

---

# CHIEF EXECUTIVE

David Mulholland

---

Paul Andrews  
Legal Services Agency  
2<sup>nd</sup> Floor Waterfront Plaza  
8 Lagan Bank Road  
Belfast  
BT1 3BN

30 September 2019

Dear Paul,

## **Civil Legal Services Decision Making Guidance**

Thankyou for your correspondence dated 25 June 2019 in relation to the Agency's preparation of comprehensive Guidance documentation on decision making in respect of applications for representation under civil legal services to coincide with the introduction of Legal Aid Management System (LAMS).

The Bar notes that the proposed aim of the Guidance documents is to improve the transparency of funding decisions, the consistency of decisions, the quality of applications for funding and the legal accuracy of decisions plus ensure appropriate levels of control over the work funded under civil legal aid certificates. The Guidance draws together some procedural changes which the LSA implemented at the same time as the LAMS go live date of 01 July 2019.

Whilst your correspondence states that the majority of issues dealt with in the Guidance largely formalise current working practices, it is evident that there are some areas in which the LSA is proposing to take a new approach as highlighted in Annex A. The new documentation is described as an attempt to produce "formal overarching decision making documentation... in preparation for the introduction" of LAMS yet it is worth highlighting that many of the changes outlined appear to not be exclusively linked to the operation of this new system. Instead, we consider that some of the topics represent policy making which we would have expected to be first raised by the Department of Justice rather than the LSA. We would not agree with the suggestion that these documents should simply be viewed as a maintenance of the status quo in terms of working practices by the LSA with the only reason for the changes being administrative in nature around necessary preparation for a new system.

---

# CHIEF EXECUTIVE

David Mulholland

---

The Bar has selected several of the changes in existing practice by the LSA to comment on in particular. Paragraph 7.8 of the Guidance on Civil Representation states that the Agency will make greater use of its powers to place scope limitations on civil certificates. We note that some certificates will continue to be issued in unlimited form but the Guidance also suggests that sometimes the nature of the work which can be carried out will be restricted (for example a certificate limited to obtaining counsel's opinion); often the certificate will be limited up to a specified stage in the proceedings (such as covering steps up to discovery or exchange of expert evidence) or may exclude certain stages (such as cover up to but excluding the final hearing). Whilst we appreciate that the Agency has powers under the Access to Justice (Northern Ireland) Order 2003 to place limitations on certificates granted, we would be concerned that it could result in the Agency potentially taking a more restrictive approach to the issuing of certificates and whether this might impact on civil representation levels across the specific categories outlined in Part C.

The Bar is concerned that, given the potential new and additional restrictions that the exercise of such powers might place upon practitioners, this Guidance has not been subject to any impact assessment or consultation with the profession in advance of its introduction. You will already be aware of the unintended impact upon counsel that arose from the Reform of Publicly Funded Legal Representation in the Civil and Family Courts in 2014. The purpose of the reform was to regulate the circumstances for which authority for counsel may be granted to ensure appropriate but cost-effective levels of representation for all legally assisted persons. The reform was introduced by way of Departmental Guidance signed by the Minister of Justice. Not only did this observe the precedent for Guidance of this nature to emanate from the Department of Justice, but the Department itself later recognised that the practical effect of the Guidance was that the changes it described had a much greater and damaging impact than was first anticipated, causing counsel to effectively be wholly removed from the Family Proceedings Court in 2014.

This had a detrimental impact on the certification of counsel in complex cases with families failing to secure representation and access to barristers for serious matters, including domestic violence and non-accidental injury to children. The Department of Justice committed itself in late 2016 to conducting a review in to the effects of the Guidance. The objective of the review was to review the operation of the Departmental Guidance in practice; assess whether the original policy intention was being delivered; identify and assess where there was a deviation from the policy intention and the reasons for this; identify any corrective action which is necessary to ensure the level of representation is appropriate and sustainable. No conclusions have ever been shared with the Bar as to any meaningful remedies arising out of this review and so the

---

# CHIEF EXECUTIVE

David Mulholland

---

detrimental and excessive effects of this previous Guidance remain in place today. On this basis we therefore believe that this new Guidance should have been issued from the Department of Justice and only after the outcomes of this previous review had been confirmed. We further believe that based on this experience, any new Guidance and should also have been subject to much greater due diligence and formal impact assessment before 01 July to allow for efforts to be made to mitigate any possible negative consequences for access to justice.

We also note that paragraph 6.51 of the Guidance on civil legal representation contains new Guidance on alternatives to civil litigation. There is reference to article 10(5)(c) which states that “every person who exercises any function relating to civil legal services shall have regard to the desirability of exercising it, so far as is reasonably practicable, so as to... achieve the swift and fair resolution of disputes without unnecessary or unduly protracted proceedings in court”. There is no requirement in Northern Ireland for mediation to be considered before civil legal aid is granted for litigation and we note the recognition at paragraph 6.54 that there is no basis for any policy shift away from litigation and towards ADR in this context.

However, throughout this section the Guidance does indicate greater moves towards ADR being pursued as an alternative to litigation. For example, 6.59 says the Agency is unlikely pro-actively to require ADR options to be pursued at the time of the initial application for Civil Representation yet 6.60 states that where the Agency is satisfied that ADR should be pursued as a better alternative to litigation, the Agency will consider limiting the certificate to cover only support for the ADR process, negotiation and settlement. Any new policy development in relation to ADR would be a matter of interest for the Bar and we would expect to have the opportunity to engage with the DOJ on this rather than seeing it for the first time in an LSA Guidance document that has not been subject to proper impact assessments.

The Bar is disappointed that the Agency formally adopted the Guidance on 01 July 2019 to coincide with LAMS going live given that, as referenced above, it appears to have no specific connection to the new system. The lack of any impact assessment around civil representation levels is also concerning given the potential for unintended negative ramifications for legal professionals in sustaining viable practices with particular reference to rural needs, gender equality and younger practitioners. However, we note that the Guidance will be subject to ongoing refinement and updating and observe the commitment that the Agency will make practitioners aware of any substantive changes as they are introduced. The Bar would also welcome the opportunity to meet with the Agency to discuss our concerns further and to have the opportunity to comment on any

---

# CHIEF EXECUTIVE

David Mulholland

---

further changes to this Guidance or any new Guidance documents issued by the LSA as appropriate.

If I can be of any further assistance in this matter at this time, please do not hesitate to contact me.

Yours sincerely,



David Mulholland  
**Chief Executive**