

APPLICATIONS FOR AWARDS OF EXPENSES OUT OF THE LEGAL AID FUND

Policy Proposal

1. To invite the Council to consider and approve draft rules at **Paper 6.1A**.
2. The rules, which were developed by the Costs and Funding Committee, replace the existing rules regulating procedure in applications for awards of expenses out of the Legal Aid Fund, under section 19 of the Legal Aid (Scotland) Act 1986 (“the Act”).

Timing

3. There is no planned timescale for bringing this instrument into force. However, subject to any operational constraints, it is hoped that it will be possible for it to be in force by the end of the year.

Rationale

4. Applications for awards of expenses out of the Legal Aid Fund are currently regulated by rule 6 of the Act of Sederunt (Civil Legal Aid Rules) 1987. The procedure provided for in rule 6 has been subject to judicial criticism on the basis that it is cumbersome and in need of being streamlined. The procedure has also been criticised by the Scottish Legal Aid Board (“the Board”), partly on the basis that they often become aware of applications at too late a stage to carry out necessary investigations and reach a settled view on their response before the hearing, and partly on the basis that they are not always provided with sufficient information.
5. The proposed provisions are designed to address these criticisms (a) by requiring the applicant to complete and send the Board a notice in a prescribed form no fewer than 28 days before the motion seeking the award is enrolled or lodged, and (b) by streamlining the procedure. The annexed note by LPPO provides further information (**Annex A**).

Issues raised during policy development stages

6. The Committee decided not to adopt the Board’s favoured approach of a ‘pre-motion protocol’ which would in addition have regulated such matters as the timescale and manner of the Board’s response to the notice and the handling of requests for further information. The Committee took the view that the adoption

of such a protocol would have involved a disproportionate response to the issues raised.

7. The issue of the extent and type of financial information that applicants seeking to establish financial hardship should be required to disclose to the Board was the subject of anxious discussion, with some divergence of views. As the information reasonably required would depend on the particular applicant's circumstances, it was ultimately concluded that the preferred approach did not involve adopting a prescriptive approach, but rather placing the responsibility on the applicant to provide a full disclosure of all relevant information.

Compatibility with SCJC guiding principles

Principle	Compatibility
<i>The civil justice system should be fair, accessible and efficient</i>	The draft rules have been designed to ensure that applications for awards for awards of expenses from the Fund are processed more efficiently, by providing for a more streamlined procedure, and by minimising the need for applications to be opposed, or for hearings to be continued, because insufficient information has been provided.
<i>Rules relating to practice and procedure should be as clear and easy to understand as possible</i>	The draft rules produced, and the associated form of notice, have been designed to be as clear and easy to understand as the nature of the subject permits.
<i>Practice and procedure should, where appropriate, be similar in all civil courts</i>	As is the present position, applications for awards of expenses for the Fund in any civil proceedings will be subject to the same rules.
<i>Methods of resolving disputes which do not involve the courts should, where appropriate, be promoted</i>	While awards of expenses from the Legal Aid Fund will still require an application to the court, the proposed changes are designed to avoid the need for applications to be opposed unnecessarily because the Board have had insufficient notice, or have not been provided with sufficient information.

Links to other initiatives

8. There are no links of any significance to other initiatives.

Implementation

9. Beyond the need to allow sufficient time for guidance to be issued to operational staff, implementation of the proposed rule changes does not appear to present any issues.

Consultation

10. The draft rules have not been the subject of any consultation.

Legal advice

11. The Committee has received legal advice from LPPO throughout the development of policy and the drafting of rules. LPPO are satisfied that the draft rules, as presented, can properly be made in reliance on the rule-making power conferred by section 38 of the Act, and that they are compatible with the rules of procedure regulating the various forms of proceedings in which applications may be made. A briefing from LPPO is contained at **Annex A**.

Recommendation

12. This Council is invited to consider and approve the proposed rules at Paper 6.1A relating to applications for awards of expenses from the Legal Aid Fund, and to agree that they should be submitted to the Court of Session for approval, subject to any stylistic or typographical amendment.

**Scottish Civil Justice Council Secretariat
September 2017**

ANNEX A**LPPO BRIEFING***Background*

In proceedings involving both a legally assisted party and an unassisted party, where the proceedings are finally decided in favour of the unassisted party, section 19 of the Legal Aid (Scotland) Act 1986 gives the court concerned power to make an expenses award in favour of the unassisted party, payable out of the Legal Aid Fund (“the Fund”). Section 19 prescribes a number of conditions that must be satisfied before any such award is made. Where the expenses in question relate to first instance proceedings the court must in addition be satisfied that the applicant will suffer financial hardship unless the order is made.

The procedure to which such applications are subject is presently prescribed in rule 6 of the Act of Sederunt (Civil Legal Aid Rules) 1987. This presently provides for what is in effect a two-stage procedure. Applications for a section 19 order require to be made by motion in the principal proceedings, but there is initially no requirement for the application to be intimated on the Scottish Legal Aid Board (“the Board”). The court will initially determine if the application should be summarily dismissed. If it is not dismissed the court is required to order the applicant to lodge a statement on oath of the grounds for claiming payment and an estimate of the expenses incurred. The court must also order intimation on the Board which has the right to appear and be represented at the hearing.

The present procedure has been criticised in the Inner House on the basis that it is unnecessarily cumbersome and that it would benefit from being streamlined. The procedure has also been criticised by the Board on the basis that they are only becoming aware of applications at a late stage, and that they are often not being provided with sufficient information to enable them to carry out necessary investigations and to arrive at a view on applications before the hearing takes place. In practice it is understood that this can often result in hearings having to be continued so that further information can be provided.

Having initially been considered by the Inner House Users Group and the Rules Rewrite Committee, the matter was referred to the Costs and Funding Committee (“the Committee”) which has developed the draft rules that have been submitted for consideration.

The draft rules

There are two principle elements to the new procedural model proposed by the Committee—

- Applications would continue to be made by way of motion in the principal proceedings, but the motion would be intimated to the Board at the outset and the Board would be able to oppose the motion, and to appear in opposition to the motion, as if it was a party to the proceedings. This should serve to streamline the procedure.
- In addition, the applicant would be required, no fewer than 28 days before the motion is enrolled or lodged, to complete and send the Board a notice in a prescribed form, along with supporting vouching. The notice has been designed to provide the Board with the information it reasonably requires in order to decide if it should acquiesce in the application, oppose the application, or seek further information. Copies of the form of notice and supporting vouchers would then require to be lodged along with the motion.

The Committee considered that it would be disproportionate to go beyond this and to attempt to prescribe in rules an entire 'pre-motion protocol' regulating such matters as the timescale for the Board's response, and the handling of requests for further information. However, the Board have indicated that they will publish on their website information about how they will respond to such notices, and a reference to the applicable web address has been included in the form.

The transitional provision at paragraph 1(4) of the Act of Sederunt is designed to avoid the introduction of the advance notice requirement resulting in a 'cliff-edge' scenario. The dates are yet to be finalised, but the intention is that the requirement should only apply where the motion seeking the award is enrolled or lodged more than a month after the Act of Sederunt comes into force. Applicants who are in a position to proceed with a motion within that period will not be affected by the notice requirement. Those who are not in a position to proceed within that period can in the meantime draw up the necessary form of notice and send it to the Board so that the notice requirement has been satisfied by the time the motion is enrolled.

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