

**FROM THE PERMANENT SECRETARY**  
**Nick Perry**

Rm B5.10, Castle Buildings  
Stormont Estate  
BELFAST BT4 3SG  
Tel: 028 9052 2992  
email: [nick.perry@justice-ni.x.gsi.gov.uk](mailto:nick.perry@justice-ni.x.gsi.gov.uk)

Mr Robin Swann  
Chairperson  
Public Accounts Committee  
Parliament Buildings  
Ballymiscaw  
Belfast BT4 3XX

By email: [pac.committee@niassembly.gov.uk](mailto:pac.committee@niassembly.gov.uk)

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## **INQUIRY INTO MANAGING LEGAL AID**

Thank you for your letter of 4 July requesting further information on a number of issues which arose during the evidence session on 29 June into the Inquiry into Managing Legal Aid. The additional information is set out below.

***In the scheme which ran for two and half years in which applicants requesting Legal Aid were asked to complete a statement of means form, how many ineligible cases were found and how many solicitors failed the compliance regime to allow them to provide publically funded legal aid?***

The Agency has been reviewing continued financial eligibility of individuals who were granted full civil legal aid, now termed representation (higher), and whose case remains open in the Agency's records.

The initial pilot review was of a sample of 10% of the certificates issued in 2011/12 which remained open on the Agency's system. Following a review of the pilot, a team was established which is undertaking a rolling review of a sample of 20% of the certificates issued in 2012/13 – 2014/15 which remain open on the Agency's system.

The Agency has reviewed 1,471 files and issued requests for renewed financial eligibility information in 1,299 cases. The difference is explained by the fact that no request for information was issued if the files indicated that the applicant had died or the case had concluded and the bill was being finalised.

Of the 1,299 cases, some 670 cases (52%) required no further action as responses indicated that the case had been concluded with no cost to the fund; the case had been concluded and the bill was being prepared; or a range of other circumstances including the assisted person had died and the case was not proceeding.

A further 529 cases (41%) resulted in a review of the assisted persons' current financial eligibility. Of these cases, 449 (85%) remained financially eligible to be in receipt of civil legal aid. In addition, 82 cases (15%) were financially ineligible and their certificates have been discharged.

In the 2012/13 – 2014/15 review a further 71 (5%) certificates were revoked as the assisted individual did not co-operate with the review. There is a balance of 29 cases (2%) still being processed.

In the review for the years 2012/13 – 2014/15, some 40 firms of solicitors represented the individuals who were found to be financially ineligible.

In respect of the number of solicitors which failed the compliance regime, there is no formal compliance regime in place at this time. This will be introduced as part of the Registration Scheme.

### ***How is the eligibility for legal aid determined?***

Applications for **Civil Legal Services** are determined by reference to two governing pieces of legislation, namely

- (a) The Civil Legal Services (General) Regulations (Northern Ireland) 2015 [2015 No. 195] – the “General Regulations” can be accessed through the following link:

[http://www.legislation.gov.uk/nisr/2015/195/pdfs/nisr\\_20150195\\_en.pdf](http://www.legislation.gov.uk/nisr/2015/195/pdfs/nisr_20150195_en.pdf);

and

- (b) The Civil Legal Services (Financial) Regulations (Northern Ireland) 2015 [2015 No. 196] - the “Financial Regulations” can be accessed through the following link:

[http://www.legislation.gov.uk/nisr/2015/196/pdfs/nisr\\_20150196\\_en.pdf](http://www.legislation.gov.uk/nisr/2015/196/pdfs/nisr_20150196_en.pdf)

Unless there are specific exceptions in the General or Financial Regulations, all applications for Civil Legal Services must satisfy the relevant legal merits tests set out in the General Regulations and the financial eligibility criteria set out in the Financial Regulations. Examples of significant exceptions are (i) that advice

provided at police stations under the Police and Criminal Evidence Act (PACE) is not subject to a merits or financial eligibility test; and (ii) the parents involved in certain public law proceedings and the child is the subject of an application for a care or supervision order or an emergency protection order (among other specific orders) are not subject to a merits or financial eligibility test.

In respect of advice and assistance, the solicitor approached by the applicant is responsible for determining whether the individual satisfies the tests set out in the General and Financial Regulations. If the solicitor is content that the individual meets the two tests, the solicitor will provide advice and will notify the Legal Services Agency of the advice submitted and the information which demonstrated that the requirement of the Financial Regulations were satisfied.

The Financial Regulations require an individual to have:

- (a) Disposable weekly income does not exceed £234 per week; and
- (b) Disposable capital does not exceed £1,000

How the disposable income and capital are to be calculated are set out in detail at Chapter 3 of the Financial Regulations. If the individual is eligible to receive advice and assistance with a contribution, the detail of how the contribution is to be calculated, together with the contribution payable are set out at rule 59 of the Financial Regulations.

The solicitor will then address the merits point and will have to be satisfied that the advice is being given on a point of Northern Ireland law.

If an applicant is seeking representation (lower), typically proceedings before the Magistrates Court, including the Family Proceedings Court, the solicitor approached by the applicant is responsible for determining whether the individual satisfies the tests set out in the General and Financial Regulations. If the solicitor is content that the individual meets the two tests the solicitor will submit an application to the Agency for processing. Unless the necessary supporting documentation is not provided, the application will be approved and a certificate issued.

The Financial Regulations require an individual to have:

- (a) Disposable income does not exceed 234 per week
- (b) Disposable capital does not exceed £3,000

Again, the details of the how the applicant's disposable income and capital are to be calculated is set out in detail at Chapter 3 of the Financial Regulations. Representation (lower) may be awarded in full or with a financial contribution from the applicant. If the individual is eligible to receive representation (lower)

with a contribution, the detail of how the contribution is to be calculated, together with the contribution payable are set out at rule 59 of the Financial Regulations.

In submitting an application, the solicitor will have to be satisfied that there are reasonable grounds for taking, defending or being a party to the proceedings to which the application relates. However, representation (lower) may be refused if it is:

- (a) unreasonable that a certificate should be granted; or
- (b) that only a trivial advantage would be gained by the applicant in taking, defending or being a party to the proceedings to which the application relates, or, owing to the simple nature of the proceedings, a legal representative would not ordinarily be employed.

The Agency will review all papers and will issue a certificate if it is satisfied that the tests are met.

If an applicant is seeking representation (higher) the solicitor will assist the applicant to complete application forms covering the financial eligibility and legal merits tests. The forms are submitted to the Agency. The determination of whether the applicant is financially eligible to receive representation (higher) is conducted by the Legal Aid Assessment Office, which is part of the Department for Communities.

The Financial Regulations require an individual to have:

- (a) Disposable income does not exceed £10,995 per annum in respect of claims involving personal injuries or £9,937 for any other case; and
- (b) Disposable capital does not exceed £8,560 in respect of claims for personal injuries or £6,750 for any other case.

The details of the how the applicant's disposable income is to be determined are set out at Chapter 4 of the Financial Regulations. The corresponding provisions for the determination of disposable capital are set out at Chapter 5 of the Financial Regulations. Representation (higher) may be awarded in full, or with a financial contribution from the applicant. If the individual is eligible to receive representation (higher) with a contribution, the detail of how the contribution is to be calculated, together with the contribution payable, are set out at rule 62 of the Financial Regulations.

The Agency will apply the legal merits test, to satisfy itself that there are reasonable grounds for taking, defending or being a party to the proceedings to

which the application relates. However, representation (higher) may be refused if it is:

- (a) unreasonable that a certificate should be granted; or
- (b) that only a trivial advantage would be gained by the applicant in taking, defending or being a party to the proceedings to which the application relates, or, owing to the simple nature of the proceedings, a supplier would not ordinarily be employed.

The Agency will review all papers and will make an offer of representation higher if it is satisfied that the tests are met.

Applications for **Criminal Legal Aid** are determined by articles 28 to 31 of the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981 [1981 No. 228 (N.I. 8)]. The “1981 Order” can be accessed through the following link: <http://www.legislation.gov.uk/nisi/1981/228/contents>.

The grant of criminal legal aid is a judicial function. Usually legal aid is granted when the case is before the Magistrates Court by the District Judge. When cases are before the County Court on appeal and Crown Court upon committal, the relevant judge may also grant or vary a grant of criminal legal aid.

In considering an application for criminal legal aid the court has to apply a financial eligibility test, that is to establish whether “the means of any person charged before it with any offence, or who appears or is brought before it to be dealt with, are insufficient to enable him to obtain legal aid.” In addition the court applies a merits test, referred to as the interests of justice test, namely whether “it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence.” If the court has any doubt as to whether an applicant’s “means are sufficient to enable him to obtain legal aid or whether it is desirable in the interests of justice that he should have free legal aid, the doubt shall be resolved in favour of granting him free legal aid.”

The Agency will be notified of the grant of criminal legal aid by the court.

### ***What are the costs associated with the Unusually Large Expenditure Panel?***

The Unusually Large Expenditure Panel forms part of the internal control mechanisms in the Agency and consists of two senior officials who provide an additional level of scrutiny where applications for experts exceed a specified financial limit. The panel is convened if an authority for an expert is sought under Civil Legal Services which is outside the financial delegated authority of staff who

routinely deal with requests for authorities. The panel exercises the same control as more junior colleagues in looking at the necessity and cost of the request.

In the financial year 2015/16 the panel met on 51 occasions to consider applications or deal with further information provided. The estimated opportunity cost for the preparation and convening of the panel was £12,530. This is not an additional cost, as participation in the panel is part of the role of those involved.

***What are the expert witness costs which the Legal Services Agency was unable able to provide to the Northern Ireland Audit Office?***

The Agency captures as “disbursements” payments which are made by solicitors on behalf of a client for which the solicitor is reimbursed. The classification of disbursements includes a range of fees, including court fees, securing documents such as medical notes and records, securing MRI scans or DNA tests and reports by experts (including the expert’s attendance at court). The details of the disbursements paid are retained on the individual case files, but the overall combined value of these payments are recorded generically as disbursements on the IT system. While the Agency can extract information from the IT system, it cannot be definitive that the information extracted represents the totality of expert reports including information secured from experts.

The Agency indicated at the evidence session that it estimated the total costs attributable to experts, including documentation from experts such as medical notes, to be in the region of £4m per annum.

The Agency estimates that criminal legal aid and representation (higher) accounts for the majority of the expenditure. The types of experts which are a recurring feature of authorities granted to provide reports and as appropriate to give evidence in court are: accountants, engineers, forensic personnel, general practitioners, medical consultants, orthopaedic surgeon, paediatrician, psychiatrist, psychologist and social worker.

***What is the composition of the Audit and Risk Committee and the Legal Aid Strategy Group and what recommendations have been made to date?***

The membership of the Agency’s Audit and Risk Committee is:

Chair Mr Allen McCartney– Independent Board Member of the Agency Member

Professor John Morison – Independent Board Member of the Agency

Mr Stephen Wooler CB – Independent Board Member of the Agency

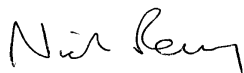
Mr Peter Toogood – Independent Member

The Legal Aid Strategy Group (LASG) is chaired by the Permanent Secretary and is made up of the Director of Access to Justice, Director of Justice Delivery, Chief Executive of the Legal Services Agency, Head of Public Legal Services Division and Head of Financial Services Division. Other officials may attend depending on the subject matter on the agenda. The terms of reference are:

“To provide strategic direction to Legal Aid Reform in the context of the Department’s resource position and accountability framework.”

The LASG is primarily a strategic oversight rather than a policy development group. Its role is to oversee implementation of the Ministerially-approved reform programme, to propose adjustments where necessary and, in the context of the legal aid budget, to bring proposals for managing emerging pressures to the Department’s Strategic Resources Committee as required.

I trust this information is helpful.



**N P PERRY**