HOUSING LAW PRACTITIONERS ASSOCIATION

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DEFENDING POSSESSION PROCEEDINGS UNDER LEGAL AID: ONE YEAR ON

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OVERVIEW

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1. LASPO & REGULATIONS

- As we all know the legal services that remain in scope are set out in Schedule 1, Part 1 whilst Parts 2 and 3 of Schedule 1 set out the exclusions

- The Funding Code is replaced by the Legal Aid (Merits and Criteria) Regulations 2012

- The Legal Aid (Procedure) Regulations 2012 replace the old Funding Code Procedures and set out how applications should be made and how cases should be conducted

- Lord Chancellor's Guidance replaces the old Funding Code Decision-Making Guidance

- FAQs published by Legal Aid Agency are a useful reference point.

- The Legal Aid Handbook website contains everything in one handy location

  http://legalaidhandbook.com/laspo-resources/

2. LEGAL AID IN RENT POSSESSION CASES

- Para 33 of Part 1, Schedule 1: Civil legal services provided to an individual in relation to (a) court orders for sale or possession of the individual's home, or (b) the eviction from the individual's home of the individual or others

- Rent cases fall under the housing category whilst mortgage cases fall under the Debt category

- See also Regulation 61 of the Legal Aid (Criteria & Merits) Regulations:

  61. (1) For the purposes of a determination for full representation in relation to any matter described in paragraph 33(1)(a) of Part 1 of Schedule 1 to the Act (court orders for sale or possession of the individual's home), to the extent that it relates to court orders for possession of the individual's home, the criteria in—
  (a) regulation 39 (standard criteria for determinations for legal representation) apply;
  (b) regulations 41 to 44 (criteria for determinations for full representation) do not apply; and (c) paragraph (2) apply.
  (2) The Director must be satisfied that the following criteria are met—
  (a) if the individual is the defendant to a claim for possession, the individual has a defence to the claim;
  (b) the prospects of success are very good, good, moderate or borderline[1]; and
  (c) the proportionality test is met.

- There needs to be an immediate threat of possession but that does not require proceedings to have been issued. See LAA FAQ 98 which says that there is no need for possession proceedings to have been issued as long as the client has received formal notification that proceedings will be issued (such as a notice under section 21 or section 8) unless there is some intervention.

  Plainly there are cases where it will be in the best interests of the client to act quickly under Legal Help but where that is not the case consider waiting for proceedings to be issued in order to avoid using a legal help matter start (a relevant consideration given the modest allocation to most suppliers).

- There will be some cases where we have to wait for proceedings to be issued for the case to be in scope, for example succession cases. See LAA FAQ 100.

- Demotion of tenancy cases are out of scope. See LAA FAQ 106

- As we all know welfare benefits cases are out of scope. This means that even if there is a legal aid certificate in place in respect of possession proceedings we cannot assist the client in resolving any outstanding housing benefit issues. See FAQ 107:

[1] The Government proposes to abolish Civil Legal Aid for borderline cases. See Transforming Legal Aid: Next Steps. Paragraph 2.21

Is all work relating to Housing Benefit out of scope even where it is used as a defence to possession proceedings?

Work to obtain or re-instate Housing Benefit is out of scope, see paragraph 15 of Part 2, Schedule 1 of LASPO. If issues regarding Housing Benefit have led to possession proceedings then legal aid will be available to advise the client on their possession matter. This could include obtaining witness statements in support of a client's defence to a possession case. It could also include seeking an adjournment of possession proceedings to enable the client to resolve their Housing Benefit issues. However, as stated, legal aid will not be available to resolve the Housing Benefit issue itself. If providers carry out work in relation to Housing Benefit alongside a possession matter it will be their responsibility to apportion the work and ensure that no legal aid claim is made for the out of scope work.

So what are the options?

1. Assist with the HB issue pro-bono (hardly an option with legal aid rates as they are but feasible in some cases particularly as many HB department will correspond by e-mail)

2. Advise client or relative/friend how to pursue the matter

3. Invite, or as necessary press, the Local Authority or other social landlord to pursue the issue, relying on paragraphs 6, 7 and 14 of the Rent Arrears Pre-Action Protocol::

   (6) The landlord should offer to assist the tenant in any claim the tenant may have for housing benefit

   (7) ….The landlord should make every effort to establish effective ongoing liaison with housing benefit departments and, with the tenant's consent, make direct contact with the relevant housing benefit department before taking enforcement action. The landlord and tenant should work together to resolve any housing benefit problems.

   (14) If the landlord unreasonably fails to comply with the terms of the protocol, the court may impose one or more of the following sanctions –

   (a) an order for costs;

   (b) in cases other than those brought solely on mandatory grounds, adjourn, strike out or dismiss claims.

4. Consider serving a Witness Summons on the Director of the HB Department where the HB issues are of sufficient gravity to justify it.

5. Where appropriate and where alternative remedies have been pursued apply for Legal Aid to make an application for Judicial Review

6. In appropriate cases apply for exceptional funding. See Lord Chancellor's Guidance on Exceptional Funding (non-inquests) and Regulation 67 of the Procedure Regulations which prescribes the form of the application

   http://www.justice.gov.uk/downloads/legal-aid/funding-code/chancellors-guide-exceptional-funding-non-inquests.pdf

- As we all know damages claims for housing disrepair are now out of scope. Legal Aid only extends to the removal or reduction of the risk of serious harm [LASPO Sch 1. Part 1, Reg 35]. However legal aid will extend to a claim for damages where it will provide a defence to possession proceedings i.e by way of equitable set-off against arrears of rent. See FAQ 83:

  Can a counterclaim for damages be in scope in respect of any other issue than serious disrepair?
  Any counterclaim that is properly pleaded as a defence to possession proceedings is in scope, subject to the Part 2 exclusions set out in paragraph 33 of Part 1, Schedule 1.

3. INTER-PARTES COSTS ORDERS

- We have all probably heard horror stories about the April 2013 amendments both to the Overriding Objective and to CPR3.9 and the tough stance that Judges have been asked to take on non-compliance with Orders and Directions.

Overriding objective

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

CPR3.9

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

However so long as we comply with Orders these amendments present an opportunity to make applications in respect of the other party's non-compliance and to obtain valuable interlocutory inter-partes costs orders.

- There are similar opportunities with early Part 36 offers not only in disrepair cases but in possession proceedings, for example offering a suspended possession order at an early stage in an anti-social behaviour case

4. DEALING WITH THE LEGAL AID AGENCY

- More than ever a challenge (or is it just me?!)
- Where appropriate make use of the Complaints Procedure which is available at:

  www.justice.gov.uk/complaints/laa

- Incidentally also be sure to use the "Civil Claim Fix" email address for wrongly rejected bills otherwise your bill reject rates will be wrongly recorded:

  laacivilclaimfix@legalaid.gsi.gov.uk

- Where appropriate take issue with inappropriate and unnecessary means enquiries, such as explaining individual transactions on bank statements.

  LAPG has raised this issue with the LAA and it may be useful in individual cases to LAPG's letter and to the LAA's response (see attached).

5. OTHER POINTS OF NOTE

Spencer v Taylor [2013] EWCA Civ 1600. Court of Appeal, 20 November

On 6 February 2006 Mr Spencer granted Ms Spencer an Assured Shorthold Tenancy of a property in Chesterfield. The tenancy was granted for a fixed term of 6 months, commencing on 6 February which happened to be a Monday. The rent was payable weekly. At the end of the fixed term a weekly periodic tenancy arose and of course the rent period therefore ran from the Monday to the Sunday.

On 18 October 2011 Mr Spencer served a section 21 Notice. The Notice said that possession was required on 1 January 2012 and there also followed a savings clause. As 1 January 2012 was a Saturday it was not the end of a period of a tenancy. The question then was whether the notice was valid.

As we all know section 21 reads:

> (1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling house let on the tenancy in accordance with chapter one above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy a court shall make an order for the possession of the dwelling house if it is satisfied -
>
> (a) that the assured shorthold tenancy has come to an end and no further assured tenancy, whether shorthold or not, is for the time being in existence other than an assured shorthold periodic tenancy, whether statutory or not and -
>
> (b) the landlord, or in the case of joint landlords at least one of them, has given to the tenant not less than two months notice in writing stating that he requires possession of the dwelling house.
>
> (2) A notice under paragraph (b) of sub-section (1) above may be given before or on the day on which the tenancy comes to an end and that sub-section shall have effect notwithstanding that on the coming to an end of the fixed term tenancy a statutory periodic tenancy arises.
>
> (3) Where a court makes an order for possession of a dwelling house by virtue of sub-section 1 above, any statutory periodic tenancy which has arisen on the coming

to an end of the assured shorthold tenancy shall end without further notice and regardless of the period in accordance with section 5(1A).

(4) Without prejudice to any such right as is referred to in sub-section 1 above, a court shall make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied -

(a) that the landlord, or in the case of joint landlords at least one of them, has given to the tenant a notice in writing stating that after a date specified in the notice being the last day of a period of the tenancy and not earlier than two months after the date the notice was given, possession of the dwelling house is required by virtue of this section, and -

(b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest day on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same date as the notice under paragraph (a) above.

4A. Where a court makes an order for possession of a dwelling house by virtue of sub-section 4 above, the assured shorthold tenancy shall end in accordance with section 5(1A)."

Lewison LJ highlighted the 3 conditions under section 21(1):

- AST has come to and end;
- No new AST, other than a periodic tenancy; and
- 2 months notice in writing (need not expire on the last day of a period of the tenancy)

Counsel for Ms Taylor advanced an argument that we are all familiar with which is that as the fixed term had come to an end the landlord could only rely on s21(4)(a) which requires the notice period to expire on the last day of the period of the tenancy.

Lewison LJ rejected this on the basis that s21(1)(2) says “may” not “may *only*” and that the latter interpretation would “turn the permissive language on its head”

Commenting on the Judgement of Hale LJ in *Fernandez v McDonald* [2003] EWCA Civ 1219, which was consistent with a prohibitive reading of s21(1), Lewison LJ said:

First, section 21(1) also encompasses cases in which a fixed term assured tenancy is followed by a periodic tenancy. That is because it says it does. Second, that periodic tenancy may or may not be a statutory periodic tenancy. It does not matter, because section 21(1) says that it does not. Thus, third it is a mistake to see section 21(4) and section 21(1) as in some way mutually exclusive. Fourth, section 21(4) is expressly stated to be without prejudice to any such right as is referred to in sub-section (1). So if there is any conflict between the two sub-sections, section 21(1) prevails.

The actual decision in the case was that the notice under section did not comply with section 21(4) so in my judgment what the court said, or rather did not say, about the

applicability of section 21(1) is not part of the ratio decidendi of the case. If, therefore, as I think, section 21(1) rather than section 21(4) governs this case, then all of the arguments about whether the notice in the present case did or did not comply with section 21(4) are irrelevant.

Lewison LJ then went on to consider whether the Notice was valid given the two alternative dates for possession, i.e. 1 January 2012 and the date determined by the savings clause. His conclusion was that this did not affect the validity of the notice and it follows that the notice would have complied with the requirements of s21(4)(a). It is perhaps surprising therefore that Lewison LJ did not simply find the notice to be valid on that basis.

Where does this leave us? Where a tenancy has been a periodic tenancy from the outset the landlord must comply with the requirements of s21(4)(a). However where a periodic tenancy was once a fixed term tenancy the landlord can rely on s21(1)(b) and avoid the pitfalls that flow from s21(4)(a).

Prevention of Social Housing Fraud Act 2013

- Criminal offence for a secure tenant to sub-let the whole or part of the property without the landlord's consent if the tenant knows it is a breach of an express or implied term of the tenancy and has ceased to occupy the property as his/her only or principal home [section 1(1)]

- Same offence for an assured tenant [under section 2(1)]

- Offence not committed if the tenant sub-lets because of violence to him/her or family [sections 1(3) and 2(3)]

- In civil proceedings the landlord can apply for an "unlawful profit order" [section 5]

- Section 6 amends the Housing Act 1988 as follows:

  15A Loss of assured tenancy status
  (1) Subsection (2) applies if, in breach of an express or implied term of the tenancy, a tenant of a dwelling-house let under an assured tenancy to which this section applies—
  (a) parts with possession of the dwelling-house, or
  (b) sub-lets the whole of the dwelling-house (or sub-lets first part of it and then the remainder).
  (2) The tenancy ceases to be an assured tenancy and cannot subsequently become an assured tenancy.

Bedroom Tax

- The DWP has issued an urgent bulletin highlighting that applicants who have been continuously entitled to HB since 1996 should not be affected by the bedroom tax [2]

Public Law cases

- Possession Proceedings and Allocations Policies. Is there a public law defence if the Local Authority landlord has pressed ahead with a claim for possession without considering relevant provisions of its allocations policy?

  Leicester City Council v Shearer [2013] EWCA Civ 1467

  The Defendant married Mr Shearer and she and her young daughter went to live with him and his mother at a house in Leicester, 35 Martival. When his mother died Mr Shearer succeeded to the tenancy. The Defendant and Mr Shearer later had a child together.

  In January 2010 the Defendant left due to Mr Shearer's violence and went to live elsewhere with the children. However both she and the children continued to spend time at 35 Martival. One night she was staying there and woke in the morning to find that Mr Shearer had hanged himself. She and the children then returned to live at 35 Martival and asked the Claimant Local Authority whether she could become the tenant. She was told that would not be possible and she was advised to make an application to the Council for accommodation.

  There was later some debate within the Council as to how best to handle the case. Eventually the decision was taken to "follow due process" and serve a NTQ on the Public Trustee and commence possession proceedings as the Council was worried that a precedent would be set if it were to grant a tenancy to an estranged spouse with no right to succeed.

  The Council's Allocations Policy contained a provision for a direct let of accommodation in exceptional circumstances including violence, decants, witness protection and *"exceptional circumstances that merit priority rehousing associated in managing risks, emergencies and making best use of management stock"*

[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270200/hb-bulletin-u1-2014.pdf

Eventually the matter came to trial and in the County Court the Recorder dismissed the claim for possession and reached the following conclusion:

So in the light of all those circumstances, in my judgment it cannot seriously be argued that a reasonable Authority would without more on the facts known have refused or omitted to exercise its discretion to grant a Direct Let. I regard that refusal or failure to consider the possibility of a Direct Let had an impact on the decision to seek possession and that failure has had an improper fettering of the discretion. It is a lack of exercising the discretion. It is a removal from the discretion to be exercised of an investigation of the matters which were appropriate to be looked at. That vitiates and compromises their decision to seek possession

The Court of Appeal upheld the decision of the County Court and concluded that In commencing possession proceedings against the defendant without giving any or any proper consideration to the option of making a direct let under paragraph 5.6 of the Allocations Policy the Council acted unlawfully.

- In bedroom taxes there may be a public law defence if the Local Authority landlord has not had proper regard to relevant provisions of its allocations policy, for example high priority under-occupation transfers and compensation payments for downsizing?

- Public Law arguments at enforcement stage. R(JL) V Secretary of State for Defence [2013] EWCA Civ 449

..[T]here will be exceptional cases, and the present is a very unusual but powerful example, where the raising of Article 8 rights at the enforcement stage will not be an abuse. The obvious example is where there is a fundamental change in the occupant's personal circumstances after the making of the possession order but before its enforcement. The example canvassed during the hearing of this appeal was that of the diagnosis of an incurable illness for the first time after the making of the possession order, making it disproportionate for the public authority to evict the occupant before he or she could be allowed to die peacefully at home.

The present case is a (probably unique) example where it would not be an abuse of process to pray in aid Article 8 rights at the enforcement stage. The appellant vigorously pursued her Article 8 rights during the possession proceedings but, as the law then stood, and Collins J was bound to conclude, they afforded her no defence. Yet it is now recognised, before the end of the process designed to lead to her eviction, that the appellant has a right to a proportionality review of the enforced loss of her home on the application of the respondent public authority. There is, quite simply, no occasion other than the present proceedings, in which that review can be conducted in that case.

I am not deterred from that analysis by Mr Hooper's submissions about the risks of cost, delay, uncertainty and a resort by public authorities to swift and rigid enforcement of possession orders. The courts are familiar with last minute

attempts of occupants of residential properties to stay the enforcement of possession orders. County court judges will be well able to discern, on a summary basis, whether some substantial change of circumstances gives rise for the first time to an Article 8 issue which neither was, nor could have been pursued prior to the making of the possession order. Abusive attempts to re-litigate, or litigate Article 8 issues which could and should have been raised during the possession proceedings can be met with the usual sanctions imposed for abuse of process including, where necessary, the making of Civil Restraint Orders.

Mr S McNally
Legal Aid Agency
102 Petty France
SW1H 9AJ

30 August 2013

Cc Mr O Mapley

Dear Shaun,

Concern about LAA Means Assessments

There has been considerable discussion for some time at the Civil CCG meetings and at a recent meeting between the LAA and practitioners (the Access To Justice Committee Problem Solving Group) about the problems faced by clients and practitioners re means assessment. We know that you put considerable resources into that meeting and it was extremely helpful to have a meeting with so many of the relevant senior staff there.

Further to that meeting our co-chair contacted the LAA to ask if there was an IT solution to gather more examples from practitioners in order to find solutions. How examples can be collated and dealt with is important. We confirm our willingness to continue to engage on this.

A number of examples about means assessments were given to you at the meeting. We have been sent a lot of examples in recent months. In view of the concern expressed by our members, we were on the verge of seeking Counsel's opinion about means assessments but have been told that the LAA has identified that some of the issues are due to incorrect training of staff. We are therefore writing to seek clarity about what the LAA asserts is correct procedure as opposed to means enquiries which are incorrectly requested.

The appendix to this letter sets out various examples which have been sent to us over the past few months. You and your colleagues may well have been sent them by others. However at this stage we would ask you to identify if you think the LAA is correct in taking the steps it has in each example and if so please could you identify

- your authority for doing this
- if this is a new procedure, when was it introduced?
- can you disclose the guidance that is being applied by means assessors and their training materials?

We have identified a number of themes and grouped the examples together. We can summarise these further and would identify these as the main themes:-

- Means testing others in the household
- Wanting detailed evidence on potential other sources of income
- Wanting detailed evidence on who is providing contribution in kind such as food, heat and light
- Wanting detailed evidence on spend.
  (And in some cases the request for information does not seem relevant because information on those transactions would not take the person outside the eligibility limits.)

Why is this so important?

There are many clients and those who are - sometimes in the loosest sense of the words - giving them support are greatly distressed and this may deter the client from proceeding with their case.

The early stages of a solicitor/client relationship are very important and if the client sees only hurdle after hurdle in obtaining advice or representation, they will become even more despondent and possibly not proceed.

Delays mean clients may be unable to obtain important protection or remedies that they would have obtained had legal aid been granted promptly.

We are informed that means issues are leading to requests for adjournments in court cases.

Emergency certificates may have to be extended while means issues are resolved.

One practitioner states that the outcome is simple: 'We are finding the LAA are being extremely picky about any means case (which is basically every one now capital is included) and I am very reluctant to allow my staff to delegate legal aid even when there is an urgent need as it takes so long for the substantive certificate to be granted and we end up doing even more work for no money.'

The level of risk has increased for practitioners.

There is more administration involved for practitioners and the LAA.

We want to identify what the LAA asserts is correct and what is not and we wish to provide urgent guidance to our members. We look forward to hearing from you in the next 14 days.

Yours sincerely

Carol Storer

Director, LAPG

Appendix

Example 1: evidence sought of financial position of former partner

A single man living alone with mental health and substance abuse issues in his 30s on a passporting benefit asked whether he is in still in a relationship with a former partner with whom he had children and if so to provide copies of her bank statements. He is an assured shorthold tenant granted an Emergency Certificate to be represented at a short notice hearing following accelerated possession proceedings and the court is satisfied he has an arguable Defence. The relationship ended many years ago. The client risks revocation of the Emergency Certificate if the queries are not answered.

Example 2: refusal to rectify mistake (seeking details from DWP)

A Council tenant living with her disabled partner who receives a passporting benefit faced with an imminent possession hearing for rent arrears and with a substantial counterclaim for disrepair. By mistake LAA phone the DWP and check her rather than her partner and then refuse to rectify over phone but insist that the practitioner obtain a letter from the DWP confirming the current award to her partner. At the same time they write with numerous questions on the bank statements provided in relation to income and expenditure – much of these relate to DLA income and disability connected expenditure. The client is severely distressed. The client risks revocation of the Emergency Certificate if the queries are not answered.

Example 3: level of detail requested – Bank Statements

3a Clients on passporting JSA are being asked to explain every entry on their bank statements over 3 months.

3b A member has heard anecdotally of demands for evidence such as recent bank statements from street homeless people etc.

3c The LAA are also asking more and more questions about what clients are *spending* their money on - eg there are questions asked about why £250 was withdrawn from an account 2 months previously - this is even where the client is on passporting benefits for income purposes. The LAA are also asking questions about income and outgoings beyond the 3 month bank statement period (eg if the bank statements go further back than 3 months and they've been included because they are on the same statement page).
The queries are taking up a lot of time both for the fee-earner and the LAA. They are also causing issues for court proceedings with hearings having to be adjourned where the means assessment is outstanding and the emergency certificate has expired.

3d. A report back from a practitioner: 'We still do not legal aid for a client for whom we delegated functions in a Children Act matter in the last week of March (substantive application sent mid March) because the LAA is querying 2 payments of £30 and £20 out of her bank account. We have now provided evidence from the friend to whom she was making those payments. He has MS and cannot get out of the house. She borrowed £30 from a friend. It is now July and we cannot represent this client on a fact finding because of these queries.
In the same letter our client who is on a previously passporting benefit is being asked to provide further bank statements (in the context of capital means testing) which she had not received by the initial deadline for submission of the App 1 and Means 2. Our client speaks no English.'

3e Another member writes: 'We have concerns as the LAA is now also asking for information on relatively small amounts of money going in and out of a client's bank account. So even where the client is passported for income purposes (e.g. on income support) the LAA still requires their bank statements as proof of their capital. This has then led LAA assessors to come back to clients to ask for an explanation of all transactions (it seems) over around £200 and sometimes going back 2-3 (or more) months.
This is causing many many delays as clients find it difficult to remember what each and every cash withdrawal was used for and any small amount of income is from. Sometimes it has led to hearings having to be adjourned as emergency certificates have expired – causing further costs for the courts system (and sometimes the local authority opponent) and concern and worry for the client.'

3f In addition, many benefit claimants do not have bank accounts, but have only post office accounts. The PO accounts do not have regular paper statements. Instead they are sent out only every 3 months. Clients have found it very difficult to obtain copy statements from the PO to send to the LAA as proof of their capital.

Example 4: checking means of all members of a family in premises where there are possession proceedings

4a 'When defending possession proceedings, the LAA is requiring every person resident in the property, even if not named on the tenancy or party to the proceedings (e.g. client's adult children), to complete a MEANS1 with full proof, on the basis that they might benefit from the proceedings and potentially should contribute.'

4b 'We represent a client under an Emergency Certificate and now substantive PFC a housing association tenant in possession proceedings for rent arrears. She has one disabled child and 2 adult children for whom disputed Housing Benefit adult non-dependant deductions are being applied causing the rent arrears. We are being asked to provide Means 1 or Means 2 for both adult children within 14 days relying on Reg 44(6) and on the basis they have an interest in defending the proceedings.
We have never been so asked before and would not means test the adult children in such circumstances. Further there can often be a conflict of interest between the parent and adult child in a situation where a deduction is correct but the adult child is refusing to pay the parent his or her contribution to rent.'

4c 'I had a client on passported benefits but her adult daughter (who is in work) also lived with her. The Legal Aid Agency insisted on her daughter also filling in a Means1 and supplying 3 months bank statements and wage slips. This was not pleasant as this entailed the mother having to disclose to her daughter that she had a gambling problem and that had rent arrears and was facing possession proceedings. We finally got the substantive certificate through. She has been assessed as requiring a nil contribution.'

Example 5: destitute clients – benefactors

5a Benefactors who are helping to support destitute clients are being required to complete full means assessments. Should they be?

5b 'I have three clients who are receiving nominal amounts of money from friends/relatives in circumstances where they themselves are unable to claim benefits. The friends have been assessed

as over the legal aid limit. As such the clients' certificate has been cancelled. In the third case the client has to pay an upfront contribution of £3000 because her brother is over the limit.'

Example 6: evidence from others

6a. Lodgers' landlords. Example from family lawyer: 'The LAA have assessed other family members in most of my cases. The recent one has been where my client is a paying lodger at a couple's house. They asked the landlords to disclose evidence of how and where they spent the £350 a month they took from my client in rent and board for living in their home in London. They refused as they said they have no relation with the client as she is merely a paying lodger in their home.'

6b. Client's cousin (family case) 'We have recently had a rejection for legal aid because the LAA decided they wanted a full means assessment from the client's cousin with whom he was staying and who was giving him £10 per week to live on.'

6c. Client's brother 'I recently had a case where the client was being supported financially by her brother in the amount of £60 per week but she was in her own property. The LSC (as was) insisted on the brother completing MEANS1 and they assessed her out of scope because of his capital. It was an emergency certificate and was revoked as a result.

I appealed this on the basis that while the rules do permit assessment of a third party where they place their resources at the disposal of the client, in my case, the brother was only assisting her by way of income and the two properties he owned (which took him/her out of scope) were not made available to the client in any way – the LSC accepted this and reinstated her certificate.'

Example 7: definition of disposable income

From last year: 'Client is on contribution based JSA - £71 per week. With him lives his 19 year old daughter who is on income based JSA. LSC ask during the means assessment - what does your daughter contribute to household expenses? We say - £10 per week for gas and electricity but buys her own food and clothes (as you can imagine, she never actually gives him the £10 even though they've agreed that).

LSC then add £10 per week to his disposable income which makes him liable for a contribution. We argue that the £10 per week is not paid to him to increase his disposable income but is paid for her share of gas and electric which he pays.'

Example 8: student nurse

'We have a client who applied for legal aid under the old regime – ie. prior to 1.4.13. She is a student nurse – so she receives a bursary – she works in a hospital and also has blocks of study.

We have been going back and forwards with LAA over financial documents – previously the LAA said that client had not provided sufficient evidence of child care costs – so she provided additional evidence – now they are saying that because she receives a bursary only (rather than wages) she is classed as a student by HMRC rather than an employee of NHS/Health service – therefore she is not in remunerative work therefore childcare costs cannot be taken into account – does anyone know what the answer is? It is somewhat irritating if they are correct as she was initially asked for additional documents to show costs of child care.'

Example 9: detailed immigration case

'I wonder whether you have any additional guidance about the 2013 Regulations and in which circumstances certain provisions relating to assessing eligibility for legal aid will be applied? Under The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013, specifically regulation 16(5), pasted below, where a person is applying for legal aid, LAA will now take into account the resources of any person contributing substantially to their maintenance.

Many of our immigration clients applying for public funding to pursue judicial review against the Home Office are not allowed to work and not eligible for NASS support, they live with friends, extended family and on the charity of others, who provide them with pocket money and food, and often let them lodge free of charge in their homes, sometimes for years, which often leads to quite a strained relationship! Some lodge with a rota of friends, who take it in turns to support them. Some rely on a combination of support from all sorts of different people. Sometimes family from abroad send money by transfer or from places like Afghanistan and Iran, in non-official channels, for them to live on. We have always provided confirmation and evidence (where possible) of the amount of support these clients get from these friends, relatives or churches and charities' destitution funds. However, now it seems we additionally need to provide information about those individuals or organisations own resources. It's the first time I have seen this, so wondered if there is some guidance I have not yet seen about how this is to be applied and in what circumstances it is not reasonable to provide this information.

We have today had an application batted back to us so that we can provide full information about our client's cousin's resources, who lets our client live in his family home but provides him with no other money, including, it seems, children's bank accounts, along with information about overseas relatives means. This will likely take months and in some cases will be impossible, particularly where clients are in Iran and subject to UN sanctions! It may also mean we are well outside the JR deadline, in an emergency this could mean we cannot get legal aid in time.

Regulations:

Resources to be treated as the individual's resources
This section has no associated Explanatory Memorandum
16.-(1) Subject to paragraph (2), in calculating the disposable income and disposable capital of the individual, the resources of the individual's partner must be treated as the individual's resources.

(2) The resources of the individual's partner must not be treated as the individual's resources if the individual has a contrary interest in the dispute in respect of which the application is made.

(3) Paragraph (4) applies where an application is made for any form of civil legal services except legal representation (other than legal representation in family proceedings).

(4) Where the individual is a child, the resources of a parent, guardian or any other person who is responsible for maintaining the child, or who usually contributes substantially to the child's maintenance, must be treated as the child's resources, unless, having regard to all the circumstances, including the age and resources of the child and any conflict of interest, it appears inequitable to do so.

(5) Where it appears to the Director that-

(a)another person is, has been or is likely to be substantially maintaining the individual or any person whose resources are to be treated as the individual's resources under this regulation; or .

(b)any of the resources of another person have been or are likely to be made available to the individual or any person whose resources are to be treated as the individual's resources under this regulation, .
the Director may treat all or any part of the resources of that other person as the resources of the individual, and may assess or estimate the value of those resources as well as the Director is able.

(6) A reference to "individual" in regulations 21 to 36 and 40 to 43 is a reference to-

(a)the individual in respect of whom the determination about financial resources is being made; and .
(b)any person whose resources are to be treated as the individual's resources under this regulation. .
(7) In this regulation-

"family enactment" has the same meaning as in paragraph 12(9) of Part 1 of Schedule 1 to the Act;
"family relationship" and "matter arising out of a family relationship" have the same meaning as in paragraphs 12(7) and (8) of Part 1 of Schedule 1 to the Act(1); and
"family proceedings" means-
(a)any matter which is described in any of the following paragraphs of Part 1 of Schedule 1 to the Act (civil legal services)-
(i)paragraph 1 (care, supervision and protection of children);
(ii)paragraph 9 (inherent jurisdiction of High Court in relation to children and vulnerable adults), to the extent that the matter relates to-
(aa)a child; or
(bb)a vulnerable adult but only to the extent that it is a matter arising out of a family relationship;
(iii)paragraph 10 (unlawful removal of children);
(iv)paragraph 11 (family homes and domestic violence);
(v)paragraph 12 (victims of domestic violence and family matters);
(vi)paragraph 13 (protection of children and family matters);
(vii)paragraph 14 (mediation in family disputes);
(viii)paragraph 15 (children who are parties to family proceedings);
(ix)paragraph 16 (forced marriage);
(x)paragraph 17 (EU and international agreements concerning children);
(xi)paragraph 18 (EU and international agreements concerning maintenance); or
(b)a matter arising out of a family relationship in respect of which the Director has made an exceptional case determination under section 10 of the Act and which is under-
(i)a family enactment; or
(ii)the Trusts of Land and Appointment of Trustees Act 1996(2).'

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By email only

Dear Carol,

Thank you for your letter dated 30th August 2013. I read the content with some concern and am sorry that you've had to take the time to contact me in this regard.

As you will be aware the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 introduced a means test for previously passported clients. As well as training and recruiting staff to manage this process we have continued to strengthen the means assessment process in the last 12 months to ensure only those eligible receive funding.

It's re-assuring to hear that you found the inaugural meeting of the Access to Justice Committee Problem Solving Group to be a productive exercise. Jim Peake who is the Agency's Lead Means Assessor was present at that meeting and he is responsible for training new means assessment recruits to ensure consistency in our practices. In any process involving human intervention there can inevitably be an element of inconsistency and we work hard through both quality control and training to ensure we process means assessments as consistently as possible.

We look to identify inconsistency and tackle it as quickly as possible but it is clear from your letter that we have more work to do in this area. Joanne Bainbridge (Head of Operations, Civil Case Management) who is responsible for the means assessment process will take forward with Jim Peake a programme of further training and consistency checks to address the potential inconsistencies raised in your letter.

I have looked to address each of your examples below. It should be pointed out that without the file reference numbers and the ability to review the entire case and information we were provided, it is difficult to comment definitively on the examples provided.

Example 1 – Evidence sought of financial position

On the face of the description you've offered this is a caseworker error. The Agency should not be looking to assess the financial means of a former partner. I do wonder though, looking at this example, whether there was a trigger contained within the papers which led the caseworker to question whether the client was still in a relationship with his former partner.

Example 2 – Refusal to rectify mistake (seeking details from DWP)

To accurately identify what has happened in this case we would need to see the case reference for this matter so it can be investigated further. Caseworkers don't usually communicate with the DWP on the telephone and the lists that are sent to the DWP central records each day are sent via secure e-mail. We've recently set up a link with a contact at the DWP which enables Jim Peake to speak and/or e-mail them directly in cases where there is a contradiction between the evidence produced from a client showing them to be in receipt of a passported benefit and a check with the DWP central records which has suggested that they are not. I'm led to believe that this arrangement is working well.

Where the applicant is in receipt of a passporting benefit there will be no need to carry out an assessment of income; and for non-passported clients DLA income is wholly disregarded. Caseworkers may however ask questions in order to determine **whether** a payment is DLA or an extra-cost disability benefit in order to avoid erroneously including that income within the assessment.

Example 3 – Level of detail requested – Bank statements

3a – Clients on passporting i.e. income-based JSA should not be asked to explain every entry on their bank statements – this was picked up through quality control and addressed so this should no longer be happening.

3b – The Agency's starting point with bank statements is that all adult clients are asked to provide three months' worth for each account they hold in their sole name or hold jointly with other parties. Clients have been asked to provide statements since November 2010. Documentation is collected to provide assurance that clients are accurately declaring their financial position on applying for funding. This is only a starting point however and the Agency will always be prepared to listen to a supplier's representations as to why it would be inappropriate in a specific case to collect statements. We recognise that clients who are street homeless and/or have mental health difficulties may have particular difficulties in providing statements but will continue to look at each case on an individual basis. The Agency will look to compromise where appropriate and I've been told that, as an example, in a recent case where the client was street homeless a sheet of paper from his bank which simply confirmed the balance of the account was accepted as an alternative to the usual bank statements.

3c – We have identified previous issues where inexperienced staff have asked unnecessary questions about cash withdrawals and engaged in-depth enquiries for lower-risk cases. We have now sought to address this issue and suppliers should now be starting to see an improvement in this area.

3d – In order to comment accurately on this I'd need the case reference number. The delays encountered by the supplier in this case do not appear justified unless those withdrawals are transfers to other bank accounts for which the Agency hasn't had the statements as yet. If you could provide the reference for this case Jim Peake will look at the case and conclude any outstanding assessment.

3e – This is a similar point to that raised under '3c' above. I refer to my comments above.

3f – Guidance has recently been issued to staff in relation to Post Office statements after an issue was identified as part of quality control. Means assessors are now aware that post office statements are only issued at three-month intervals.

Example 4 – Checking means of all members of a family in premises where there are possession proceedings

4a - The Regulation being relied upon here is Regulation 44(6) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 which outlines that it will be appropriate to assess the financial means of third parties where it is considered that 'there are other persons or bodies, including those who have the same or a similar interest to the individual or who might benefit from any proceedings, who can reasonably be expected to contribute to the cost of the civil legal services, or (ii) some other source of funding exists which could be used to contribute to that cost.' This power may therefore apply in possession proceedings to others living in the applicant's home. Prior to April 2013, this power was set out in the Funding Code (Procedural Rule C18 and Regulation 38(5) of the Community Legal Service (Financial) Regulations 2000. Clearly where there are other adults within the property who will benefit from the proceedings it is right that we consider their ability to contribute to the costs of the funding of the legal case. Further guidance has been issued to caseworkers so that enquiries will be better targeted at those who are more likely to be required to contribute (e.g. adult child/relative in full-time employment as opposed to adult child/relative who is a full-time student or receiving income-related benefit; also caseworkers have now been asked to telephone clients in the first instance to obtain some provisional information about a third party's financial means to avoid unnecessary delays. In terms of advice for your fellow practitioners they should be aware that questions as to whether someone else should be making a contribution towards legal costs will arise where there are other adults living in the property in possession cases. For clients on income-passporting benefits, information as to who these adults are (e.g. full-time student, unemployed, in work) can be declared on the 'extra information' sections of the CIV Means2 form.

4b – It would be helpful to have the case reference number to allow a full review of this case. The housing benefit 'non-dependant deduction' amount is calculated based on the gross income of the non-dependant i.e. there are set amounts that are deductable from the housing benefit award depending on the level of gross income; the smallest deduction will be applied for an adult who is in low paid work or receiving income-related benefits. Therefore whether it is appropriate to ask for a contribution towards the costs of the case in accordance with Regulation 44(6) will depend on the particular circumstances.

In relation to the potential conflict of interest where rent arrears have accrued owing to the adult's refusal to meet their obligations towards the rent despite staying in the property, the circumstances should be fully explained when the application is made.

4c – From the information you've provided in this case that the daughter was in work, it would appear that the Agency has taken appropriate steps here to establish the financial circumstances in the first instance although it was subsequently determined that she should not be required to pay a contribution.

Example 5 – Destitute clients – benefactors

5a – When a client has no income of their own Regulation 16(5) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 like its predecessor Regulation 11(4) in CLS (Financial) Regulations 2000 provides the basis for the inclusion of resources belonging to a third party in the circumstances described in the regulations. Guidance is set out in the Lord Chancellor's Guide to determining certificated work at section 3.2 which confirms that the Director has the power to treat all or part of the resources of the other person concerned as belonging to the individual.

Generally, where an individual is receiving a fixed amount of monetary support from a third party, the determination will include the financial support received alongside the individual's main source of income. For cases where a person appears to be wholly financially supported by a third party, it is our practice to send out the CIV Means1 to obtain full information about the third party's resources i.e. pursuant to including all of the resources of the third party who is in effect substantially maintaining that individual in accordance with Regulation 16(5).

5b – Again it's difficult to speak about specific cases in the absence of case reference numbers but generally the Legal Aid Agency will consider the overall circumstances of a case and decisions will be influenced by all relevant factors such as whether the client has made or intends to make an application for state benefits and the reason for not doing so previously where such funds are potentially available; or whether it is a scenario where a person has no recourse to public funds e.g. a failed asylum seeker; the degree of affiliation with the third party providing support e.g. a distinction may be drawn between say a registered charity providing support and close family members who the client is living with and fully supported by; along with some consideration of the level of financial support provided.

Example 6 – Evidence from others

6a – Lodgers' landlords – The main issue that arises in informal lodging arrangements, which often involve close relatives, is that it is sometimes unclear what the money paid by the legal aid applicant is for i.e. accommodation only, or to pay for utilities, food or other incidentals, or all of the above. This may necessitate further enquiries to establish the amount deductable for the cost of accommodation, as opposed to amounts going towards expenditure such as food and utilities that is in-built into the financial limits and therefore should not attract a further allowance.

6b – Client's cousin – See the examples under 5 above. From the information provided it was reasonable for the Agency to make enquiries in this case.

6c – Client's brother – Again I would refer you to my response under 5 above.

It appears from what you've said that the client was in her own property (not living with her brother or residing in one of the brother's houses) presumably with her own financial resources in addition to the allowance of £60 per week. The conclusion that one could draw here is that an inexperienced caseworker may have sent out the CIV Means1 to the brother but when the review came through an experienced caseworker realised that the assessment should have just included the £60 per week.

Example 7 – Definition of disposable income

Money received from lodgers or adult children living in the family home is counted as income – this will include money given to the client or paid directly to the utility company to cover the client's household bills i.e. payment in kind. The salient point in this example is whether the money was in fact being paid. (Regulation 21 and 16(5) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 refer).

Example 8 – Student nurse

It appears form the detail given that our handling of this case could have been improved however the decision reached by the Agency was correct i.e. childcare costs cannot be allowed for student nurses who receive bursaries. I accept that it would be frustrating for the client and the supplier to be asked for documentary evidence of childcare only to then be told that no allowance could be made in the assessment process for it. No allowance can be made in the assessment process for childcare for the reasons you state, namely that HMRC class student nurses as being students rather than employees - see Regulation 27 of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 for more information or its equivalent under the CLS (Financial) Regulations 2000 as amended which was Regulation 23.

Example 9 – Detailed immigration case

Please see my response under Example 5. As stated regulation 16(5) of the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 provides that the Director may include all or part of the resources belonging to a third party within the financial determination in the circumstances described in the regulations. We have previously identified that there may be particular concerns about how Regulation 16(5) is applied to failed asylum cases where a person is not entitled to NASS support or other state benefits and may be receiving small amounts of assistance from a charity or similar, and will re-issue our internal advice to caseworkers that although evidence of the type and amount (as relates to money or vouchers) of support provided should be obtained e.g. letter from the charity concerned, we will not be looking to include the charity's resources and a CIV Means1 should not be sent. Similarly, as relates to individuals providing support in these circumstances depending on the degree of affiliation between the client and the third party (e.g. whether they are closely related will be relevant), the amounts of support and the length of arrangement it may not always be necessary to issue a CIV Means1 – but it will be appropriate in some circumstances. Where there are

circumstances as described involving UN Sanctions, foreign exchange rules, person's in warzones etc it would be useful if an explanation can be provided as to the exact nature of the support and why it would induce a lengthy delay or prove impossible to provide evidence (e.g. because the person is based in Afghanistan etc) so that the caseworker concerned can consult a senior caseworker or the Means Policy Co-ordinator in head office.

As specific case reference numbers were not provided we have not been able to investigate the specifics of each case referred to. If these details are available we would welcome you sharing them with us so we can share learning points with our caseworkers and ensure any further training required for individuals takes place.

Joanne Bainbridge and Jim Peake would be happy to discuss in person the issues you've raised if you feel this would be beneficial. We are currently working on guidance materials for Solicitors in relation to means assessment and would welcome your input at the draft stage.

Yours sincerely

S G McNally CBE

Director, Case Management