



Scottish Legal Aid Board

Review of Stage Reporting Process

THE SCOTTISH LEGAL AID BOARD

STAGE REPORTING

1. INTRODUCTION

The Board has recently completed a review on the revised stage reporting processes in place since March 2009 when changes were made to reduce the number of time based reports that had to be submitted while, at the same time, increasing the situations when unprompted reports would be expected from solicitors acting for legally aided parties.

2. PREVIOUS REPORTING PROCESS

Stage reporting was introduced as part of the civil legal aid reform package in October 2003. The submission of reports was intended to allow the Board to consider whether there had been any changes to the underlying assumptions that allowed legal aid to be granted. Reports were to be submitted by the solicitor acting at key stages in a case. The reporting process was divided into compulsory reports and ad hoc reports.

Compulsory reports were needed where:

- a proof or debate had been assigned or twelve months after legal aid was granted -whichever was the earlier;
- in family cases involving a child welfare hearing when a proof or debate had been assigned or six months after legal aid was granted - whichever was the earlier;
- each subsequent twelve months after the initial report;
- at the conclusion of proceedings.

Ad hoc reports were to be submitted to cover significant developments in a case such as:

- where a case was sisted (other than where sisted for legal aid);
- where a proof diet was adjourned;
- where a minute of a tender was lodged but rejected; and
- to advise on the outcome of a debate.

When a compulsory report was submitted a solicitor was entitled to a payment to account for the blocks completed to the point of submitting the report. There was not a high take up rate for such payments possibly because a solicitor had to submit accounts that were detailed to obtain the stage payment. This was seen as cumbersome and unnecessary work which inclined solicitors to hold off lodging an account till the end of proceedings.

3. BENEFITS OF THE PROCESS

There are several benefits to the reporting process. The key benefits are:

- it helps both the solicitor acting and the Board to review developments in the case;
- it allows the Board to consider whether legal aid should continue and, where it does, gives assurance that the case has been reviewed; and
- it gives opponents an assurance that a case is being regularly reviewed.

4. CHANGES MADE MARCH 2009

In March 2009 changes were made to the stage reporting system, in part, as a result of criticism from the profession about the need to send routine stage reports in each and every civil case irrespective of the particular circumstances of the case but also because of the proposed introduction of a system for monitoring potential high cost cases. The hands on monitoring process would give more overall control of expenditure incurred under a grant of civil legal aid without the need for submission of routine time based stage reports. The main change was the removal of the need to provide routine time based reports until a period of eighteen months had passed from the date of grant of civil legal aid in family cases and twenty four months in non family cases.

Stage reporting is now done either through the lodging of time based or unprompted reports. Time based reports are needed eighteen months after the date of grant of civil legal aid in family cases and twenty four months in non family cases. Unprompted reports are needed at certain key points in a case. Solicitors have a duty to report the up to date position in a case using these two stage reporting methods. The fulfilment of this duty is particularly important in the case of unprompted reports. Unprompted reports require to be submitted whenever there is a material change affecting the assumptions on which the grant of civil legal aid was made. These reports are needed as it is possible that, as a result of these material changes, the statutory tests of probable cause and reasonableness may no longer continue to be met.

The existing guidance in respect of unprompted stage reports is that such reports should be provided:

- where a case is sisted other than where it is sisted for legal aid;
- where the outcome of any debate or hearing has changed the nature of the assisted person's case;
- whenever a proof diet is adjourned;
- when a minute of tender is lodged particularly where the minute of tender is to be rejected;
- when a solicitor is given, or has information, to suggest that the prospects of success in a case and/or the prospects of recovery have altered;
- where the total cost of the case is likely to increase significantly compared with the information on cost that was given either at the time the application for civil legal aid was made or in any stage report already lodged; and
- on any occasion where a grant of civil legal aid is transferred to a new solicitor and that new solicitor's assessment of the merits of the case, or the appropriateness of legal aid continuing, is different from that of the solicitor who made the original application.

5. MONITORING FINDINGS

Samples of one hundred applications where stage reports have been lodged were reviewed to consider the use made of the reporting system. In the cases examined the information provided by the solicitor acting about the current status of the case and its prospects for success was not always sufficient to allow a decision to be taken to continue with the grant of civil legal aid immediately.

In thirty nine (39%) of the cases there was a need to continue the stage report for the provision of further information before the decision could be taken to allow legal aid to remain in place. The information provided was sufficient to allow the grant of legal aid to continue but there was not always detailed information about:

- the current position in the court case;
- costs already incurred or likely to be incurred;
- the applicant's continuing prospects for success/recovery;
- progress already made in the case; or
- the extent of the issues still under consideration.

These are key elements of the process and this essential information must be provided before we can say it is reasonable and appropriate for legal aid to remain in place. As this information is not always being provided we will work with the profession and issue new guidance on the completion of stage reporting forms.

One specific factor considered in the review of the stage reports was whether solicitors gave information on any revised assessment of the estimate of case costs from that given at the outset. When an application for civil legal aid is made an estimate of the likely cost of the proceedings is given. When a stage report is lodged there an updated estimate of case costs should be given. Where the case costs change from that provided initially an explanation has to be given for this. The unprompted stage report process also requires that a report be lodged where costs are likely to have altered considerably from any estimate previously given.

In nineteen (19%) of the cases examined the estimate of case costs given with the stage reports was different from that provided at first instance. All of these cases involved family matters and specifically residence and/or contact. The reason for the change in the estimate of the case costs (which was always an upward shift) was the obtaining of a report ordered by the sheriff. The provision of reports in cases involving children can substantially add to the cost of a case but in none of cases examined did the upward estimate result in civil legal aid not continuing.

Of concern however, was the fact that there seems to be little appreciation that sanctions granted for the involvement of experts and/or counsel are likely to push up case costs from any estimate previously given. As an example, in one case where payments to account had already been made to the value of £15,000 the solicitor gave the estimate of case costs as being between £1,001 and £2,500. This was clearly incorrect and should have been known to the solicitor when the stage report was lodged.

Solicitors acting for clients where the case is being funded by the public purse should keep abreast of case costs and provide the Board accurate case cost information. The

reason for the failure, in some situations, to give correct information on this issue is not clear but whatever the reason, it is not satisfactory. Private fee paying clients would always be given detailed information on costs and where an insurance company or trade union was funding a case accurate information would be provided to them about the costs of the case to date.

The responses to questions in the forms detailing the prospects for success and the prospects for recovery were also examined. Solicitors have to advise if there have been any changes in these prospects since the application was initially lodged. Of the cases considered all, with five exceptions, adhered to the original view given on prospects of success and recovery. A change in assessment does not necessarily mean the grant will be terminated but we need to be given this information based on an accurate assessment of prospects so that we are at least able to examine the issues to decide whether it is reasonable for legal aid to continue.

6. STATISTICAL INFORMATION

Time based stage reports are needed 18 months after a grant of civil legal aid in family cases and 24 months after a grant in non family cases. Thereafter time based reports are required on a yearly basis until the conclusion of the case irrespective of the nature of the case. The compliance rate with requests for time based stage reports stands at around 59%.

Time based reports are not always received as soon as one is requested. Reminders are sent to solicitors acting when a time based report is due. The time scales are:

- 28 days are initially provided for the report to be lodged;
- 14 further days are given after the expiry of 28 days; and
- A final 14 day period is given after this to lodge the report.

Solicitors have a total of 56 days to send in a report although the aim is to see the majority lodged within the initial 28 day period.

The unprompted stage report process is entirely within the hands of the solicitors acting. Assessing the level of compliance with this system is difficult. The Board cannot state definitively how many such reports should have been lodged when contrasted against the number lodged in reality. Work undertaken on the Board's review of high cost cases does however suggest that these requirements are not always being met. This is not to suggest that no such reports are lodged but rather that compliance with the unprompted stage reporting obligations is not as universal as it should be. In view of this it is difficult for the Board to be satisfied that all relevant information is being provided at all times through the unprompted stage report process.

7. HIGH COST CASE REVIEW

Work being done as part of a review examining high cost cases (cases with accounts paid in excess of £25,000) identified a number of failures to send both time based and unprompted reports. It is important to note, however, that this represented only a

small percentage of the overall application population. However where there is non-compliance with the stage reporting process in high cost cases this carries greater risk to the Fund so these are the very cases where reports must be supplied.

Twenty five high cost cases were examined and of these twenty five, twenty one should have produced at least one stage report. In reality there were twelve reports resulting in a compliance rate of 57%. The remaining four cases either concluded before a stage report was due (two cases) or were not yet due to provide a time based stage report (two cases).

In the twenty one cases where at least one stage report was due a total of twenty six reminders were issued to solicitors about the need to provide a stage report. In one case an unprompted stage report was provided when a proof was adjourned and a fresh proof date fixed.

An inability to give an accurate estimate of case was particularly prominent in these cases. In one extreme example the estimate of case costs was given at between £1,000 and £2,000 when payments to account had already been made in excess of £50,000. While this was the most extreme example, it was not an isolated incident. Even in long running, high value cases there are failings by solicitors acting in keeping accurate records of case costs.

Equally, however, there were examples of good practice in the stage reporting process with a number of detailed and accurate reports being made. The good practice used in those reports has helped to inform the basis for future guidance on completion of forms. It has also given assurance that, when properly completed, the existing forms are more than able to provide the information needed to decide if civil legal aid should continue.

8. FAMILY AND NON FAMILY CASES

In order for stage reporting to become fully effective particularly for those cases likely to result in significant expenditure to the Fund, the stage reporting process should differentiate between family and non family cases. In all applications examined the issues of concern related primarily to family rather than non family cases. This is not to suggest that non family cases should have a reduced stage reporting procedure but rather emphasises that the greater risk to the Fund arises from family cases.

The distinguishing factors in family cases were:

- The limited prospects for obtaining expenses where one party is successful even if only one party in that action is legally aided.
- The increased likelihood of both or a number of parties being legally aided particularly in contact and residence actions. Early evidence from research into stage reports, high cost cases and examination of cases where there were multiple legally aided parties, taken in conjunction with information already gathered from the special urgency review, identifies the lack of private client reality that exists in situations where there is a multiple legally aided party dispute. This makes it vitally important that adequate stage reporting

mechanisms are in place and are complied with to avoid the risks of unnecessarily elongated procedures.

- Certain family cases can become elongated because of the nature of the issues involved. In non family disputes there seems less of elongation of a case beyond situations where procedures take longer simply because of the court process. Family cases that go to proof are more likely to see the introduction of all manner of evidence which stretches the process considerably.

In family cases the Board has to have sufficient information to be able to consider:

- The costs already incurred based on accurate information and whether the estimate of case costs to conclude matters is realistic having regard to the requests for sanction made throughout the case and any payments to account that may have been made; and
- Whether cases that have been continuing for a considerable period of time are making any progress and the potential for conclusion of the case in the near future and the prospects for achieving a satisfactory outcome.

9. REVISED GUIDANCE

Examination of high cost cases and multiple party legally aided cases has shown a number of situations that may be likely to trigger higher than average costs in the running of a case. In view of this it is proposed that the guidance about the provision of unprompted stage reports be amended to take into account these potential high cost trigger factors. Stage reports should therefore always be supplied:

- **Whenever any hearing of any sort of three days or more is fixed.** The current guidance requires that a stage report be provided when a proof diet is adjourned. However, where such hearings are fixed the costs are likely to be significant and so this is information that is needed at the earliest possible opportunity to allow an evaluation of prospects of success in a case.
- **Whenever a minute of tender is lodged and has not been accepted.** At present the requirement to lodge an unprompted stage report is principally driven by situations where the minute of tender lodged is rejected. It is considered that a stage report should be submitted in all situations where a minute of tender has not been accepted. Failure to provide an unprompted report is likely to lead to consideration being given to non payment for work done from that time.
- **In any cases involving children where allegations of abuse or sexual abuse of any sort arise.** A significant factor in all of the high cost family cases examined which resulted in proceedings being elongated was that such allegations were made. These allegations can take up much court time even where such allegations are ultimately found to be spurious. In view of this it is important that the Board is made aware of any such allegations as soon as they are made where this information was not available when the application for legal aid was initially considered.
- **Whenever an expert has been instructed and their report shows a material difference from that advanced in the assisted person's position or case.** Examination of the high cost cases uncovered instances of expert reports being obtained for an assisted person which were critical of the position being adopted by the assisted person and yet the Board was not advised of this. It is vital that

this information is provided to allow an evaluation of the appropriateness of the grant remaining in place.

- **Where a report is obtained in any case involving children and the reporter is not supportive of the assisted person's position or case.** This information should be given to the Board to allow an assessment of whether the case should continue to be funded at public expense.

10. ADDITIONAL PROPOSALS FOR CHANGE

The Board would like to see rigorous compliance with the stage reporting process become routine for solicitors acting in legally aided cases. As matters currently stand, however, there are no real consequences for a solicitor where they fail to comply with the stage reporting requirements even although these are key to ensuring proper control of Fund expenditure.

It is proposed that when a time based report is requested, the final reminder letter has been sent and still no response is received this failure to comply with the final reminder letter will result in an automatic suspension of the grant of civil legal aid. This will avoid expenditure being incurred to the Fund at a time when the Board cannot know if it is reasonable for legal aid to continue and whether the costs being incurred by public funds are appropriate. Concern has been expressed in the past about the impact of such a step on the assisted person who is not responsible for the provision of the stage report. It is considered that the risk to the Fund in allowing grants of civil legal aid to remain in place unchecked and potentially incurring significant expenditure is now too great to allow the existing process to continue unchanged.

The Board can only suspend grants of civil legal aid for a maximum of 90 days at any one time. If the end of the suspension period is reached and there is still no stage report it is proposed that consideration be given to terminating the grant of civil legal aid. While terminating the grant of civil legal aid may appear a significant step it is the only way of guaranteeing that no unnecessary expenditure is being incurred when the Board cannot know if the grant should remain in place. Until such time as we know it is appropriate for civil legal aid to remain in place then it cannot be said that allowing costs to be incurred from public funds is appropriate. Comments on any proposal to terminate are always sought by the Board before such a step is taken so the solicitor and the assisted person have another opportunity at that time to provide the relevant information.

When accounts are submitted (particularly high value accounts) it can become clear that an event occurred during the course of the proceedings that should have been the subject of an unprompted stage report. If the failure to provide an unprompted stage report involved a significant issue that would have impacted on whether civil legal aid continued, then the proposal is that consideration will be given to not paying for any work undertaken from the point when the unprompted stage report should have been lodged, unless it can be shown that there are good reasons for making such payment notwithstanding the failure to report.

These proposals for change are significant and so they will be subject to an initial monitoring and control stage. Detailed guidance using examples of good practice will be issued to the profession. These proposals are needed as without these steps the Board cannot be satisfied that it is getting all the information needed throughout the

lifetime of a case to allow it to decide whether or not continuing to spend public funds on a case is appropriate. Changes will be made to the forms used for time based stage reporting to provide a prompt to solicitors asking about any changes that may have occurred in the case that have not already been reported.

The Board would prefer not to find itself in the position where any of the proposed sanctions will be required. Full compliance with the stage reporting process would mean the Board does not have to take any of the steps detailed. Such action will only be taken where compliance does not occur. There is no reason therefore why such action should be necessary in a legally aided case.