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Please ensure all relevant colleagues in your firm are made aware of the content of this mailing.

GUIDANCE ON APPLYING THE FINANCIAL ELIGIBILITY TESTS FOR ADVICE AND ASSISTANCE

As you know solicitors are responsible for determining their client's financial eligibility to receive advice and assistance, having regard to any guidance given by the Board as to the assessment of disposable income or capital.

It is important that clients who are granted advice and assistance are financially eligible. On preparing this guidance we have taken account of comments from the Law Society of Scotland, the Family Law Association and a number of practitioners.

This letter provides guidance to solicitors on how they should determine their client's financial eligibility including the importance of seeing documentary evidence to verify their client's eligibility. **It is not intended to prevent anyone from obtaining advice and assistance who is entitled to receive it.** Additionally, this letter outlines forthcoming changes to the advice and assistance forms which will assist this process.

The guidance mirrors that already provided to applicants explaining whether they qualify financially for advice and assistance and reminding them of the need to take along proof of income and capital when visiting their solicitor. (This is included in our leaflet "*Do I qualify financially for advice and assistance or civil legal aid?*" issued in April 2006 and available from our printers, Stewarts on tel 0131 659 6010 or on our website.)

Assessing financial eligibility

A client's income and capital must be within the current financial limits to qualify for advice and assistance.

We recommend that disposable capital is assessed first as failure to qualify on capital will make the client ineligible even if they are in receipt of the passported benefits (income support or income based Jobseeker's Allowance).

Assessing disposable capital

In this context capital means savings and anything else of value owned by the client and their partner, if appropriate. **This excludes the client's main residence. This also excludes the value of any disputed assets which are part of the subject matter of the advice.** Examples of capital include:

- the amount that could be borrowed against all land and buildings the client or their partner own, other than the client's main home, including interests in timeshares
- money in the bank, building society, post office, premium bonds, national savings certificates etc
- investments, stocks and shares
- money that can be borrowed against insurance policies
- the value of other non essential possessions, such as a boat, a caravan, second car, jewellery (but not wedding or engagement rings), antiques or items bought for investment purposes
- money that is owed to the client or their partner
- money due from the will of someone who has died
- money due from a trust fund
- money that can be borrowed against business assets
- redundancy payments.

There should however be excluded from capital the following:

- the home in which the client and their partner lives
- the client's household furniture and clothing
- the client's tools and equipment they need for work
- the value of any property or item that is the subject of the dispute.

Additionally, if the client is of pensionable age (whether in receipt of a pension or not), various disregards of capital are allowed, and full details of the latest levels can be found in the current advice and assistance Keycard. The Keycard also gives details of the latest standard allowances which can be subtracted from any capital which the client may have.

Assessing disposable income

A client whose disposable income exceeds the current income limit (presently £208 per week) is not eligible to receive advice and assistance, irrespective of the level of disposable capital, unless in receipt of income support or income based job seekers' allowance.

In this context income means the total income, from all sources which the client and their partner received or became entitled to during or in respect of the seven days up to and including the date of the application. **This excludes income which is in dispute, for example, the amount of maintenance being claimed from someone which is part of the subject matter of the advice (i.e. the subject matter of the dispute). Income tax and national insurance contributions are also not included in income if the client is employed.**

If any payments are made monthly, multiply these by 12 and then divide by 52 to work out the weekly figure. To make assessment easier round up or down the figure to the nearest pound.

If the client/their partner receives income support or income-based Jobseeker's Allowance, they qualify automatically on income for advice and assistance and will not have to pay a contribution. However, the solicitor still requires to assess their client's disposable capital.

In this context income means:

- earnings (including any tips), drawings or profits from business
- maintenance payments (unless paid through the Child Support Agency)
- private or employee pensions
- occupational sick pay
- occupational maternity pay
- student grants or bursaries (but not student loans)
- national asylum support service (NASS) payments
- money received from friends and relatives (other than loans)
- income from savings and investments
- dividends from shares.

Various benefits which the client may receive are disregarded in the financial assessment and do not need to be included as income. These are as follows:

- attendance allowance
- back to work bonus
- bereavement allowance
- bereavement payment
- child benefit
- child maintenance bonus
- child support maintenance (paid through the Child Support Agency)
- child tax credit
- Christmas bonus
- contribution based Jobseeker's Allowance
- council tax benefit
- disability living allowance
- disabled persons tax credit
- guardian's allowance
- housing benefit
- incapacity benefit
- industrial injuries disablement pension
- invalid care allowance
- pension credit
- severe disablement allowance
- state retirement pension
- statutory maternity pay (non-occupational)
- statutory sick pay (non-occupational)
- sums payable to holders of the Victoria Cross or George Cross
- war disablement pension
- war widow's/widower's pension
- widowed parent's allowance
- working tax credit.

The Keycard shows the benefits to be disregarded and also shows the latest standard allowances which can be deducted from the total income. These allowances are deductable for a partner living with the client, and for any dependent person who is wholly or substantially maintained by the client, and is a member of the client's household.

Aggregation of resources

In the assessment, the resources of a partner must also be taken into account. A "partner" is considered to be someone the client normally lives with as a couple, whether or not they are married and of the same or different sex.

The partner's resources do not need to be taken into account in the following circumstances:

- the partner has a contrary interest in the case
- the client and partner are living separate and apart
- it would be inequitable or impractical to aggregate their resources. (On the rare occasion where aggregation of a spouse's resources may arguably be inequitable or impractical, please contact the Board for advice).

Documentary evidence of client's financial circumstances

We would expect all but a minority of clients to be able to provide their solicitor with documentary evidence of their financial position. When arranging an initial meeting with a solicitor, the client should be asked to bring along documentary evidence of their capital and income along with the proof of identity required when signing up new clients whether legally aided or not.

Apart from helping verify the client's eligibility, documentary evidence will also help ensure that the correct contribution is assessed.

In terms of the Advice and Assistance regulations an application must include such information as is necessary to enable the solicitor to determine the client's disposable capital and either their disposable income, or where appropriate the benefits they receive, and include such information as is necessary for the solicitor otherwise to satisfy himself as to the client's eligibility.

We would recommend therefore that the solicitor should see, wherever practicable the following:

- *for income*

    - where the client is in employment, a recent wage slip or bank statement
    - where the client is in receipt of benefits a letter of award, benefit book (in the limited cases where payment is made in this way) or a bank statement (which might simply be an ATM receipt showing the credit)

- *for capital*

    - a bank statement and statement/pass book and certificate for savings and/or investments held.

The solicitor will no doubt wish to ask and see sufficient information to ensure that the client has neither directly nor indirectly deprived themselves of any resource with intent to reduce either their disposable capital or disposable income or maximum contribution. Such resources have to be treated as part of their resources for the assessment of eligibility. In all cases and including, in particular, those where information is not forthcoming from the client, we would expect the solicitor's file to record the fact that the information was requested and that the client has been advised of the checks which the Board may make by way of the Department for Work and Pensions, banks, employers and others.

We appreciate that in some circumstances, clients may not always have documentary evidence available when consulting a solicitor. Where a client does not have the necessary documentation, for example, in emergency situations, where they are part of some acrimonious dispute which prevents access to such documentation or where they are in custody, the solicitor may nevertheless be able, from the limited information available to determine their client's financial eligibility. Nonetheless the solicitor should thereafter seek verification from the client preferably before seeking any increase in authorised expenditure but always at the earliest opportunity and exhibit this on the file so that it can be seen at peer review or at Board compliance audit.

The foregoing applies equally to repeat clients. It is not safe for the solicitor to assume that their client's financial position is unchanged from that previously stated.

Assurance checking

Whilst the regulations require the solicitor to be satisfied as to the client's eligibility to receive advice and assistance, the Board has always carried out further checks of the client's financial eligibility. We are currently increasing the volume of checks, both for clients in receipt of benefits, and those who are in employment to provide assurance that advice and assistance is being made available consistently and appropriately throughout the country.

As a result of this work we are identifying clients who have made false declarations to their solicitors. We will take action in these cases firstly by reporting the case to the procurator fiscal and secondly by seeking to recover any legal aid costs met by the Board.

We are aware that many solicitors do see documentary evidence but do not record the fact in the application. It is important to do so because greater volumes of checks will be made in cases where the solicitor has indicated to the Board that they have not seen documentary evidence to support the client's application.

As a matter of good practice we recommend that the solicitor reminds their client that a false declaration could have severe consequences. We would much prefer that a client is not put in this position and the solicitor seeing verifiable documentation will help minimise this risk.

New advice and assistance forms

We are in the process of issuing new and separate advice and assistance intimation and increase forms for children's, civil and criminal matters. The first of these forms, to be used for children's advice and assistance matters has already been issued. (These forms are used for applications by adults and children in relation to matters arising from Part 2, Chapters 2 and 3 of the Children (Scotland) Act 1995.)

We expect to introduce the new civil and criminal advice and assistance forms in spring 2007. The introduction of these forms should make the financial eligibility test easier to conduct and the revised financial questions on the forms will make completion of the information easier for the solicitor.

Further information on conducting the financial eligibility test can be found in the latest version of the Keycard dated April 2006.

Who to contact if you have any questions:

- For further information regarding any of these issues please contact:
  - Mr Kingsley Thomas, Manager of Criminal Legal Assistance – 0131 240 2085
  - Mr Joe Kelly, Head of Civil Legal Assistance - 0131 240 2031
- You can obtain the latest Keycard, our Handbooks, mailshots and other publications, on our website at **www.slab.org.uk** or call our Communications Department on 0131 240 1985
- Copies of forms and leaflets are available from our printers, Stewarts – tel 0131 659 6010.