, you must provide a copy of his/her invoice including a breakdown of the time spent, as fees are calculated on this basis. Details of fees are included in The Recorder, issue 32. It is helpful if you include a copy of the sanction letter. For professional witnesses details of time spent are also required.

We are receiving increasing numbers of outlays claimed in respect of medical reports which are actually precognitions. Although the information may be provided in the form of a report, we have to treat this as a precognition, and any subsequent

fee claimed by the witness concerned is considered to be an outlay as defined in Regulation 4(2) of the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999. In these circumstances you may need to provide a copy of the medical report to clarify this.

**Witness expenses** – all witness expenses claims must be accompanied by vouchers. Witnesses are not automatically entitled to payment for lunch; they must prove that they have incurred this expense by submitting a receipt. In the same way, all travel (except mileage) must be vouched in order to be recompensed. We appreciate that solicitors often recompense the witness in advance but proof of your payment is not sufficient – we must have proof from the witness that they actually incurred the expense. Any claims for mileage must be accompanied by an explanation of why this was necessary and evidence that this was the cheapest method of travel.

**23(1) b accounts** – these should be completed on a block fee basis and not on a time and line account.

**Additional complaints** – if you have stated on the synopsis form that another complaint has been served in respect of the same matter, please enclose copies of all relevant complaints.

**Additional documentation** – the items above are the only additional documentation which we require sight of in relation to each account. Please do not send in complete files as it causes us additional time to return them to you.

**Staples** – whilst we need papers to be firmly secured, we often receive accounts with large numbers of staples. We have to remove these in order to microfilm the accounts for storage, which is time consuming – if you can use as few staples as possible it frees our staff to do more useful work.

**Order of papers** – when submitting accounts, please submit with synopsis forms ASM/1/A and ASM/1/B at the front, followed by any other documentation.

Addressing these issues will allow us to provide a more effective service and will reduce unnecessary correspondence.

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## EXTRA STATUTORY CONCESSION CASES – REFUNDS OF INTERIM PAYMENTS

We continue to receive refunds of interim payments/reimbursements of outlays in cases where judicial expenses have been successfully recovered on behalf of assisted persons. We would remind solicitors that in terms of section 17(2A) of the Legal Aid (Scotland) Act 1986 any sum of money recovered under an award of or an agreement as to expenses in favour of a client must be paid to the Fund. The Board will then offset such payments as have been made to the firm and any balance will be remitted to the firm. If the solicitor elects to accept the judicial expenses in full and final settlement of his claim, we will require, in addition to the sums recovered being remitted to us, a breakdown of how those funds require to be paid out of the Fund. Please refer to page A:100, section 13.2 of the Scottish Legal Aid Handbook which sets out the Board's requirements in "extra statutory concession cases".

# EXEMPTIONS FROM RECOVERY UNDER REGULATION 16(3) OF THE ADVICE AND ASSISTANCE (SCOTLAND) REGULATIONS 1996

We regularly receive hardship applications for recoveries which are exempt from payment of fees and outlays from property recovered or preserved, for example employment tribunal cases. The regulations were amended as from 15 January 2001 to include exemptions in employment tribunal cases or under any settlement arrived at to prevent or bring to an end proceedings in which such an order may be made.

The dwelling is also exempt in matrimonial cases where the party continues to reside. If this is the only recovery, this should be made clear in the account. No hardship application is necessary in this instance. However, if other assets were also preserved/recovered then a hardship application would be required.

A list of exemptions is included in Regulation 16(2) of the Advice and Assistance (Scotland) Regulations 1996.

## NON-QUALIFIED ATTENDANCES IN ADVICE AND ASSISTANCE

We are receiving an increasing number of advice and assistance accounts in which the initial attendance is being charged at the unqualified rate and the work carried out by an unqualified person. It is unclear in many cases from the accounts when the nominated solicitor confirmed that the client was eligible to receive advice and assistance.

An unqualified person may ingather information on the solicitor's behalf as to the client's need for assistance on a matter of Scots law and his/her financial circumstances. It is, however, the solicitor's responsibility to decide whether a grant of advice and assistance can be competently made. Until this decision has been made, no work can be charged for, as this is prior to the grant of the advice and assistance. If the narrative of the account makes it clear when the solicitor made the decision, it avoids us having to write for clarification and helps us to deal with your accounts more effectively.

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# TAXATION DECISIONS

We agreed recently that, to help the legal profession understand our assessment decisions, we would publish information about relevant legal aid taxation decisions in the Recorder and on our web site.

By April we shall have placed the first raft of decisions on SLABpro, the Board's web site for the profession. These are the decisions referred to, and summarised in, our Criminal Accounts Assessment Manual. We shall be updating this information on a regular basis and, in addition, summarising further decisions in future issues of the Recorder.

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## THIRD PARTIES AND THIRD PARTY MINUTERS

We have encountered some problems in assessing accounts where third parties have entered proceedings, whether by way of third party notice, or as party minuters in family proceedings. Some practitioners have failed to seek amendment of an existing legal aid certificate to reflect the fact that an additional party has entered the process. The third party, or party minuter, will invariably be opposing the order, or orders, sought by the existing parties to the action. As persons having an interest in the litigation, and opposing such orders, third parties or party minuters fall within the definition of opponents for the purposes of civil legal aid. Accordingly, practitioners should ensure that an appropriate amendment is sought to the certificate when an additional party enters the process. Failure to seek amendment may result in work being abated from accounts, and could have expenses implications for the assisted person in the proceedings.

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### Finance guidance

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## MILEAGE RATE

With effect from 1 December 2001, the mileage rate has been increased to 40p per mile for all mileage incurred on or after this date. This is in line with the Scottish Executive rate as explained to you in a letter to the profession from Jim Edgar, Director of Finance, on 11 August 2000.

# IMPROVEMENTS TO THE CONTRIBUTIONS PAYMENT SYSTEM

We recently introduced significant improvements to the system for paying contributions towards civil legal aid.

- > Instalments in most cases are now payable over 20 months
- > A detailed breakdown showing how the contribution was assessed is being issued with all offers of civil legal aid subject to contribution.

We have been concerned about the number of offers for legal aid where a contribution is payable that are refused by the applicant. We have carried out research among applicants who have refused offers, and it indicated that

- > many of those with the lowest disposable incomes (who are therefore assessed with the lowest contributions) were still refusing offers because of the size of the instalments payable, and might have taken up the offers had a longer payment period been given
- > applicants were unaware that in some circumstances they might get some or all of their contributions back
- > some applicants turned down offers because their solicitors advised them that they could do the work for less than the contribution.

## **Extension of contribution payment period**

Ministers have now have agreed to extend the payment period for contributions based on income to 20 months in all civil cases. This extends the agreement we obtained from the Scottish Executive in July 2000 to extend the payment period for contributions over £500 to 15 or 20 months, which reduced the number of refusals after offer. The new arrangements took effect on 21 January 2002, although favourable consideration will also be given to requests for extending the payment period for offers made before the effective date. The exceptions are where the contribution is less than £20, when we expect the applicant to be able to pay the contribution in one payment, and where the contribution is more than £20, but less than £50, where we ask for payment in 5 monthly instalments.

The changes are intended to reduce the monthly contribution payment amount to a more affordable level, thus allowing an increased number of applicants to accept their offer of civil legal aid.

## **Estimating case costs**

In addition to the extended contribution period, we are giving solicitors the option of estimating case costs and submitting these to the Board, if they believe that an accurate estimate can be made. Where case costs appear likely to be significantly lower than the assessed contribution, we may be able to adjust the level of the contribution. Further guidance on this option will be issued as soon as possible.

## **Explanation of level of contribution**

We now attach a form to all offers of legal aid subject to contribution, explaining how the decision on the level of contribution has been reached. We will also be making it clear in the offer letter that, depending on the eventual cost of the case, part of their contribution could in some cases be returned to the applicant. Together with the extended payment period and the option of providing estimated case costs at the outset,

we believe that these measures will

- > provide applicants with a more affordable payment schedule
- > allow the Board to ask for contributions based on realistic case costs, making the system fairer and more affordable
- > assist applicants in making informed decisions on whether to proceed with an offer of legal aid.

A letter informing all practitioners of the change in procedure was issued on 17 January 2002, but if, for any reason, you did not receive a copy of this letter, please contact the Board's Secretariat who will provide you with a copy.

As you may be aware, following a recent restructure of the Applications Department, we now have a Unit which deals with means assessment, both at application stage and after the certificate has been issued. If any part of the notes about the breakdown of contributions is unclear, or you would like some further information, either in general or in connection with a specific client's circumstances, please contact Claire Ewart, the Assistant Manager of the Unit, or Paul Meenan, the area's specialist, both on extension 279, or ask to speak to the Team Leader of the Means Team dealing with your client.

We hope that the extended payment period will allow more people access to justice by enabling them to take their case forward with legal aid. We shall be monitoring the effects carefully, with a view to making further recommendations for adjustments if necessary.

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## PAYMENT OF PRINCIPAL SUMS TO MEET NET LIABILITY TO THE FUND

On 7 March 2001, the Board's Legal Services Department sent all legal aid practitioners guidance headed "Please note important changes to our procedure concerning section 17 of the Legal Aid (Scotland) Act 1986". (If you would like a further copy of the guidance, please contact our Secretariat or find it on [www.slabpro.org.uk](http://www.slabpro.org.uk).)

Section C of that guidance was headed "Changes to payments to the Board of the principal sum". This confirmed that in terms of section 17(2B) of the 1986 Act, all that has to be paid to the Board by the solicitor for the assisted person is the net liability to the Fund.

In practice this means that solicitors may not have to send us all of any principal sum recovered, but only sufficient to cover the amount of their civil account (including VAT, outlays and counsel's fees) and a sum equal to the costs of any supplementary account (for example for enforcement work).

The guidance notes also dealt in some detail with how solicitors should deal with a number of potentially problematic issues, such as when the client was legally aided for part of the proceedings only, where there has been a change of solicitor, where the principal sum may not be realisable until some point in the future, or where expenses have been agreed/ordered but there are difficulties in securing payment.

Since the guidance was issued, however, it has been our experience that many practitioners have continued to send us the whole amount of all principal sums recovered. This may mean that additional work then has to be undertaken by both the solicitor and the Board before funds in excess of the net liability can be released to the assisted person, and there may be an unnecessary delay in such funds being made available to the assisted person.

One potential cause for this may be that insurers continue to make settlement cheques payable to the Board, so we would ask that you bring this matter to the attention of any party with whom you may be effecting settlement.

If you would like to discuss any of the above, or if you wish to discuss any matters relating to principal sums in general, please contact Cindy Marshall, Team Leader, Treasury Department on 0131 220 1965 or at [Marshallci@slab.org.uk](mailto:Marshallci@slab.org.uk).

# LEGAL AID IN A CHANGING WORLD

Research into the reduction in civil legal aid applications in Scotland between 1992 and 2001

## Background

The Scottish Legal Aid Board has been concerned to establish the reasons behind the significant decrease in the volume of applications for civil legal aid. Applications are currently at their lowest level in almost twenty years and around 15,000 lower than their peak year of 1992/93. The Board undertook research to try to explain this change. The report on this research, published by the Board in December, presents the results of various analyses which explore:

- > changes in the use of civil legal aid
- > the impact of shifts in financial eligibility
- > the possible deterrent effect of the contributions payable by some people towards the cost of their case
- > the availability of solicitors' outlets providing a civil legal aid service
- > changes in legal aid legislation and Board policy
- > changes in the wider legal system.

The work was carried out by Board staff and by the David Hume Institute, which looked at the changes in eligibility.

## Key Findings

The three most commonly suggested explanations for the drop in civil legal aid applications are that:

- > fewer people are applying because fewer people are eligible
- > those who are eligible are put off by the size of the contribution payable
- > people find it difficult to access civil legal aid because fewer solicitors are offering the service.

However, the Board's analysis suggests that these factors cannot themselves explain a reduction of the size seen since 1992/3:

- > Overall financial eligibility fell by 2 percentage points between 1992/3 and 1998/9, from 57% to 55% of the population. This means that around 110,000 fewer people were eligible in the later year, which in itself would account for around 650 applications per year.

Within the 2.8 million eligible population, there has been a major shift between eligibility with and without a contribution, with around half a million fewer people eligible without a contribution.

The analysis suggests that both the overall reduction in eligibility and the shift in balance to contributory eligibility will certainly have contributed to the reduction in applications. This is likely to account for around 30% of the overall reduction between 1992/3 and 2000/01.

- > Perhaps of greater significance is that the bulk of these changes were the result of an explicit policy change in 1993, which had a very significant impact on both eligibility and, as a result, applications.

Any reductions in or movements within eligibility since 1993/4 will have been as a result of index-linked financial limits failing to keep pace with rising national income levels.

While most of the eligibility related reduction in applications was seen within two years of the 1993 changes, most of the overall drop in applications has actually occurred since then. Indeed, no more than 13% of the drop in applications seen between 1994/5 and 2000/1 can be explained by changes in eligibility.

Accordingly, changes in eligibility offer only a partial explanation for the *continuing* drop in applications.

- > With regard to the deterrent effect of the contribution, the 1993 changes did affect the number of applications from people likely to be assessed with a contribution, and more of those who did apply turned down an offer of legal aid with a contribution.

Since then, the evidence suggests that people eligible with a contribution are, on the whole, only very slightly less

likely to apply for civil legal aid than in the past. However, take-up of offers has improved, particularly since the Board extended payment periods for those with contributions above a certain level.

- > Although the number of solicitors' outlets making one or more application for legal aid fell between 1998/9 and 2000/1, there were still 1041 such outlets in 2000/1. This figure is actually higher than the 1029 recorded in 1992, the year in which civil applications were highest.

These analyses suggest that there must be other factors in the reduction in applications. In order to identify such factors, the Board examined in greater detail the changes that have occurred within civil legal aid.

This analysis showed that the past decade has seen substantial changes in the profile of applications for civil legal aid, which themselves suggest additional avenues for analysis:

- > Although the balance between pursuers and defenders and males and females has remained broadly unchanged, there have been important shifts within these categories.

In the early 1990s females were far more likely than males to use legal aid to pursue a case, and less likely to use it to defend one. By 2000/1 there were more female defenders than male defenders.

Although still greater in number than male pursuers, the proportion of female pursuers had also decreased, from 51% to 44%.

- > The types of case for which applicants seek legal aid have also altered: although still the single most common category (accounting for over 20% of applications), 'fault' based divorce applications have fallen by half, whilst applications for contact have increased.

Applications for reparation have fallen, but less so than most other areas.

These changes reflect, to a large extent, a reduction in ordinary cause and summary cause court business, as well as wider societal changes:

- > In particular, the number of divorces granted fell by 13% from 1993 to 2001. Grants of divorce on 'fault' grounds fell by 44% over the same period. It is, therefore, likely that fewer people will require legal aid for such cases.
- > Alongside this apparent reduction in demand for legal aid in the largest category of applications, there is some evidence that there has been a change in the approach taken to the resolution of family disputes.

The less litigious approach of many family law practitioners, alongside a growth in mediation and legislative changes such as the non-interventionist approach embodied within the Children (Scotland) Act 1995, suggests a greater emphasis on resolving matters involving separation and the care of children without recourse to the courts.

- > Further support for this suggestion comes from an analysis of advice and assistance.

The use of advice and assistance in relation to family matters has fallen less markedly than civil legal aid (and indeed use of advice and assistance in civil matters as a whole has increased over the same period). The cost of advice and assistance in family cases has also increased rapidly over the period in question.

This suggests that advice and assistance may be used more often than in the past to resolve such matters without the need for civil legal aid.

## Conclusions

Overall, it would appear that :

- The fall in applications for civil legal aid is due primarily to external changes in the way dispute resolution is conducted, including a reduction in court business, particularly in family and matrimonial proceedings.
- Although overall financial eligibility has changed little, the 1993 eligibility changes moved a substantial number of people from being eligible with no contribution into contributory eligibility. The level of contributions also increased. These changes did have a significant effect on the number of applications in the following two years. Even so, over the period from 1992/3 to 2000/1 as a whole, the impact of changes in eligibility is outweighed by that of external changes. In particular, the impact of changes in eligibility *subsequent to* those made in 1993 has been relatively minor.
- Overall numbers of solicitors' outlets are higher than in 1992, although there has been some reduction over the past three years. This, on the face of it, would not therefore explain a reduction in numbers of applications.

The Board is nevertheless concerned that certain aspects of the system make access to civil legal aid more difficult for certain potential applicants. The Board is seeking to improve the operation of the system to remove as many barriers as possible. For example, the Board has made proposals for changes to the operation of the special urgency provisions and the contributions system with the aim of making civil legal aid more accessible to the particular applicants – or potential applicants - affected by these parts of the system, as well as looking at ways of reducing the bureaucracy and complexity surrounding civil legal aid.

Further research will flow from the findings presented in this report. For example, this report suggests the need for a more detailed analysis of the distribution of solicitor outlets.

Although the overall picture perhaps suggests little cause for concern, we are keen to explore further possible variations between different parts of the country. In addition, the distribution of work within firms, particularly in light of the stagnation in fee levels, may also merit further examination.

Similarly, while eligibility has not been the strongest factor in the reduction in applications in recent years, we intend to extend the work already carried out to consider the interaction of the different eligibility rules for advice and assistance and civil legal aid.

Such further research will help improve our understanding of other aspects of legal aid and help ensure that potential problem areas are identified before they can impact negatively on access to civil legal aid services.

The full report, **Legal aid in a changing world**, is published by the Board, ISBN 1-902300-11-4.

It is available by writing to: Secretariat, Scottish Legal Aid Board, 44 Drumsheugh Gardens, Edinburgh EH3 7SW. Telephone: 0131 226 7061, E-mail: [general@slab.org.uk](mailto:general@slab.org.uk), Web: [www.slab.org.uk](http://www.slab.org.uk)

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# PUBLIC DEFENCE SOLICITORS' OFFICE – EVALUATION BY THE SCOTTISH EXECUTIVE

The Scottish Executive published its report “The Public Defence Solicitors’ Office in Edinburgh: an independent evaluation” in September 2001. The report raises a number of interesting issues on the operation of the office and the wider criminal justice system in Scotland.

The report identifies some differences in the handling of cases by the PDSO compared to the private sector defence solicitors operating in Edinburgh. However, it recognises that the enabling legislation required that the PDSO be formally evaluated and a report presented to Parliament within three years, which led to the research being carried out at an early stage in the PDSO’s life, before it had reached maturity. During the period on which the research focuses the PDSO suffered substantial unpopularity among many clients and private criminal defence solicitors as a result of clients being directed to use the PDSO in order to ensure sufficient numbers of clients for the study.

However, the Board removed direction in June 2000, following discussions with the Edinburgh Bar Association and Law Society of Scotland. Since then it has been encouraging to see a more constructive relationship between the local bar and the PDSO as well as an increased level of client satisfaction. The cost of running the Office also continues to fall, a fact recognised in the research report.

The Scottish Executive is currently considering the findings of the research.

The full report, as well as a summary of the research findings, can be downloaded from the Scottish Executive’s web-site.

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## INNOVATIVE LEGAL ADVICE PILOT PROJECTS ANNOUNCED

In March last year the Board invited interested organisations to submit proposals for pilot projects to be run under the newly commenced powers contained in Part V of the Legal Aid (Scotland) Act 1986. Part V allows the Board to employ solicitors to work in partnership with local advice giving organisations. The Board received over 40 submissions from such organisations or partnerships of organisations from across Scotland. The number, quality and diversity of the proposals submitted reflected the range of advice services available in Scotland and demonstrated the imagination, innovation and commitment of those offering the services.

As well as commencing the necessary legislation, the Scottish Executive has given the Board additional funding of £250,000 pa for the projects. This has enabled the Board to select four “Part V projects” from amongst the many good proposals. The four successful projects were announced at a launch event hosted by the Board on 11 October. The package of projects heralds the start of a programme of developing new approaches to delivering legal advice and improving access to justice. Amongst those who will benefit from the pilot projects are asylum seekers in Glasgow, people living in rural areas of the highlands and islands, socially excluded people in West Lothian and rough sleepers and young people in Edinburgh.

Speaking at the launch event, Jean Couper, Chairman of the Scottish Legal Aid Board

said: "I'm delighted to announce these four pilot projects which aim to make legal advice more accessible by adapting to non-traditional legal settings and delivering services in new and different ways. The projects will provide new, innovative and much wanted services to the communities they serve whilst giving the Board and others a unique insight into different ways of providing legal advice".

The four projects are:

**Castlemilk Law and Money Advice Centre and the Ethnic Minorities Law Centre in Glasgow** - this partnership will provide advice and representation to clients throughout the asylum process at outreach surgeries in the north and south side of Glasgow. Although the initial proposal was for a single solicitor specialising in asylum law to work in the south side of the city, additional Scottish Executive funding from the Social Justice Department has enabled this service to be extended to asylum seekers in Sighthill. Each law centre will have a full time solicitor with administrative support and in addition to casework, which is where the immediate need is, there will be a development aspect to the project, including an element of community education and liaison with other advisers and statutory agencies.

**Citizens Advice Bureaux Service** - working out of the Citizens Advice Scotland Inverness office, the solicitor will serve six bureaux in 13 locations including Caithness, Ross and Cromarty, Nairn, Moray, Skye and the Western Isles. The project will deliver a second tier advisory service through training and support for CAB advisers and enable greater access to legal services for people living in rural areas. The solicitor will provide advice and support for bureaux staff via telephone and email, as well as training in legal skills such as case diagnosis and representation to advisers and partner agencies. The solicitor will also act for clients in cases of particular interest to their local communities.

**Streetwork** - working with some of the most socially excluded people in the community, the project will provide legal advice to young people and rough sleepers at risk on the streets in Edinburgh. The solicitor will inform and advise clients by working with them at their own pace and in surroundings where they are comfortable, including on the streets, drop in centres and hostels. The solicitor will also provide training, support and back up for advisers and partner agencies.

**West Lothian Advice Partnership** - brings together the expertise of all the major advice providers in West Lothian, providing advice and support to socially excluded people. The solicitor will help break down barriers to legal advice through better access and local delivery, whilst working in partnership with the local legal profession. The advice partnership includes West Lothian Council Advice Shop, Livingston Citizens Advice Bureau, Workers Benefits Centre and Breich Valley Information Service. Casework will be limited to enable the largest possible number of clients to be seen. Developing links between the advice sector and local solicitors will be an integral part of the project, in particular to facilitate referrals.

The Board believes that, although a welcome initiative in their own right, these projects should also be seen as part of the wider development of community legal services. While solicitors and advice organisations continue to serve their local communities well, the pilots will allow the evaluation of different methods of improving access to justice. The information gained on different ways of delivering legal advice will be invaluable in the development of community legal services in Scotland, building upon the strengths and variety of present provisions, through new partnerships, new initiatives and new services.

The combination of projects selected by the Board offers a chance to explore innovative methods of providing advice services in a range of situations and to let us consider what difference, for example, solicitors working in non-traditional settings, or providing support to advisers can make to helping people with their legal problems. The projects will become operational once solicitors are recruited and the necessary local arrangements are made with the relevant organisations. The first solicitor took up his post with Streetwork on 14<sup>th</sup> January. Each pilot will run for a period of two or three years, during which time it will be monitored and evaluated.

# LEGAL AID INQUIRY – REPORT OF THE JUSTICE 1 COMMITTEE OF THE SCOTTISH PARLIAMENT

The findings of the Scottish Parliament Justice 1 Committee's Legal Aid Inquiry were published in November, and were welcomed by the Board. Jean Couper, Chairman of the Scottish Legal Aid Board said:

“The Board very much welcomes publication of the Justice Committee's Legal Aid Inquiry Report. Legal aid is of benefit to a great many people in Scotland and the Committee has set out a number of interesting proposals to improve access to justice through legal aid.”

The Board submitted written and oral evidence to the Inquiry and the Committee's report reflected on a number of the issues the Board raised, including

- > the complexity of the legal aid legislation
- > the case for uprating a number of financial limits contained in the Legal Aid (Scotland) Act 1986 and connected regulations
- > the limitations of the Board's strategic role in ensuring an adequate level and quality of provision.

The Committee also identified several areas of concern shared by the Board and on which, with the support of Ministers, the Board has recently made further progress to improve legal aid provision. These include the recently announced changes to the operation of the special urgency provisions and the repayment period for contributions. The Committee was also keen to examine the findings of the Board's research into the drop in applications for civil legal aid, including an analysis of the impact of changes in eligibility and contributions; the research report has been forwarded to the Committee and was published in December. The Board will carefully consider the specific recommendations made by the Committee to the Board on operational issues and will continue to work in partnership and co-operation with others involved in the justice system to make the system more efficient and effective. The Board will play its full part in implementing the agreed recommendations to enhance access to justice for those who need it through a range of legal aid services.

# SCANNING OF MAIL INTRODUCED

As part of the e-commerce project we recently started scanning incoming correspondence. Initially, only letters that tend to fit into one of the following categories are being scanned

- > letters replying to a request from the Board
- > letters containing information for the Board
- > letters requesting information from the Board

Standard correspondence attached to application forms and accounts which does not fall into the above categories is not scanned.

The original correspondence is still date stamped and sent to Departments for action. Scanning will be used as an electronic backup to ensure, for the benefit of our customers and ourselves, that we have a record of the correspondence we have received.

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## E-BUSINESS

In the last issue of *The Recorder* we announced the start of the first pilot of our e-business project, covering advice and assistance. Briefly, the project objective is to provide a more effective and efficient delivery of legal aid, by making use of new technologies and re-engineering business processes.

We sent firms an invitation to participate in the pilot, to evaluate the technology dealing with advice and assistance. Our business analysts are currently visiting the fifteen firms who were selected to participate, to discuss what solicitors would like to see happening as a result of the project, and to assess the likely benefits for both solicitors and the Board.

Between July and October we carried out a business process analysis of advice and assistance applications and accounts. We have also held a number of internal workshops to suggest potential improvements in business processes. The Law Society of Scotland is assessing a mechanism for authenticating and verifying the identity of practitioners transacting with the Board, and liaising with us on this project.

We appointed Alistair Stocks as our e-business project manager at the beginning of October, and he will be responsible for taking this project forward.

# REPORTERS AND SUB-COMMITTEE

## MEMBERS 2000/2001

The following practitioners acted as external reporters to the Board during 2000/2001.

### Members of the Faculty of Advocates

I R Abercrombie, QC	D A Kinloch	D C Rae	A M Clark
L J Milligan	E W Robertson	L J Dunlop, QC	S O'Brien, QC
S Woolman, QC	A J Hajducki, QC		

### Solicitors

I M Banks, Greenock	J P Hunter, Hawick	S N Moffat, Edinburgh	P Brown, Glasgow
C J B Jackson, Leven	B A Murphy, Ayr	F Cooper, Edinburgh	P H Loudon, Edinburgh
D Nicol, Edinburgh	A Cruickshank, Elgin	M K Lucas, Arbroath	G S Peterson, Lerwick
A D Currie, Jedburgh	J N McCormick, Glasgow	A S Pollock, Glasgow	S Doonan, Glasgow
D S McDonald, Aberdeen	A Prentice, Edinburgh	C J Flanagan, Dunfermline	R H McFarlane, Cupar
J Pryde, Midlothian	M Foster, Glasgow	S G McLaren, Perth	D Reekie, Edinburgh
K H R Graham, Edinburgh	H A Macandrew, Turriff	D Short, Edinburgh	E A Grant, Paisley
D MacPhee, Fort William	W H Summers, Aberdeen	C Hennessy, Glasgow	W C MacReath, Glasgow
S R Waters, Alloa	D Hossack, Edinburgh	D S Millar, Edinburgh	D S Williamson, Edinburgh

### Co-opted members of Sub-Committee

The following practitioners acted as co-opted members of the Legal Services Sub-committee during the year.

F Cooper	D S Millar (part-year only)	D Nicol
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Our thanks to all of those people for the work they have carried out throughout the year.

## HAVE YOU RECEIVED THIS INFORMATION?

Since issue 33 of *The Recorder* was published, the following mailshots containing important information about legal aid, have been sent to practitioners:

- letter from Kingsley Thomas, Manager, Criminal and Advice and Assistance Applications, to all practitioners about the advice and assistance helpline number (tel 07711 42 43 44) – 21 September 2001
- letter from Legal Services and Applications Department about changes to eligibility limits from 22 October, extension of ABWOR to life prisoners and extension of automatic criminal legal aid to Glasgow Drug Court cases, enclosing a keycard, proforma calculation sheet and eligibility limits leaflet – 19 October 2001
- letter from Jim Edgar, Director of Finance, to all practitioners about changes to the mileage rate to 40p from 1 December 2001 – 23 November 2001
- letter from Janet Nixon, Head of Secretariat, to all firms about the introduction of a new leaflet covering the Board's complaints procedure – 3 December 2001
- letter from David Buchanan-Cook, Manager, Compliance, to compliance partners at Criminal Legal Assistance Registered Firms enclosing a copy of the Criminal Legal Assistance Register showing all registered firms and their associated registered solicitors as at 18 December 2001 – 19 December 2001
- letter from Tom Murray, Director of Legal Services, to all practitioners about the payment of legal aid contributions – 17 January 2002
- February 6 2002 Letter to the profession about changes to ABWOR regulations from 6 February 2002

If you did not receive these, contact our Secretariat office for a copy or look on our website for the profession, SLABpro at [www.slabpro.org.uk](http://www.slabpro.org.uk).

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# USEFUL INFORMATION

## Addresses

The Board is now a full member of Legal Post. The Board has dedicated addresses for applications that allow our mail room to identify and process these quickly. For applications, please use DX 555251, Edinburgh 30, or Legal Post LP1 Edinburgh 7, or Post Office Box No 12650, Edinburgh, EH3 7SW. For general mail the Board's addresses are DX 555250 Edinburgh 30, or Legal Post LP2 Edinburgh 7, or by post to 44 Drumsheugh Gardens, Edinburgh EH3 7SW.

## Web sites

We aim to provide a range of useful information giving practical help and advice for solicitors and advocates on our web site for the profession at [www.slabpro.org.uk](http://www.slabpro.org.uk). The site includes mailshots, the Scottish Legal Aid Handbook and the most up to date versions of legal aid forms in electronic format. We no longer issue CD-ROMs with this information. You can access the site by using the following login details (which are unchanged from those published in the last edition of The Recorder):

**username: procurator      password: LAACT1986**

## Who's who at the Board

The September 2001 edition of The Recorder (issue 33) included contact details for all departments at the Board, including fax numbers.

Jim Edgar, Director of Finance, has taken responsibility for the Board's Information Systems function, which includes the E-Business Project. To reflect this change, Jim's post is now Director of Corporate Services and Accounts. Other recent staff changes include the appointment of John McLeod as Acting Head of Information Systems and Douglas Laughland as Acting Assistant Manager in Compliance.

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## CHECK YOUR DETAILS

To ensure that correspondence, *The Recorder* and other important information from the Board reaches you, please make sure that you tell us immediately if you change address or firm.

Please also remember to tell us if your firm changes to or from Royal Mail and Hays DX or Legal Post so that we can update our records and send mail to you by the most appropriate means. Please write to our Finance Department with any change in address or practitioner details.

If you are registered on the Criminal Legal Assistance Register, you should also notify our Criminal Legal Assistance Registration Unit on ext. 444 if you change firm or address.

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# IN THE NEXT RECORDER

We aim to publish *The Recorder* at least three times a year. We would be interested to know if there is any information you would like to see in future issues of *The Recorder* - for example, clarification on a particular legal aid policy or procedure – or if you wish to suggest an article. We would welcome your suggestions so please contact Colin Sim on 0131 226 7061, ext. 306 or e-mail us at [general@slab.org.uk](mailto:general@slab.org.uk).

If any solicitor in your firm does not receive *The Recorder*, please ask them to contact our Secretariat office, quoting the firm's code and their practitioner code, to be included on the mailing list. You can find back copies of *The Recorder* on our web site for the profession at [www.slabpro.org.uk](http://www.slabpro.org.uk).



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