



Association of **Lawyers for Children**  
Promoting justice for children and young people

## Note to members

In our [press release of 22.11.17](#), we alerted our members to the [Government's announcement](#) made the previous day that the police are investigating the potential manipulation of drug and alcohol test results carried out by 2 companies: Trimega Laboratories Ltd and Radox Testing Services.

### Purpose of this note

The ALC wishes to keep its members informed of developments on this subject as and when those become available and to offer guidance to its members. We will update this note from time to time with any relevant new information.

### What is the issue?

In summary, the issue is that there may be individuals who will have been the subject of hair strand testing (HST) for drug and alcohol use in family court cases between January 2010 and April 2014 and who may be concerned about the reliability of these tests given the Government's announcement. There may also be other individuals who were involved in such cases and who may also be concerned, even if those individuals were not themselves the subject of HST.

The Ministry of Justice (MoJ) and HM Courts and Tribunals Service (HMCTS) published [guidance](#) for individuals concerned about the issue. This explains how to apply to the court to set aside or vary a relevant order using a special form, C650.

### What we told initially told our members

In our [press release](#), we told our members and any other reader that:

- If you were involved in a family court case that you think was affected by an unreliable drug or alcohol HST, you can try to contact the solicitors' firm who represented you in that case and ask for their advice. If you cannot contact them or they cannot help you, you can look for another solicitor on [The Law Society's website](#). You could also contact [Citizens Advice](#) or the local authority involved in your case.
- We considered that those affected should be able to receive non-means, non-merits tested advice and assistance under the 'Legal Help' scheme so that they can get free initial advice about their situation.
- Following the initial advice stage, if a solicitor took the view that there was sufficient merit to make an application to the court, we considered that the

solicitor ought to be able to apply for a legal aid certificate to continue to assist the client and prepare any relevant application. Our firm view is that no financial eligibility test should be imposed; the application for a legal aid certificate should be non-means tested.

- We would make our position clear to the LAA and the MoJ.
- Members may wish to carry out a review of files so as to identify cases in which drug or alcohol testing by Trimega, or Randox (if applicable) occurred during the applicable period.

### **What we did next**

On the same day as our press release, we wrote to the MoJ.

#### *Contents of ALC letter to MoJ, dated 22.11.17*

1. We have considered the letter from Ms Thambyrajah, dated 20.11.17 (then subject to embargo). Thank you for bringing this to our attention. We have also read the written statement (HCWS265) made by the Minister of State for Policing and the Fire Service, Mr Nick Hurd yesterday (21.11.17) and the guidance note 'Forensic toxicology tests' published yesterday on Gov.UK.

2. We have alerted our members to the situation by way of a press release which can be found on our website here: <https://www.alc.org.uk/publications/responses>

3. You will be aware that the subject child, their parents and those with parental responsibility (PR) who are respondents to Part 4 Children Act 1989 (CA 1989) proceedings are automatically entitled to non-merits and non-means tested legal advice, assistance and representation under a legal aid certificate. Where issues arise within Part 4 proceedings concerning the validity or accuracy of expert evidence, those respondent parties can obtain legal advice about such matters from their solicitor as part of the work conducted under the legal aid certificate.

4. We believe that where Part 4 proceedings have concluded and no legal aid certificate remains live but a parent or person with PR finds themselves needing to obtain legal advice as a result of potential manipulation of drug and alcohol test results, then the parent or person with PR should be placed on the same footing as they would be if the issue arose within the course of Part 4 proceedings: that person should be able to obtain non-means and non-merits tested legal advice and assistance.

5. We suggest that the MoJ should make immediate interim arrangements for provider firms to be able to give advice and assistance under Family Help (Lower) to those parents and persons with PR who find themselves in this situation. In public law matters, this form of service is non-means and non-merits tested. It is remunerated as a (national) fixed fee of £365.00 with the capability of becoming an escape fee case. Although the form (CW1 PL) may need some tweaking, we suggest that the sufficient benefit test for a provider firm to give Family Help (Lower) to a

client in these circumstances can be met by evidencing that:

- a) a test result was adduced in Part 4 proceedings from one of the companies concerned (Trimega Laboratories Ltd or Randox Testing Services);
- b) the client was a person who was the subject of the test; and
- c) the test was obtained during the applicable period (January 2010 and April 2014).

6. If, following the provision of initial advice and assistance given under Family Help (Lower), the client seeks to make an application to the court to vary or set aside an order in relation to children, we suggest that the client should be able to make an application for a legal aid certificate (for continued advice, assistance and representation) on a non-means tested basis. It would seem to us that the merits criteria could be addressed within the application which would be assessed by the Legal Aid Agency.

7. Finally, while we believe that most affected individuals will have been parents or those with PR who were respondents to Part 4 proceedings, we are conscious that there will potentially be some individuals who were the subject of such testing in other family court proceedings (primarily private law CA 1989 proceedings). Those individuals may have: had the benefit of legal aid; been litigants in person; or themselves been funding their costs of legal advice and representation. We submit that irrespective of whether the individual had legal services or not, or who was funding those legal services, any individual who seeks legal advice as a result of potential manipulation of drug and alcohol test results should be availed of legal aid on the same basis as we have suggested above in relation to parents or persons with PR involved in Part 4 proceedings.

As this matter is of importance to our members, we confirm that we intend to shortly publish this letter on our website.

We look forward to hearing from you in response to our suggestions.

The MoJ replied to us the next day.

*Contents of MoJ letter to ALC, dated 12.11.17*

Thank you for your letter dated 22 November 2017 and for swiftly alerting your members to this issue. I note the concerns you have raised about the availability of legal aid for individuals potentially affected by the alleged manipulation of drug and alcohol test results.

The Government understands the concerns of many individuals about the potential impact on their families, which no doubt form the basis of your suggestions. The number of people who may wish to apply to the family court and the types of cases potentially affected are currently unknown. The Government further recognises that parties are not at fault for the cause of this issue which is why the court fee for all applications made using the Form C650 – Application Notice to vary or set aside an order in relation to children – has been remitted.

The current position is that individuals will continue to be assessed for their eligibility for legal aid within the existing legislative framework. As you are aware, applications are assessed on an individual basis to determine whether the matter is in scope of legal aid and whether any eligibility criteria set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) are met. Where a matter is in scope, individuals may be eligible for legal help subject to an assessment of any applicable means and merits criteria.

I recognise that this may be disappointing to some individuals but we hope the process we have put in place is simple and accessible for potential applicants, including those who may be litigants in person. We appreciate any assistance you are able to provide members of the public who may contact you in relation to this issue.

### **Why are we still concerned?**

We are concerned that some individuals who may need to seek legal advice and assistance about this issue may not be eligible for legal aid to cover the costs of legal services. We believe that any affected individual should be entitled to non-means tested legal aid because as the MoJ says: *“the Government further recognises that parties are not at fault for the cause of this issue.”*

We can think of situations where individuals may not be eligible under the current legal aid schemes. These are:

- a) A parent may have had non-means tested, non-merits tested legal aid to cover the costs of legal services during care proceedings where she or he was directed to undergo HST. To qualify for legal aid funded advice and assistance now regarding the issue of reliability of the HST, the parent would need to meet the Legal Aid Agency’s (LAA) stringent financial eligibility tests. A parent may find themselves to not be financially eligible if, for example, they are now working.
- b) Similarly, a parent may have met the means and merits tests to qualify for legal aid (including the evidence as to domestic abuse or child protection) to cover the costs of legal services during private children law proceedings. A parent may find themselves to now not be financially eligible. If they are financially eligible, the parent may no longer have valid evidence as to domestic abuse or child protection.
- c) A parent who was a litigant in person or a privately paying individual may have been the subject of a HST. That person may not be eligible for legal aid now if they require legal advice and assistance about the reliability of the HST.
- d) A friends or family member may have not been a party to family proceedings but may have been the subject of a HST as part of an assessment as to their suitability to care for a child with whom the court was concerned. That person may not be eligible for legal aid.

- e) A child or young person who was the subject of family proceedings may be aware that their case involved a direction for HST. That child may wish to obtain advice and assistance about the reliability of the HST but the child may not be eligible for legal aid.

We believe that individuals in the above situations (and indeed anyone affected by the issue of the reliability of HST) should be able to receive non-means tested legal aid to cover the costs of legal advice and assistance.

### **What we are asking of our members**

We believe it is difficult to predict how many individuals will be affected or will seek legal advice and assistance on the issue.

Many may well be eligible for legal aid under the Legal Help scheme which, if in relation to a public law order, would be paid at a national fixed fee of £132.00<sup>1</sup>. If the proceedings in which the HST were conducted were private children law proceedings, the national fixed fee for Legal Help in that situation would be £86.00<sup>2</sup>.

The issue which concerns us is that the Legal Help scheme, whether in relation to advice and assistance on public or private children law issues, is subject to a financial eligibility test. We are concerned that there will be a number of people affected by the issue of the reliability of HST results, who require and deserve advice about the issue but who will not be eligible for legal aid. We do not believe that those persons should be prejudiced by having to privately pay for legal services or, worse still, go without legal services when the issue is not one of their own making.

We intend to make further representations to the MoJ about the issues but we also encourage our members to inform us if they come across a situation where the legal aid scheme operates to deny legal aid to an individual in this situation.

We also intend to liaise with other organisations representing practitioners affected by this issue, including the Law Society which may be able offer guidance to family practitioners about the nature and extent of their obligations / duties in this relatively unique situation.

We would also welcome information from our members as to what, if any, steps they are taking to review those cases where HST by Trimega or Radox may have occurred, or whether they consider that they cannot or should not conduct such a review, and why. This applies to members who may have represented persons who underwent HST, children in such cases or local authorities.

1.12.17

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<sup>1</sup> Table 2(a): Legal Help, Family Public Law within Schedule 1 to the Civil Legal Aid (Remuneration Regulations) 2013

<sup>2</sup> Table 3(a): Legal Help, Family Private Law within Schedule 1 to the Civil Legal Aid (Remuneration Regulations) 2013

## **UPDATE: 7.12.17**

We have now sent a letter of further representations to the MoJ and we await a response.

### Contents of ALC letter to MoJ, dated 7.12.17

Thank you for your letter of 23.11.17. We have now prepared a note for our members which explains the current position as we understand it. It goes on to set out why we remain concerned. We would kindly ask that you consider our note as it provides examples of circumstances where individuals would not qualify for legal aid on the basis of the current scheme.

1. We are pleased to note that: *“The Government further recognises that parties are not at fault for the cause of this issue”*. We agree with that statement, however we are disappointed to note that currently the MoJ does not intend to make any adaptation to the legal aid scheme to address the concerns we raised in our letter of 22.11.17: that there may be a number of individuals who should be afforded legal advice and assistance but may not be financially or otherwise eligible under the Legal Help scheme or beyond (Family Help Higher and / or Full Representation).

2. In our view, it is wrong (as a matter of principle) that an individual affected by the issue of potential manipulation of HST results should find themselves having to either: (a) go without legal advice and assistance; or (b) privately pay for such advice and assistance. Early and timely initial advice and assistance is likely to ensure that any application made to the court, is made promptly, properly and with the best available information. It will also likely assist individuals to make informed decisions about whether to make an application to the court at all, in the particular circumstances of their case. Given that there is no publically available *detailed* guidance about how the court will process and determine such applications, we believe it is essential that early legal advice and assistance is made available to all affected persons. We submit that such advice should be covered by legal aid on a non-means tested basis, precisely because, as the Government has confirmed, affected individuals are not at fault for the cause of this issue.

3. We would encourage the MoJ to reconsider its position in relation to the legal aid financial eligibility assessment and (where applicable) the domestic abuse / child protection evidence requirements for individuals who seek legal advice and assistance about the potential manipulation of HST results in family law matters.

4. We note that it is still early on since the Government’s initial announcement and the introduction of the special court form and process for applications to be made to vary/discharge orders arising from potential manipulation of HST results. However, we believe that members of the public and family law practitioners (particularly our members) would be assisted by detailed information about how the court will consider and determine applications. This will aid practitioners in the provision of advice and assistance to clients. We welcome an early indication from the MoJ as to when such detailed guidance will be forthcoming.

5. As the note to our members explains, we are liaising with fellow practitioner and representative groups. As yet, we do not believe that practice guidance particularly for the solicitors' profession has been published. We will work with the Law Society and other relevant groups in the development of such guidance. At this stage, it seems that each firm / organisation (which may have assisted clients in proceedings where HST was conducted during the relevant period) will be determining their own individual approach to the issue. We are concerned that there may be inconsistency of approach and that some firms / organisations may not be taking any action at all.

6. We would be grateful if the MoJ could confirm whether it is taking, or plans to take, any action on a systematic level. We have in mind that the state has positive obligations to parties within family proceedings to ensure a fair hearing and we wonder whether a systematic approach to identifying affected cases should be implemented. Potentially, a project team could be put in place to:

- a) Consider court files relating to family proceedings within the relevant period to identify cases where HST was conducted by Trimega or Randox with a view to approaching affected individuals or their lawyer who was on record;
- b) Co-ordinate and agree nominal funding to firms who are seeking to conduct an identification exercise themselves which may be complex and time-consuming;
- c) Liaise and pursue Trimega or Randox for their own invoicing or other records with a view to identifying affected individuals.

As this matter is of importance to our members, we confirm that we intend to shortly update our note to members with the contents of this letter and any reply.

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