



Scottish Legal Aid Board

Report on the Best Value Review - Regulation 18 (Special Urgency)

**USE OF REGULATION 18 OF THE
CIVIL LEGAL AID (SCOTLAND) REGULATIONS 2002**

REPORT ON REVIEW

1. INTRODUCTION

The Board has recently completed a major review of the special urgency provisions in place for civil legal aid. A wide range of issues have been examined to assess both how the provisions of regulation 18 of the Civil Legal Aid (Scotland) Regulations 2002 are being used by the profession and how they are processed by the Board. Issues under consideration included:

- whether the increasing use of the regulation 18 provisions is providing best value to the Legal Aid Fund in terms of expenditure;
- whether work done in terms of regulation 18 is appropriate and reasonable; and
- whether work done in terms of regulation 18 is necessary as a matter of special urgency in all situations.

To carry out this review we have considered and examined a wide range of applications for civil legal aid both where the regulation 18 provisions have been used and where they were not. We have considered accounts lodged in terms of regulation 18 where legal aid was not granted with particular consideration being given to high cost accounts. We also visited several firms of solicitors to talk about their practice and the use they make of the regulation 18 provisions. The firms comprised a mixture of city and rural firms making varying levels of use of the special urgency provisions.

In undertaking this review we have examined what is needed for the proper protection of applicants and ensuring effective access to justice balanced against the need to ensure that public funds are being used appropriately and are providing best value for money in all situations. As a result the review has identified areas where changes can be made to the special urgency provisions without preventing qualifying applicants from accessing urgent assistance when necessary.

2. OPERATION OF REGULATION 18

Civil legal aid is only available from the point when the Board is satisfied that the statutory tests for civil legal aid are met. These are:

- probable cause;
- reasonableness; and
- financial eligibility.

From time to time work has to be undertaken by a solicitor to protect their client's position before an application for civil legal aid can be finally determined. Because of this, in 1988 provisions were introduced to the civil legal aid regulations to cover work that had to be done as a matter of special urgency before a decision could be taken on a civil legal aid application. These provisions are set out in the Civil Legal Aid (Scotland) Regulations 2002.

The provisions of regulation 18 are designed to protect an applicant who has no choice but to bring or defend court proceedings urgently. In addition, it also provides solicitors with a degree of assurance in respect of payment for work that has been done appropriately under the terms of the regulation.

Regulation 18(1)(a) allows a solicitor to do certain work as a matter of special urgency and to tell the Board about it afterwards. Solicitors are required, by legislation, to tell the Board within 28 days of starting work that they have done this. The work that can be done without the Board's prior approval is listed in regulation 18(2) of the 2002 Regulations.

In all other situations an application can be made to the Board in terms of regulation 18(1)(b) for the Board's approval to undertake work as a matter of special urgency before an application for civil legal aid is decided.

Whether work is done in terms of regulation 18(1)(a) or 18(1)(b), the Board has to be sent an application for civil legal aid within 28 days of starting the special urgency work unless the application for civil legal aid has already been made. Where an application is not sent within this time period any special urgency work will be excluded from any grant of legal aid that may subsequently be made.

Where work is done in accordance with regulation 18, that work may be covered under any legal aid subsequently granted if the Board is satisfied that, at the time the work was undertaken, there was probable cause and it was reasonable in the particular circumstances of the case. It does not mean that the effective date of the grant of civil legal aid is the date the special urgency work began.

Solicitors have to assess a client's likely financial eligibility before regulation 18 work can be undertaken on behalf of a client to show they had a basis for believing that their client would qualify financially for civil legal aid. A contribution may be due to be paid where work is done in terms of regulation 18. To enable the Board to assess and collect any contribution that may be due, a mandate needs to be completed by the solicitor and signed by the client where special urgency work is undertaken. In signing the mandate the client agrees to pay any contribution the Board assesses they can pay towards part or all of the cost of the special urgency work where civil legal aid is not granted.

Prior to 2002 the responsibility for collecting the contribution assessed as due by the solicitor fell to the solicitor acting. Payment of any account lodged under the then Secretary of State's Determination (the route for payment where a civil legal aid application was refused but special urgency work had been done) would be made net of any assessed contribution. Solicitors often expected their clients to pay any such contribution in one lump sum and this could result in applicants with urgent problems being denied access to justice if they could not afford to pay the contribution in full. To try to resolve this issue changes were made to the legal aid legislation giving the Board the responsibility for collecting the contributions as assessed. By doing this, the Board's standard practice of allowing payment of any contribution due to be made over a period of time opened up the special urgency facility to those who would otherwise have struggled to meet the costs involved.

The signed mandate is the route to payment for the solicitor. The Board can only accept intimation of work done under regulation 18 without a mandate in very exceptional circumstances and even then all work carried out is at a solicitor's own risk until such time as a mandate is received by the Board.

While the arrangements in place in terms of regulation 18 afford a substantial level of protection to solicitors should legal aid not be granted this does not extend to applicants insofar as they are not entitled to the benefit of modification of liability of expenses if legal aid is not granted. It is very important that this is borne in mind at all times when commencing work on behalf of a

client using the special urgency provisions and that only the minimum amount of work necessary to protect a client's position is undertaken..

3. INCREASED USE OF SPECIAL URGENCY PROVISIONS

There was a significant increase in the use made of regulation 18 from 2008/09 to 2009/10. The number of notifications in terms of regulation 18(1)(a) rose from 8595 in 2008/09 to 12 254 in 2009/10. The number of applications for approval to undertake special urgency work in terms of regulation 18(1)(b) rose from 1808 to 3 130 over this same period.

The number of civil legal aid applications (including review applications) received in 2008/09 was 18158. This increased to 23162 in 2009/10. Application numbers increased by 27.5% from 2008/09 to 2009/10 but regulation 18 activity increase well in excess of this with a 42.5% increase in regulation 18(1)(a) notifications and a 73.1% increase in regulation 18(1)(b) applications seeking Board approval to do work.

Applications Received (including reviews)	2008/09	2009/10	Variance
Total number of applications	18158	23162	+5004 (27.5%)
Applications with regulation 18(1)(a) notifications	8595(47.3%)	12254 (52.9%)	+3659 (42.5%)
Number of regulation 18(1)(b) applications	1808 (10%)	3130 (13.5%)	+1322 (73.1%)

It is clear that the increased use being made of regulation 18 does not simply correlate with an increase in the number of applications so other factors must be affecting the use made of the provisions. With the recession placing increasing pressure on public finances, it is imperative that the factors driving up use are identified to continue to ensure that urgent access to justice is being delivered in an appropriate manner.

Family cases saw a substantial increase in regulation 18(1)(a) notifications. Of significance were applications where contact was the primary category code. As part of the research undertaken, consideration was given to the use made of regulation 18 to raise proceedings before civil legal aid was granted using two separate six month periods. This showed an increase use rising from use being made in 616 of 952 applications in the period January-June 2007 (64.7% of the total) to 1276 of 1786 applications in the period July-December 2009 (71.4% of the total).

CONTACT Initial applications	2007 (Jan-June)	2009 (July-Dec)	Variance
Total of LARNS all categories	8346	10943	+2597 (31.1%)
Total of LARNS for CONTACT	952 (11.4%)	1786 (14.8%)	+835 (87.7%)
LARNS for CONTACT with Reg 18 1(a)	616 (64.7%)	1276 (71.4%)	+660 (107.1%)
Volume of Reg 18(1)(a) notifications	662 (69.5%)	1341 (75.0%)	+679 (102.5%)

4. VARYING PRACTICES OF FIRMS

The general use made of regulation 18 by solicitors registered to undertake civil legal assistance increased over the period 2007 to 2009. The number of firms submitting high numbers of applications for civil legal aid utilising the provisions of regulation 18(1)(a) (that is in over 70% of total applications lodged by a firm) increased by 8% over the period 2007/2009.

The practices of both high and low use firms were examined to try to identify different factors that may have driven greater usage of the regulation 18 provisions by certain firms. It appears that a significant factor leading to increased usage is the willingness, or otherwise, of firms to risk raising proceedings for contact and parental rights and responsibilities orders in particular, using regulation 18 rather than waiting for a civil legal aid application to be determined. As indicated previously, as part of the research into the use made of the special urgency provisions a number of visits to firms of solicitors took place to discuss their practices.

None of the firms visited considered that they had to use regulation 18 because of the processes and procedures of the Board. Significantly these firms did not consider that the outcomes achieved in any case differed depending on whether regulation 18 was used or not. Those firms that had a very low use of regulation 18 experienced no unsatisfactory outcomes for their clients.

5. REGULATION 18 ACCOUNTS

In the year 2008/09 £629K was paid through the regulation 18 payment of accounts provisions which allows for payment for work done where civil legal aid is not granted. In the year 2009/10 this had increased to £813K. Such accounts are submitted where civil legal aid is not granted but a solicitor has undertaken work using the special urgency provisions.

High value accounts paid in terms of regulation 18 were examined to identify specific factors that not only led to the account being higher than the average but also to identify any potential areas of concern in respect of work undertaken or client attitudes. Appendix A details the findings in high value accounts in detail.

The key areas of concern identified were:

- The number of actions being raised using the special urgency provisions where the circumstances of the case did not show there was, in fact, any “special urgency”. Regulation 18 specifies that steps may be taken where needed “as a matter of special urgency to protect the applicant’s position”. In a large number of applications dealing with family cases, no special urgency leading to the raising of the action was identified. It appeared that such actions were often raised simply because the provisions of regulation 18(1)(a) and (2) allow this without any explanation being necessary. Specific reference is made to Appendix A in this connection.
- Applications seeking the Board’s approval to carry out work as a matter of special urgency in terms of regulation 18(1)(b) where there is in fact no special urgency are regularly lodged and refused because of the absence of anything to show the matter cannot wait until a decision is taken on the legal aid application.
- The level of work being undertaken using regulation 18 at times when an applicant is not co-operating with the Board’s requests for financial information or has not provided a Form 1 or 2 to allow the Board even to begin to consider financial eligibility.
- The use being made of regulation 18 where applications are held as rejected due to a want of basic information that should have been provided with an application at the

outset and are thus, at the time the special urgency work is being done, incapable of being considered to determine whether the statutory tests are met and;

- Cases involving residence and contact disputes being raised using the special urgency provisions and then a court report being ordered at an early stage in the proceedings before an application for civil legal aid is determined. Where legal aid is then not granted, not only has the cost of the work undertaken by the solicitor to be met but also the cost of any report that may have been ordered.

6. FINANCIAL ASSESSMENT BY SOLICITORS

Solicitors acting need to be satisfied that an applicant is likely to qualify financially for civil legal aid before use can be made of regulation 18. This is something that solicitors can find difficult. Appendix B sets out examples of errors made in calculating financial eligibility and the concerns raised by these assessments. These are not isolated examples and such errors are by no means uncommon.

In assessing whether the financial eligibility test is carried out appropriately a number of factors have been identified that disclose a lack of, or incomplete, knowledge of financial eligibility issues by solicitors. These are:

- a failure by solicitors properly to capture and record income and outgoings;
- a failure to understand how to calculate financial eligibility in terms of lower income limits;
- the acceptance of assertions made by client in relation to their outgoings at face value because the Board has previously indicated that verification of financial circumstances is not needed; and
- failure to take into account relevant second property values where property is not the subject matter of dispute.

In considering accounts for payment in terms of regulation 18 the Board has to consider whether a solicitor has demonstrated they had adequate reason to believe their client would qualify financially for civil legal aid. Where there have been fundamental failings in assessing financial eligibility, payment of the account should not be made.

The guidance available to solicitors to assist them in assessing financial eligibility is being strengthened to help the profession give robust scrutiny to an individual's potential eligibility for civil legal aid before work is undertaken in terms of regulation 18. The Board's current guidance states that solicitors are not expected to see any vouching or verification of income, capital and expenditure from a client when completing the mandate but this is an area that has to change to avoid, so far as possible, risk to public funds.

7. FINANCIAL ELIGIBILITY ASSESSMENT BY THE BOARD

Where a decision is taken to refuse an application because one or both of the legal merits tests have not been met, further work may still be needed to complete a financial assessment. Where an application has been refused on the merits this is needed to establish whether or not any contribution may be due towards any special urgency work undertaken. It is necessary to ensure that, so far as financial eligibility is concerned, a decision is recorded against all applications for civil legal aid where special urgency work has been undertaken. The decisions will be one of:

- granted;
- refused; or

- abandoned.

Completing the financial assessment allows for the potential recovery of all sums that may be due to the Fund where work has been undertaken in terms of regulation 18 notwithstanding that there has been a refusal of the application on the legal merits of the case.

Where a financial assessment has to be abandoned because of non co-operation by an applicant, the applicant becomes liable for payment of the full amount of any regulation 18 account paid by the Board.

It has to be borne in mind however that it is only where a full collection of sums due is made that there is no loss to the Fund. Not all contributions can be collected and even if a full recovery is made the Board still has to meet the costs of collection.

8. REJECTED APPLICATIONS

Currently applications for civil legal aid that are lodged incomplete are held as rejected to allow solicitors and/or the applicant the opportunity to provide further information to complete the registration of the application. The most common reasons for rejection of an application are:

- failure to sign the form by the solicitor and/or the applicant;
- failure to provide a financial Form 1 or Financial form 2;
- failure to provide an applicant's statement;
- failure to provide supporting information; and
- failure to provide a copy of an initial writ where the application is in respect of a defence to an action.

Where solicitors undertake work in terms of regulation 18 they have to comply with the 28 day requirement for the lodging of a legal aid application unless the application was lodged before undertaking the special urgency work. In view of this there may be occasions when an application has to be lodged that is not fully complete. Solicitors and/or the applicant should provide any relevant missing information to support the application and to allow the registration and assessment of it to be undertaken as soon as possible. There are however certain key aspects of an application that should be completed before any application is submitted even where the application is being lodged to meet the 28 day requirement. These are:

- signing and dating of the form by the solicitor acting;
- signing and dating of the form by the applicant; and
- a statement from the applicant.

Where work has been done as a matter of special urgency, the solicitor will have been given sufficient basic information to examine the potential issues involved in the court case. Given this, an applicant's statement should always be provided with an application. Signing and dating an application by the solicitor acting is a basic essential requirement. In addition, while there could be difficulties in getting an applicant to sign a form where special urgency work has been undertaken it is a requirement of regulation 5 of the Civil Legal Aid (Scotland) Regulations 2002 that an application is signed by the applicant so, without this, there is no application in terms of regulation 18(3) and (4).

Solicitors must try to ensure that they get all relevant essential information from the applicant and also that they stress the importance of the applicant co-operating with the Board in respect of

any queries. Where basic application requirements are not met and remain outstanding at the point a regulation 18 account is lodged payment may not be made unless there are good reasons for the failure to meet these requirements.

9. PROPOSALS FOR CHANGE

A number of changes are envisaged in relation to the operation of regulation 18. None of these changes are considered likely to have any impact on access to the courts and justice where appropriate. Where work must be done as matter of special urgency to protect a client it will still be open to a solicitor either to undertake the work without the Board's prior approval or to seek such approval for any necessary work in terms of regulation 18(1)(b). The Board will continue to process applications for approval speedily with over 97% of applications being dealt with within the Board's stated target of two days. The changes envisaged, while still allowing immediate access to the courts where necessary, will also protect public funds and reduce the risk of a client being exposed to court costs should their application for legal aid be unsuccessful.

At all times it is expected that regulation 18 will be used to do the minimum amount of work needed to protect a client's position and to avoid exposing the Fund to unnecessary costs.

9.1 Changes to the scope of regulation 18

The use of regulation 18(1)(a) where no apparent issue of special urgency exists has the potential to waste funds and prejudice the client. An application for civil legal aid may not be granted but if regulation 18 has been used to bring a case notwithstanding the lack of urgency unnecessary costs are incurred to the Fund. In examining a range of special urgency applications it is clear that cases are being raised in terms of regulation 18(1)(a) not because the case is specially urgent and any delay will prejudice the client but rather simply because the option is there to raise an action without immediately. Regulation 18(2) will be amended to remove:

- the ability to move for interim orders for residence or interdict or interim orders under section 11 of the Children's (Scotland) Act 1995, including initiating or entering proceedings in which such orders may be sought),
- the ability to move for or oppose a motion for variation of an order relating to parental responsibilities or parental rights under section 11 of the 1995 Act.
- the ability to obtain reports for residence orders or contact orders within the meaning of section 11(2)(c) and (d) of the 1995 Act when the court so orders

In all these situations, although the steps would be removed from the list under regulation 18(2), the solicitor would still be entitled to seek the prior certification of the Board, in appropriate circumstances, under regulation 18(1)(b) giving the Board control as to which cases proceed under special urgency and those which do not. This will mean that the cases that have real urgency can go ahead with immediate court action being undertaken while other non urgent cases can wait until a decision is taken on the full application.

9.1.1 Notwithstanding that the question of whether the tests of probable cause and reasonableness were met in relation to any work done as a matter of special urgency can be considered at the tail end of the application process, it would be beneficial to include a provision at the outset of the application allowing the Board to flag up any potential areas

of concern or risk for the solicitor acting. To this end the terms of regulation 18 will be amended to allow consideration of issues in addition to whether work has to be undertaken as a matter of special urgency including whether the matter appears reasonable as a whole.

9.2 Financial assessment by the solicitor

In future, we consider that solicitors undertaking regulation 18 work on behalf of a client should see verification of the client's financial position before completing the assessment of potential financial eligibility, wherever possible. Work undertaken without seeing evidence of eligibility should be done at the solicitor's own risk.

9.2.1 To this end guidance to the profession will be issued on:-

- i) the need to obtain verification for income and outgoings where it may impact on financial eligibility
- ii) the need to consider where an individual has second properties or substantial capital,
- iii) the need to consider areas of potential areas of deprivation of resources, and
- iv) situations when the need to see verification may be dispensed with.

This guidance will be issued in April 2011 and the profession will be notified of the date when the need to see verification will commence.

9.2.2 In complex financial assessments, the solicitor acting should not undertake regulation 18 work without contacting the Board about the applicant's potential financial eligibility. This will give both the solicitor acting and the Board the necessary reassurance about a client's likely financial eligibility in cases where the issues to be considered are not straightforward reducing the risk to public funds;

9.3 Payment of regulation 18 accounts where the application remains rejected

9.3.1 Applications that have been rejected because they do not contain sufficient information to be assessed are not be capable of attracting payment of a regulation 18 account as there is no decision on the application to refuse. In deciding whether there is sufficient information to register an application to be considered with a view to taking a decision to grant or refuse, the minimum requirements will be an application signed and dated by the solicitor, signed and dated by the applicant and accompanied by a statement from an applicant unless good reason is shown for its absence. This process will come into effect in April 2011 and the profession will be notified of the date of commencement in advance of its implementation.

9.4 Regulation 18 and its use while applications are outstanding

9.4.1 Where an application is rejected (or outstanding for any reason) because of a lack of information from the applicant and/or the solicitor and the information requested is not complex and should be capable of being provided readily, the solicitor is not likely to be authorised to undertake work in terms of regulation 18 so long as such matters are outstanding. No more than three weeks should elapse between a request for such information and its provision. Requests for approval in terms of regulation 18(1)(b) should be refused. Where there is the potential for work to be done in terms of regulation 18(1)(a) the solicitor should be notified that because of the lack of information from the

solicitor and/or co-operation by the applicant, work in terms of regulation 18(1)(a) should not be undertaken. This should apply to all cases unless good reasons are given justifying delay in providing outstanding information needed. In the event that such work is undertaken without reasonable justification, the solicitor will have payment for this work abated from any account.

9.5 Regulation 18 where previous application for legal aid terminated

- 9.5.1 Where an application for civil legal aid is lodged in respect of proceedings where a previous grant of civil legal aid for the same proceedings was terminated due to a failure by the applicant to co-operate with the Board, the solicitor acting will be limited in the use that can be made of regulation 18(1)(b) in that the Board will consider whether there are good reasons for authorising such work where there has been a previous failure to co-operate. Where there is the potential for work to be done in terms of regulation 18(1)(a) the solicitor should be notified that because of the previous termination, work in terms of regulation 18(1)(a) should not be undertaken. This should apply to all cases unless good reasons are given about the circumstances that led to the previous termination
- 9.5.2 Requests for funding for advice and assistance should not normally be made to prepare and submit a second or subsequent application for civil legal aid or special urgency cover where a previous application has been terminated as a result of the applicant's failings. It is unreasonable to use public funds to prepare an application for second or subsequent consideration when the only reason the first application was refused is because of the applicant's failure to co-operate. In the event that such a request is made it is likely to be refused unless good reasons are given justifying this expenditure.

9.6 Use of regulation 18 where previous applications have been made covering the same subject matter.

Where a number of applications are made on behalf of the same applicant for the same or connected proceedings the solicitor may need to be restricted in the access they have to regulation 18(1)(a) and (b). For regulation 18(1)(b) applications any requests in a multiple application situation may be refused unless there are good grounds for raising an action immediately. In regulation 18(1)(a) situations the solicitor should be alerted to the possibility that by undertaking work as a matter of special urgency where there have been repeated court actions on the matter they risk their account not being paid unless good reasons are given justifying this. This is necessary to protect public funds from costs incurred by the involvement in repeated proceedings of a similar nature.

10. CONCLUSIONS

The Scottish Government has already decided to make some changes to the Civil Legal Aid (Scotland) Regulations 2002 in respect of the issues set out in paragraph 9.1 as part of the legal aid savings package. These have been discussed with the Law Society of Scotland. The Law Society issued information on the savings package to its members on 10 March 2011. The changes are expected to come into effect on 1 April 2011 and guidance will be issued prior to that date. Guidance will also be issued on other matters not requiring regulatory change before any amendments to the process are made.

11. COMMENTS

Any comments on the review findings and proposals should be sent to

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REGULATION 18 CONSULTATION**Case 1 – regulation 18 account paid at £4885.52**

The applicant had a previous grant of legal aid for a parental rights and responsibilities order. In that case the solicitors acting raised the court action using the special urgency provisions. The grant of legal aid was then terminated in terms of regulation 31(a)(iii) due to a failure by the applicant to co-operate with requests for financial information. An account was paid at £564.71.

The applicant then re-instructed the same solicitors and they submitted a second application for legal aid in November 2008 to continue the proceedings for a parental rights and responsibilities order and contact. The solicitors again used the special urgency provisions this time to amend the initial writ. They also took steps in relation to child welfare hearings and obtaining of two reports ordered by the court. These reports had a total cost of £4030.77. An interim award of supervised contact was made. The application was admitted on its merits but subsequently was abandoned due to a failure by the applicant to co-operate with a request for financial information. No further instructions were provided and the solicitor withdrew from acting.

The SU mandate signed by the applicant showed that the solicitor had assessed the applicant as being financially eligible with a contribution payable of £1112. No financial form 2 was ever completed. The issues of concern here are:

- A second application for legal aid was lodged notwithstanding that legal aid had already been in place and had to be terminated due to a failure by the applicant to co-operate with the request for financial information.
- Advice and assistance was used to prepare and submit the second application for civil legal aid with a total authorised expenditure of £850 being made available to the individual notwithstanding that it was a second application and that the first application had been terminated as a result of his failings.
- Using the special urgency provisions before a grant of civil legal aid was in place is unacceptable in a situation where the applicant himself created the special urgency. The applicant and his solicitor should not have been allowed to use the special urgency provisions.
- The applicant again failed to co-operate in respect of his financial assessment notwithstanding that special urgency work had been undertaken. This is unacceptable and a waste of public funds.

Case 3 – regulation 18 account paid at £4094.82

The applicant sought legal aid to pursue proceeding for a parental rights and responsibilities order and contact. The circumstances show no urgency and the case could have waited until a decision was taken on the legal aid application. The proceedings were raised and the court ordered a report. Interim orders were granted. The report cost £3204.73.

The legal aid application was then abandoned due to the applicant's failure to co-operate with a request for financial information. Confirmation could not be obtained that a passport benefit was in payment and the applicant failed to provide a Form 2. The queries relating to the financial position took place over a three month period during which time a significant amount of work was undertaken by the solicitors. They subsequently withdrew from acting when they could not obtain their client's instructions.

The issues of concern here are:

- The case itself was not urgent. There was a delay of three months between contact ceasing and the applicant approaching a solicitor to raise an action. In view of this delay there was no reason at all why the applicant could not wait until a decision had been taken on whether or not civil legal aid should be made available.
- It took three months before we could be satisfied that the applicant was not going to cooperate with our requests for financial information and the application abandoned. Significant work was undertaken at this time. The solicitors then had to withdraw from acting. This suggests it is inappropriate to allow special urgency work to be undertaken when there is an outstanding matter that can be addressed either by the solicitor or the applicant.

Case 3 – regulation 18 account paid at £2790.39

The applicant sought legal aid to pursue proceedings for a parental rights and responsibilities order and contact. The circumstances do not suggest any special urgency. The proceedings were raised, defences lodged and a report ordered by the court. The applicant was found to be liable for the full cost of the report and the fee amounted to £1,791. When the case next called the applicant was awarded interim contact.

The application was submitted in November 2008 and admitted on the merits. However it had to be abandoned on three separate occasions due to a failure by the applicant to provide financial information (on two occasions the application was resuscitated) with the final decision to abandon being taken in June 2009 by which time a significant amount of court work had been undertaken.

The SU mandate signed by the applicant shows that the solicitor had assessed the applicant as being financially eligible with a contribution payable of £959. The issues of concern here are:

- The application did not require to be raised as a matter of special urgency. The applicant could have waited until a decision had been taken on whether to grant civil legal aid before raising proceedings and incurring expenditure against public funds. The child in question was born at the end of August and the application was not lodged till November.
- The application was abandoned and resuscitated on two occasions before it was finally abandoned in June 2009. Throughout this time adequate financial information from the applicant could not be obtained yet work was being undertaken by the solicitor acting in this case. Work should not be undertaken as a matter of special urgency when there is an outstanding matter that can be addressed either by the solicitor or the applicant.

Case 4 – regulation 18 account paid at £2478.23

The applicant sought legal aid to pursue a minute to vary seeking an order for residence which failing contact. The child was resident with an aunt and uncle who had obtained an order for residence in June 2005. The proceedings were raised in February 2009. The court refused to make an interim award of residence and ordered that a curator be appointed. The curator provided a report at a cost of £1,562. An award of interim contact was subsequently made and the case sisted.

The Board's Audit and Investigation Department conducted a fraud enquiry and established that the applicant had failed to declare in her financial forms for advice and assistance and civil legal aid that she was in employment. A decision was taken not to report the matter to the procurator fiscal, but to seek recovery of the sums paid on the solicitor's accounts from the applicant. The issues of concern here are:

- This was not an urgent situation. The child had been resident with the opponent since 2005. This could have waited for a decision to be taken on the legal aid application.
- The failure to provide correct financial information is unacceptable.

Case 5 – regulation 18 account paid at £2552.80

This application involved a defence to an anti social behaviour order. The case was heard in Inverness Sheriff Court and the nominated solicitor was based in Glasgow. Regulation 18(1)(b) applications were granted to cover various appearances before the court. The nominated solicitor attended court on three occasions; two of the three appearances were charged in full incurring costs in the region of £500 each time, the third visit was shared with another case. The total travel charges and accommodation amount to over £468. A local solicitor was employed to cover two other appearances.

The application was rejected in February 2009 as no statement by the applicant or a third party had been provided. These statements were not submitted until June 2009 and the application was refused on the merits quickly thereafter. A review application was also refused. Three of the requests for regulation 18(1)(b) were made during the period when the application was rejected.

The final appearance at court took place on 22 July 2009 when a local solicitor appeared and an outlay of £51.75 was paid. The issues of concern here are:

- Substantial costs have been incurred in this case because of the instruction of a solicitor from outwith the locality. While selecting a solicitor of choice is provided for in the legislation it can incur additional expenditure and it is a matter for further consideration.
- The application had to be rejected on three separate occasions before basic information including the applicant's statement could be provided. During these periods of rejection a substantial amount of work was done. As soon as the statements were received the application was refused because the information provided showed that the defence had no possibility of success.
- It is a concern that the solicitor acting even felt that there was defence to put forward in relation to the matters raised in the ASBO.

Case 6 – regulation 18 account paid at £1,563.48

This application related to a defence in an action for contact. The applicant was a 14 year old girl opposing proceedings at the instance of her father. Answers were lodged and a curator was appointed. A report was subsequently provided at a cost of £964. The father then withdrew the crave for contact.

The application for legal aid was rejected on 17 July because there was no statement by the applicant or a third party statement. No response was received to the rejection. The contact

crave was withdrawn in August 2008 and the case disposed of in October. This highlights continuing urgent work during a period when the application remained rejected.

The issues of concern here are:

- The application was held as rejected because there was no provision of basic statements. So far as the statement from the applicant is concerned this should always be capable of being provided with an application given that the solicitor must obtain basic information from their client before they are in a position either to put the case to the court or to lodge defences.
- Substantial work has been done while the application was held as rejected. Where the solicitors acting or the applicant is capable of taking forward matters to bring the rejection period to an end then no work should be undertaken in terms of the special urgency provisions.

Case 7 – regulation 18 account paid at £2275.76

The applicant applied for legal aid to defend divorce proceedings in connection with residence and contact and to seek a capital sum. Defences were lodged and a report was ordered by the court with both parties being liable to pay a one half share of £2536.83 i.e. £1,268.42. Court procedure took place during the period April to October 2009 including child welfare hearings, adjustment of the pleadings and an options hearing. There was no attempt to sist the action pending a decision on the application.

The application was granted on the merits but abandoned in September due to the applicant's non co-operation with requests for financial information. The solicitor withdrew from acting in October before the case concluded. The SU mandate signed by the applicant shows that the solicitor had assessed the applicant as being financially eligible with a contribution payable of around £1,000.

The issue of concern here is:

- There was no co-operation as far as financial assessment is concerned here. This non co-operation was at the same time as considerable work was being undertaken in terms of the special urgency provisions. This work should not be permitted at a time of non co-operation.

Case 8 – regulation 18 account paid at £1,913.57

The applicant was the respondent in variation proceedings for residence. Answers were lodged and a curator was appointed to report. The case proceeded to a hearing when the court granted interim orders based on the reporters recommendations; the previous residence order in favour of the respondent was varied ad interim and residence was awarded to the minuter. The applicant / respondent obtained interim residential contact. A one half share of the curators report cost £916.

The application for legal aid was submitted on 27 April and rejected on 8 May 2009 because no financial form 2 was provided. The initial urgent work was completed by 11 May when the court made the interim orders. There was subsequent procedure when the court re-appointed the curator and various further hearings took place.

The issues of concern here are:

- The application was abandoned and resuscitated on two occasions before it was finally abandoned in June 2009. Throughout this time there was no adequate financial information from the applicant and yet work was being undertaken in this case. Work should not be undertaken as a matter of special urgency when there is an outstanding matter that can be addressed either by the solicitor or the applicant.
- There were four different parties involved in this particular application involving the mother, father and grandparents. In a range of issues involving the same child the applicant had a previous legal aid application granted in 2006 and a total sum of £8,304.05 was paid in it. One of the grandparents had made three applications for civil legal aid but none had been granted. One was abandoned in 2009 where an account was paid in terms of regulation 18 in the sum of £869. The mother had a total of seven applications for civil legal aid in respect of the same child and other parties. Of these four were granted and had paid accounts. For the corresponding case with this particular application total costs were incurred against the mother of £1,823.85 and her grant of civil legal aid was terminated because she failed to provide information requested by the Audit Department.
- The total of her other various grants of civil legal aid amount to £28,972.77. In total the legal aid expenditure to date for cases involving these parties and the child amount to £45,059.39.

Case 9 – regulation 18 account paid at £1378.49

The applicant sought legal aid for residence and to interdict the opponent from removing the child from his care. Proceedings were raised as a matter of urgency and the pursuer was granted interim interdict. A child welfare hearing was fixed and a report ordered by the court. Adjustments were made to the pleadings and following receipt of the report an options hearing was discharged to allow the case to settle by joint minute. Both parties accepted the recommendations of the reporter which were framed around an agreement by both parties to put their differences aside and to allow the pursuer residence and the opponent reasonable contact.

The application was granted on the merits, but subsequently abandoned due to the applicant's failure to co-operate and supply financial information. The SU mandate signed by the applicant shows the applicant as financially eligible with a nil contribution. The issues of concern here are:

- This was not an urgent case in that the applicant had de facto residence of the child and there was only the vaguest of suggestions that the mother might seek to alter this. In reality the applicant could have waited for a decision on the civil legal aid application.
- The applicant failed to co-operate with the financial assessment and the application had to be abandoned. This was all while work was being undertaken in terms of the special urgency provisions.

REGULATION 18 CONSULTATION

The tables below detail six cases selected at random for examination and analysis following refusal on financial eligibility grounds.

1.

DISPOSABLE INCOME – BOARD	DISPOSABLE CAPITAL – BOARD	DISPOSABLE INCOME – SOLICITOR	DISPOSABLE CAPITAL – SOLICITOR	APPLICATION LOWER INCOME AND CAPITAL LIMIT
£11,115	£nil	£5,777	£nil	£10,074

In assessing financial eligibility the solicitor in this case omitted income consisting of:

- payments of child tax credit amounting to £4,020; and
- payment of an annual incentive bonus of £2,466.

The solicitor also failed to take into account outgoings covering:

- dependency allowances for children amounting to £2,377;
- counsel tax payments; and
- board and lodging payments.

2.

DISPOSABLE INCOME – BOARD	DISPOSABLE CAPITAL – BOARD	DISPOSABLE INCOME – SOLICITOR	DISPOSABLE CAPITAL – SOLICITOR	APPLICATION LOWER INCOME AND CAPITAL LIMIT
£11,545	£nil	£10,782	£nil	£10,074

Once the solicitor reached a disposable income figure he deducted the lower income limit of £2,995 which put the applicant within scope for eligibility. This was inaccurate and should not have been done.

3.

DISPOSABLE INCOME – BOARD	DISPOSABLE CAPITAL – BOARD	DISPOSABLE INCOME – SOLICITOR	DISPOSABLE CAPITAL – SOLICITOR	APPLICATION LOWER INCOME AND CAPITAL LIMIT
Not assessed	£14,056	£9,631	£8,982	£10,074 & £11,649

The solicitors carried out an accurate assessment of income but when assessing disposable capital they deducted the lower capital limit from disposable capital thus rendering the applicant eligible when in reality the capital held exceeded the upper limit.

4.

DISPOSABLE INCOME – BOARD	DISPOSABLE CAPITAL – BOARD	DISPOSABLE INCOME – SOLICITOR	DISPOSABLE CAPITAL – SOLICITOR	APPLICATION LOWER INCOME AND CAPITAL LIMIT
£11,043	£nil	£1,884	£nil	£10,074

In this application the applicant declared that outgoings were being paid to cover:

- maintenance;
- rent and council tax payments for an ex partner; and
- debt repayments.

The solicitor allowed all of these outgoings when assessing disposable income but when we came to consider these matters we were not provided with any verification to show that any of these payments were actually being made. As such, no allowances were made for these outgoings in our assessment of disposable income.

5.

DISPOSABLE INCOME – BOARD	DISPOSABLE CAPITAL – BOARD	DISPOSABLE INCOME – SOLICITOR	DISPOSABLE CAPITAL – SOLICITOR	APPLICATION LOWER INCOME AND CAPITAL LIMIT
£6,316	£14,048	£5,777	£nil	£11,649

The assessment of income undertaken by the solicitor was reasonable but in determining capital the solicitor took no account of a property owned by the applicant which was rented out. This second property was not and could not have been viewed as subject matter of dispute as the issue under consideration was a contact action. The applicant was not eligible in terms of disposable capital.

6.

DISPOSABLE INCOME – BOARD	DISPOSABLE CAPITAL – BOARD	DISPOSABLE INCOME – SOLICITOR	DISPOSABLE CAPITAL – SOLICITOR	APPLICATION LOWER INCOME AND CAPITAL LIMIT
£7,388	£63,584	£nil	£nil	£11,402

The mandate in this case was completed in May 2007. Bank statements showed a deposit of £74,057.02 in April 2007 being the proceeds of sale of a business. The sum of £70,045.20 was withdrawn in June 2007. The solicitors advised that this had been given to his brother. In assessing financial eligibility gifting capital to a brother to set up a business is not something that is appropriate nor should it render an applicant eligible for legal aid.

The findings here highlight a number of areas of potential concern which are:

- a failure by solicitors properly to capture and record income and outgoings. The mandate form adequately covers the issues to be taken into consideration and so failure to obtain relevant information is not acceptable;

- a failure to understand how to calculate financial eligibility. The lower income limit and the lower capital limit have been deducted from disposable income and disposable capital in two cases. This failure has given the impression that clients were financially eligible for civil legal aid when they were not.
- assertions made by clients in relation to outgoings being accepted at face value without any verification being necessary; and
- failure to take into account relevant second property values when the property could not be viewed as subject matter of dispute.

These cases were selected at random and while we have never expected solicitors' assessments of eligibility to be as accurate as our own, key issues such as not deducting lower income and capital limits from disposable income and capital figures should be within a solicitor's ability to consider. It is therefore a matter of concern when differences in assessments result in individuals being rendered financially eligible when they are not.