

30 March 2010



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Verification of financial Eligibility in Advice and Assistance/ABWOR in Civil and Children's Cases

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation whose members help injured people to gain the access to justice they deserve. Our members are mostly solicitors, who are all committed to serving the needs of people injured through the negligence of others. The association is dedicated to campaigning for improvements in the law to enable injured people to gain full access to justice, and promote their interests in all relevant political issues.

APIL welcomes the opportunity to provide written comment relating to the verification of financial eligibility in advice and assistance/ABWOR in Civil and Children's cases. We were initially concerned with the short time allowed for consultation on this matter, especially as we are an organisation which relies upon the input of its members in order to formulate balanced and constructive responses. APIL is grateful for the agreed extension to 2 April.

In your letter, dated 22 February 2010, you state that *"some applicants may be admitted when they are ineligible or some applicants may not be paying the appropriate contributions to the costs of their cases"*¹. We would ask if there is any evidence to suggest that fraud is being committed. Have the Scottish Legal Aid Board (SLAB) discovered fraudulent applications through the connection they now have with the Department for Work and Pensions (DWP)? We would suggest that if they have this information it is made public; firstly to justify the shift of responsibility from the SLAB

¹ The Scottish Legal Aid Board, *Consultation on the Verification of Financial Eligibility in Advice and Assistance/ABWOR in Civil and Children's Cases*, Covering Letter, Para. 2.

to the solicitor, and secondly to assist solicitors with what to look for when identifying potentially fraudulent cases. Furthermore, if fraudulent applications have been discovered this way, surely this proves that the current system of the SLAB checking applications via the DWP works.

APIL believes that this extra requirement on solicitors is simply too onerous. The draft guidance, and suggested new practice, increases the amount of bureaucracy surrounding the application for civil legal aid, and expects the solicitor to carry out this work with no additional remuneration. It has always been our belief that the task of ensuring that the applicant is eligible has been the responsibility of the Board. The duty of the solicitor is to satisfy himself that the client is eligible.

The guidance, at page 3², suggests that the new process will be simple by listing the types of documents which solicitors may be expected to acquire. However; what is not clear in the guidance is how the solicitor is to obtain this documentary evidence. For example, how would a solicitor find out the value of a timeshare? Or the value of non-essential items such as jewellery or antiques? Or if money can be borrowed against business assets and insurance policies?

APIL would suggest that the only way a solicitor would be able to find out this information would be to make written enquiries with the appropriate business. To obtain this information, a solicitor would need to make enquiries with other organisations such as banks, estate agents and loan providers amongst others. All of which would incur a cost to the solicitor which could be, and most probably will be, quite high. The requirements of the draft guidance go above and beyond solicitors' capabilities in terms of time and expense. Increasingly, solicitors are finding that the organisations these enquiries are made with are requesting a fee for a copy of these documents incurring more charges to the solicitor. In addition, if the solicitor is unable to acquire these documents in the first place, the draft guidance suggests that the solicitor should continue to seek this information as the case progresses³, incurring more costs for their time with no remuneration. Furthermore, where the solicitor does acquire the documentary evidence, they are required, by the draft guidance, to ensure

² The Scottish Legal Aid Board, *Consultation on the Guidance on the Verification of Financial Eligibility in Advice and Assistance/ABWOR in Civil and Children's Cases, Capital: Documentary Evidence*, Page 3 Paras. 1 and 2.

³ The Scottish Legal Aid Board, *Consultation on the Guidance on the Verification of Financial Eligibility in Advice and Assistance/ABWOR in Civil and Children's Cases, Cases where no documentary evidence of eligibility is immediately available*, Page 5 Para. 3.

that this data is up-to-date by continually assessing the financial position of the client⁴. APIL believes that this requires too much of a solicitors time and expense.

In addition to this, if a client states that they do not have any additional accounts, or excess jewellery, or a second home, how does a solicitor prove this? Does the solicitor take the word of his client (as he does now) or will the applicant be refused legal aid and penalised because the solicitor did not hold documentary evidence on file that the client had none of the above?

Contrast this with government agencies which are set up with the support of fully paid officials to deal with these types of applications, and to aid applicants, within passport offices and the DWP. We use the passport office and DWP as examples as these are provided as examples within the draft guidance. These government departments have paid officials to help with queries of fraud or to discover the true financial position of an individual. Solicitors do not have this luxury. It is not reasonable to expect solicitors to undertake work which government officials and agencies are paid to do for no pay.

A further problem that could be encountered is the reliance upon the party to whom the solicitor is writing, or making enquiries with, to respond. The experience that many solicitors will encounter is that claimants will simply give up. The extra time and processes it will take to make the application will be seen by many claimants as arduous and unnecessary work and they may simply not apply or not pursue their claim.

APIL would also suggest that problems will be encountered when you consider that the majority of civil work with the client is now conducted over the telephone. In a lot of instances the solicitor may not even meet the client. Furthermore, there is no detail in the draft guidance about how this new process will work with children applicants? Are they to be treated the same, as in solicitors will be required to see their bank statements and make enquiries as to their savings accounts, or will there be an alternative process?

APIL agrees that a document trail should be attempted and that solicitors expect to make reasonable enquiries as to a claimant's financial position to ensure that they are eligible for legal aid prior to application; however, the new process requires too much.

⁴ The Scottish Legal Aid Board, *Consultation on the Guidance on the Verification of Financial Eligibility in Advice and Assistance/ABWOR in Civil and Children's Cases, Age of documentary evidence*, Page 5 and 6 Para. 1.

A solicitor may expect to request a copy of a bank statement each month but not to continually request copies of documents to discover if there has been a change of financial status of the claimant. We would ask that a copy of a bank statement and a standard form, filled out by the solicitor, is sufficient to satisfy the Board that reasonable enquiries have been made.

APIL believes that the SLAB could include within their form a questionnaire, to be completed by the solicitor, which can be kept on file with the solicitor rather than an onus to keep copies of paperwork and vague questions or enquiries would be sufficient. The questionnaire could follow this format:

- *Have you seen the following documents?*
(an exhaustive list and tick box format would appear here)

The solicitor would then send a copy of this to the Board with the application and keep a copy on file. Through this method, solicitors can suggest the types of documents clients should send to them, and it will encourage solicitors to ensure that they see a copy of them.

Finally, when comparing the civil legal aid application with the criminal legal aid application, the civil application already requests more time and expense of the solicitor. A civil client is using the law which is there, and is not accused of breaking it. Solicitors currently receive under £50 per hour for civil legal aid work, which is already disproportionate when compared with other government grants. To request further work to be carried out by the solicitor for no additional pay would be unfair.

We hope that our comments prove helpful to the committee and look forward to engaging with you further in the future.

Yours sincerely

A handwritten signature in purple ink that reads "Katherine Elliott". The signature is written in a cursive, flowing style.

Katherine Elliott
Legal Policy Officer