

Peter O'Brien
Deputy Chief Executive
Law Society of Northern Ireland
Law Society House
96 Victoria Street
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25 June 2019

Dear Peter,

Decision Making Guidance

In preparation for the introduction of the Agency's new case management system, Legal Aid Management System (LAMS), the Agency has prepared comprehensive Guidance documentation on decision making in respect of applications for representation under civil legal services. The Guidance deals with all aspects of Civil Representation, that is, applications for Representation (Higher Courts) and Representation (Lower Courts).

The Guidance is intended to complement online applications under LAMS and should be read in conjunction with the guidance published on LAMS. The Guidance will be updated on an ongoing basis to reflect changes to the legislative framework and any judicial decisions that impact how the Agency makes its decisions.

Historically, the legal aid authority in Northern Ireland took decisions on the basis of the relevant statutory provisions, a range of Circulars and precedent decisions. As such there was no formal overarching decision making documentation. In developing this Guidance the Agency is therefore putting in place a formal document to serve the following purposes:

- (a) To improve the **transparency** of funding decisions, so that the approach we take to our funding decisions is clear and publicly available;
- (b) To improve the **consistency** of decisions by ensuring that all of our decision makers are approaching decisions in the same way;
- (c) To improve the **quality** of applications for funding, by making practitioners aware of the information we need and how it will be applied;
- (d) To improve the legal **accuracy** of decisions by ensuring that our practices are fully consistent with the statutory framework introduced in 2015; and

- (e) To ensure that we have the appropriate levels of **control** over the work funded under civil legal aid certificates.

The Guidance draws together some procedural changes which LSA will implement at the same time as LAMS goes live. These changes do not require any legislative amendment as the powers are already contained within the Access to Justice (Northern Ireland) Order 2003. While some areas may reflect a new approach by the Agency the majority of issues largely formalise current working practices. The changes have already been incorporated throughout the Guidance however the details are attached at Annex A to highlight the specific areas covered.

The Guidance does not cover advice and assistance, nor does it address the following areas in any detail: financial eligibility, levels of representation, costs or the statutory charge. The Agency intends to expand its portfolio of guidance to cover other areas of civil legal services in due course. There are however parallel documents which accompany this Guidance which deal with applications for Exceptional Funding and restate, in a more accessible form, the Agency's Guidance on Authorisation of Counsel.

The Agency would recommend that all practitioners familiarise themselves with the overview of the statutory scheme which forms an introduction to the Guidance. Practitioners will also wish to note the sections in the Guidance which address the merits criteria, both the general principles and the approach to individual case categories. In addition practitioners will wish to note the section which sets out how the Agency will deal with applications for alternatives to civil litigation, including mediation and ADR.

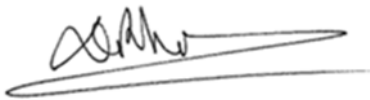
The Guidance also reflects a Direction issued by the then Justice Minister in February 2016. The Ministerial Direction formalises the approach to prospects of success and cost benefit analysis which has long been part of the application process. The Ministerial Direction is also attached and will be available on the LSA website. The Guidance sets out how the Agency will formally apply this Direction. In addition, the Guidance also sets out a framework for a range of limitations on certificates.

As noted the Agency intends to formally adopt the Guidance when LAMS goes live on 1 July 2019. While there is no statutory requirement to consult on what is essentially the formalisation of internal decision making guidance, the Agency would welcome comments on the Guidance. Any comments received will be considered and, where appropriate, incorporated into the Guidance.

The Guidance will be subject to ongoing refinement and updating and the Agency will make practitioners aware of any substantive changes as they are introduced. Any minor editorial changes that are required, for example typographical errors or changes to dates, will be made on an ongoing basis and the Agency will not be informing practitioners off these changes.

We would welcome any initial comments by 30 September 2019.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Paul Andrews', with a long horizontal flourish underneath.

Paul Andrews
Chief Executive

Guidance on Civil Representation

Changes in existing practice

PART A

- 6.4 Emergency applications may be refused if the application is made at the last minute with no adequate excuse for the delay (see also final paragraph of Part B of the guidance).
- 7.5 Note that filing and serving a Notice of Appeal will not longer to regarded as falling within the scope of a certificate covering first instance proceedings and will need to be specifically authorised
- 7.8 The Agency will make greater use of its powers to place scope limitations on civil certificates (both for Rep Lower and Higher)
- 7.16 Proceeding under a new divorce petition may be covered by an amendment to a certificate and no longer requires a fresh application
- 7.21 A transfer of proceedings from the county court to the high court may be covered by an amendment to a certificate and no longer requires a fresh application
- 7.31 A fuller explanation may be required by the Agency if a certificate is transferred to new solicitors for a second or subsequent time
- 8.12 Guidance on prior authorities for mediation in light of the Edmunds case
- 11.9 to 11.12 Guidance on the submission of late materials on appeal

PART B - MERITS CRITERIA

- 5.4 Estimates of prospects of success must reflect the underlying legal strength of the case i.e. the likelihood of success at trial, not the likelihood of securing a settlement
- 6.4 Similarly estimates of likely costs for the purposes of considering cost benefit should look at the cost if the case proceeded to trial
- 6.7 The cost benefit analysis must also take into account the prospects of success.
- 6.36 Importance of checking for the existence of before-the-event insurance
- 6.48 New guidance on the dividing line between advice & assistance and Civil Representation
- 6.51 Onwards New guidance on alternatives to civil litigation

PART C - CATEGORY SPECIFIC GUIDANCE

15.5 More use of limited certificates for Private Law Children Order proceedings

21.2 and 21.7 The merits of representation in divorce proceedings will always be considered separately from the merits of representation in ancillary relief

21.9 Divorce proceedings should be issued in the county court unless the Agency is satisfied that the High Court is the appropriate venue

22.8 Ancillary relief certificates will usually be limited up to representation at the FDR hearing