

# Commissioner's Advice to Inspectors

## Evidence

### Part 1 –Basic Principles

#### (i) What is Evidence and why do we need it?

Evidence is something that either proves or disproves a fact. Evidence and facts should not be confused. Evidence is all of the information in the case and is used to find the relevant facts of the case and to determine the crucial issues. Incorrect evaluation of the evidence is likely to throw the decision off course. Evidence may be available to the Inspector various forms:

- physical evidence – for example, worn out shoes or bedding;
- written evidence - such as the application form and other correspondence;
- verbal evidence - such as an interview or telephone call;
- local knowledge - local shops, local bus routes etc; and
- General knowledge – for example, the knowledge that a normal, full term pregnancy lasts for nine months.

#### *Direct or Indirect*

Evidence can be direct or indirect. **Direct evidence** is “first hand” – evidence that comes from someone’s own knowledge. It can be written or verbal. This might include what the applicant has said on the application form, in a letter or at an interview. Direct evidence can also come from a person other than the applicant, for example a letter from a doctor about a medical condition, or from a social worker about a family’s living conditions. Direct evidence is likely to be good quality evidence as it comes from the person most likely to know and will generally be accepted.

**Indirect** evidence is so called because it is second hand and not directly from someone’s own knowledge. This might be evidence about what someone has been told by a third party (e.g. “my doctor told me I should get a new bed”) which is *hearsay* evidence. Or, what is shown in documentary or electronic records to which the decision maker has referred (e.g. the budget status for the district or a computer screen showing the applicant’s Social Fund debt).

The courts have strict rules about the use of hearsay evidence. However, for Social Fund purposes all indirect evidence, including hearsay, should be

documented and taken into account. The appropriate weight to be given to the evidence will be determined in the individual circumstances of the case and the value of the evidence assessed in the light of its overall credibility. As a general rule indirect evidence is likely to carry less weight than direct evidence although there may be exceptions to this.

### ***Relevant or irrelevant?***

Not all of the evidence before the Inspector is necessarily relevant. Inspectors may, for example, see cases where there is evidence which the applicant believes is of great importance, but which has no actual relevance to the crucial issues or outcome of his case. Often, such evidence may be emotive and distracting and will need to be handled sensitively. For example, an applicant may supply a wealth of evidence in relation to very difficult problems - but which ultimately may have no bearing on the outcome because the eligibility conditions for an award are not met.

### **(ii) The Quality of the Evidence**

The quality and the weight to be placed on the evidence can be assessed by a number of factors. Depending on the individual case, relevant considerations may include:

- How detailed is the evidence?
- Is the evidence clear and accurate?
- Is the evidence complete?
- Is the evidence consistent?
- Is the evidence rational, with a chronological sequence of events?
- At what stage of the process was the evidence introduced?
- Have responses to enquiries been open and straightforward or have they been vague or evasive?
- Is there any corroboration, which might help to resolve any issues with the evidence?
- Is there a need for independent corroboration of the evidence?

When looking at the evidence it is important to look at the whole picture. Inspectors should ask whether the evidence “adds up” and the Inspector has a duty to take the necessary steps to ensure he has all the relevant evidence available, and to make any appropriate enquiries to help resolve any issues with existing evidence.

### **(iii) Natural Justice**

The rules of natural justice apply to Inspectors' decisions. The basic tenets of natural justice are: to know the case one has to answer; and, to have a proper opportunity to do so. This means that the Inspector's decision cannot stand unless the person directly affected by it was given fair opportunity both to state his case and to know the reasoning behind the other side's case (Part 2 of this Advice covers in more detail issues around natural justice in cases where there are problems with evidence).

The Inspector may see a case where the Reviewing Officer has already obtained information from third parties but did not first obtain the applicant's permission to do so; and/or where the applicant is unaware of the additional evidence. The Inspector cannot ignore the evidence if it seems relevant, the Reviewing Officer has used it, and the information damages the applicant's case. However, the Inspector must also make the applicant aware of the evidence. This can either be by telephone or in writing. If the Inspector considers it unlikely that the matter can be resolved easily, or that it is right to give the applicant time to consider the evidence before replying, then it will most likely be appropriate to write to the applicant. This though is a matter for the Inspector's judgement in the circumstances of the particular case.

The above principles apply to any new evidence obtained by the Inspector that may be detrimental to the applicant's case. However, new evidence will not normally be sent to Reviewing Officers. This is because the Department has indicated that they do not routinely wish to see additional correspondence. There may, nevertheless, be occasions when the Inspector considers it appropriate for new evidence to be sent to the Reviewing Officer for comment. This might be, for example, where the applicant supplies new evidence which is totally at odds with previous evidence and on which the Reviewing Officer's decision has been based, or because an applicant alleges that crucial information he supplied has been incorrectly recorded.

### **(iv) The Burden and Standard of Proof**

#### *The burden of proof*

Social fund evidence is subject to the rules of civil law. The basic legal principle in civil cases regarding **the burden of proof** is that "he who asserts must prove". This means that the burden normally rests with the social fund applicant.

Factors such as language difficulties, limited communication skills, or mental health problems may be relevant factors in a particular case; and/or the applicant may have little knowledge of the social fund and may not know what the required evidence is. The Inspector therefore needs to be alive to these potential issues, and has a responsibility to make any appropriate enquiries necessary to help reach a sound decision. This may mean taking a more proactive approach to gathering evidence on crucial issues. However, it is important to stress that the onus is normally on the applicant to provide the evidence necessary to make his case.

The social fund application forms already ask for a certain level of detail and explain why the information is important. By the time the case reaches the IRS the applicant will have made further contact on at least two occasions and should have given reasons why he feels the decision should be changed. In some cases there will also have been additional dialogue between the applicant and Jobcentre Plus. In most cases, it is therefore reasonable to expect the applicant to have offered evidence in support of his application.

For example, if someone who has lived in a property for some years asserts that a large number of major household items need replacing at the same time, leaving his family with very little in their home, then the burden of proof will be on the applicant to show that this is indeed the case. The same principle would ordinarily apply if someone asserts that he is following a planned resettlement programme. It would not be enough for the applicant to say he was following a plan; he would need to provide sufficient detail about who was running the plan, what it involved, his level of participation, etc.

The burden of proof moves to the Inspector when applying an exclusion or disqualification. This principle is sometimes referred to as the “reverse burden”.

### *The standard of proof*

One crucial difference between civil and criminal law is that the **standard of proof** is lower in a civil case. A criminal case must be proved “beyond reasonable doubt”. The standard of proof required in a civil case is “the balance of probabilities”. In essence this means that if one side can prove something is **more likely to be true than not**, then it will have been successful in asserting that which it seeks to prove.

Although a lower standard of proof is required in civil cases, the “balance of probabilities” still goes beyond the *possibility* of something happening or being true. Many things are possible but are also unlikely on the balance of probability. This can be illustrated by reference to the national lottery:

*There is a 1 in 14 million chance of winning the national lottery jackpot. It is therefore possible I will win on Saturday, but on the balance of probability, highly unlikely.*

Inspectors must therefore use their judgement not to decide whether the applicant's evidence is possible but whether, on balance, it is *likely* to be true. So, in providing any evidence in support of a social fund application, the applicant's burden will be discharged as long as the Inspector can accept that something is "more likely than not".

There may be rare cases where the evidence reveals equal degrees of probability. Here the person bearing the burden of proof on the issue in question has failed to make his case. In practice this means:

- In cases where the burden of proof is on the applicant then the applicant has not made his case and the balance of probability goes against the applicant.
- In cases where the burden of proof is on the Inspector, then the Inspector has not made his case and the balance of probability goes for the applicant.

#### **(v) Assumption or inference**

*Assumption: "the action or an act of taking something for granted; the taking of something as being true, for the sake of argument or action; something so assumed; a supposition.*

*Inference: "a conclusion drawn from data or premises; an implication; the conclusion that is intended to be drawn".*

Inspectors can draw reasonable inferences from the evidence in the papers. However, they cannot make assumptions. Where there is insufficient evidence to draw reasonable inferences or find facts it will be appropriate for the Inspector to use their inquisitorial power to seek the necessary evidence to make the correct decision. An inference cannot be made without evidence to draw it from. Care must always be taken in making inferences and particularly so when the applicant has described his or her situation in terms that are vague or non specific. For example, an applicant might say she left her previous home because of "domestic violence"; or say that floor coverings are needed because of "mobility problems". Evidence given in such general terms is likely to need further investigation. The Inspector may need to establish exactly what the particular problems are, and exactly how they impact on the person, before he can decide how much weight should be attached to the evidence.

## **(vi) Evidence from Experts**

Evidence can include information and opinion supplied by experts. However, it is important to be certain that any evidence is within the expert's field. For example, the evidence of a specialist child care social worker relating to the likelihood of a child being taken into care would carry a good deal of weight. However, if the same social worker gave his opinion as to whether a cooker was beyond economic repair or not this would be of less significance. Care must also be taken that the expert providing the evidence is doing so from his own experience and not merely repeating what the applicant has told him. Where this is the case, such evidence is unlikely to be given any great weight.

There may be cases where an Inspector has some specialist knowledge, but great care should be taken before giving this any weight and allowing it to influence the outcome of any review: For example:

- The Inspector is familiar with the area in which the applicant lives and knows there is a launderette and supermarket approximately 50 metres from the applicant's home. If this information was relevant and potentially crucial to the outcome of the case then it would be legitimate for the Inspector to use the information. However, before doing so he would need to ensure the information remained accurate and up to date, and it would need to be put to the applicant to allow him a chance to comment.
- The Inspector has a relative who has multiple sclerosis. The applicant suffers from the same condition. It would not be appropriate for the Inspector to relate his own experience of multiple sclerosis to that of the applicant (although he can use his knowledge of the illness to evaluate the applicant's situation). Conditions affect people in different ways and cannot be generalised. It is important, therefore, that Inspectors do not allow their own experiences in such matters to influence the decision making process.

## **Part 2 - Problems with evidence**

The evidence in Social Fund applications is not always straightforward and clear cut. The evaluation of the evidence is a clinical process. Inspectors must address the crucial issues and should not shrink away from difficult issues such as apparent conflicts in the evidence; implausibility; or late changes in the evidence. The best way of dealing with evidential issues such as these will often be through making further enquiries.

If the Inspector has cause to question the validity or accuracy of an applicant's evidence then he will need to explain his reasons for doing so. It is important that Inspectors are open and upfront about why they have concerns about the evidence. But questions should not be phrased in such a way as to be confrontational or to cast unnecessary doubt on the applicant's integrity or deter the applicant from replying. It should also be borne in mind that not all applicants are as adept at expressing themselves in writing as they, perhaps, would like to be. Often, what at first may seem totally implausible, may prove to be accurate, or reasonably so, on further investigation.

The following section covers some of the more common evidential problems likely to arise, and includes advice on the approach Inspectors should take.

### ***Credibility***

Credibility lies at the heart of evaluating the evidence. Is the applicant's evidence believable? Is the evidence realistic, persuasive and convincing, or is it far fetched, weak or unreliable?

If the evidence is unsatisfactory in that it is implausible or inconsistent, this will damage credibility. This may mean that the person giving the evidence does not establish on the balance of probability that what he asserts is true and consequently the evidence may be rejected.

### ***Conflicting Evidence***

Inspectors will see cases where parts of the evidence conflict, or appear to conflict. Conflicts can affect credibility. They can arise because the applicant's evidence is self-contradictory; or because it conflicts with the evidence of a third party; or because the applicant's evidence may be at odds with what is known to be the case by the Inspector. It is important that Inspectors consider all the circumstances when faced with potentially conflicting evidence and make all necessary enquiries to resolve the issues when it is appropriate to do so.

Some “conflicts” in evidence may actually be explained by change of circumstances over a period of time. For example, an applicant may initially say that his cooker has broken down and later say he has no cooker. Both accounts may be correct, however, as the applicant may have had the broken cooker removed from his home.

Inspectors should also consider the applicant’s personal circumstances when faced with possible conflicts. Genuine mistakes can occur when a person has, for example, mental health problems, or is facing emotional stress at the time.

It is therefore very important to strike the right balance when making further enquiries. This includes safeguarding against appearing to have already made a decision to reject evidence because of apparent conflicts. In short, the applicant must be given a fair opportunity to resolve any issues with his evidence.

Where the Inspector resolves a conflict by seeking more information from a third party (with the applicant’s permission), the additional evidence must *if it is adverse to the applicant’s case* be copied to the applicant for comment before a decision is made. Again, there is no routine need to send such information to the Reviewing Officer.

If an applicant is unable to provide a satisfactory explanation for any conflicts the Inspector will be left with the same evidence as before. However, there is an important difference in that the applicant has been given the opportunity to resolve the difficulty. It is then safe for the Inspector to go on to find facts from the available evidence.

Very occasionally, despite all reasonable steps being taken, the conflict will remain unsolved and the Inspector may be left with evidence of exactly equal weight on each side of the conflict. In this situation the decision will go against the person who bears the burden of proof.

### ***Similar fact evidence***

Similar fact evidence is evidence showing similarities between the circumstances of the application currently under consideration and earlier applications. In most cases, the Inspector will be looking only at the evidence relating directly to the application being decided. However, there may be occasions when it is appropriate to refer to other applications to take account of relevant “similar fact evidence”. In a case where the applicant has made a number of applications over a relatively short period of time, the Inspector is entitled to examine relevant evidence carefully to decide whether an award should be made, and particularly so if the circumstances of the current and previous applications appear to be similar.

Some similarities will be perfectly consistent with what a reasonable person would expect, but some occurrences of similar fact evidence may have the potential to damage the applicant's credibility. To damage credibility, there has to be some striking similarity or a pattern that is unlikely to have a logical explanation, and cannot be explained just on basis of coincidence.

In cases where similar fact evidence could damage the applicant's credibility and lead to the Inspector rejecting some or all of the evidence the principles of natural justice again require that any doubts about the evidence must be put to the applicant. This includes telling the applicant exactly why there are doubts about the existing evidence and allowing the applicant a chance to respond. It is also important for the Inspector to maintain a neutral position about the evidence so as not to prejudice their judgment about the case. What, at face value, may appear to indicate implausibility or a lack of credibility in evidence might have a satisfactory explanation once it is put to the applicant.

In practice, the question of how much weight to give to similar fact evidence is likely to occur mainly, although not exclusively, in crisis loan living expenses cases. The current application should not be refused simply because the applicant has made previous applications for living expenses. There must be either a striking similarity, or some other pattern of behaviour, that is sufficient to damage credibility to the point where the standard of proof is not satisfied. This could include frequency, regularity, or the relationship of applications to times of additional expenditure and so on, as well as similarity of circumstances.

When dealing with similar fact evidence the Inspector may need to take account of factors such as the applicant's health or lifestyle as these may impact on the incidence of events.

### ***Tainted Evidence***

On occasions, Inspectors may identify that an applicant has submitted evidence either on the application before him, or on an earlier application, that cannot be accepted as fact even on the balance of probabilities. This might call all of the applicant's evidence into question. Evidence that is unreliable in one aspect should not, however, be allowed to lead to a summary rejection of *all* of the evidence. Nevertheless, it may though lead to doubts that mean that careful scrutiny of the remaining evidence is appropriate.

### ***Late or changed evidence***

Evidence that is introduced late in the process may have less value than that produced at the earliest opportunity, and may need to be treated with caution. The best evidence will often be that offered in the early stages of the process, especially if it relates to a need the applicant presents as being particularly urgent and important.

There may, however, be genuine reasons for a delay in submitting evidence. For example, the applicant may be reluctant to divulge information of a personal nature; or there may be a genuine reason why the applicant was unaware of the potential importance of certain evidence. However, caution may be needed where the indications are the applicant was aware the matter would be at issue, or the new evidence is not wholly consistent with earlier evidence, especially if the evidence is produced after a decision has been made. Inspectors should exercise similar caution when dealing with evidence that an applicant changes during the course of the review although late changes in evidence should not be confused with changes in the applicant's circumstances which occur during the review process.

Late or changed evidence may raise difficult judgements and require careful scrutiny. For example, the Inspector may need to question why the evidence was not produced earlier in the proceedings; whether the applicant was aware of the importance/relevance of the evidence; and whether corroboration of the new evidence should be sought.

### ***The need for corroboration***

Corroboration is evidence that confirms the accuracy of other evidence, and often involves a third party. Guidance given by the Secretary of State suggests that an application will normally be determined on the information on the application form and that only exceptionally will corroboratory evidence be needed. There may be cases where the evidence is self contradictory, inherently improbable, or is offered at a very late stage in the process, and where the particular issues cannot be resolved without first seeking corroboration or clarification.

The following are examples of where it might be appropriate for the Inspector to seek corroboration:

- The applicant's evidence seems implausible, is particularly vague, is unlikely or inconsistent, and it seems likely that evidence from a third party will help to resolve the issues.
- Expert opinion is needed to validate the evidence. For example, an Inspector may decide to seek confirmation from a chemist that certain

medication needs to be stored in a fridge; or from an engineer that an electrical item is beyond repair.

If corroboration of evidence is deemed necessary, it is important that Inspectors identify relevant evidence and do not request corroboration of evidence that is unlikely to impact in any way, or where refusal of an award is likely. Inspectors should also be aware that some forms of corroboration may require a fee to be paid - for example the cost of a call out charge or an engineer's report. Before asking for any corroboration that will, or might incur expenses, the Inspector should consider whether a payment would be appropriate to meet any charges should these be requested.

### ***Evidence given by a third party in confidence***

A third party may supply information, either at the Inspector's request or otherwise, but ask that his identity is not disclosed to the applicant.

In these situations the Inspector's first consideration is whether the information is crucial, or likely to be crucial, to the outcome of the case. If it is, then the Inspector should explain that the evidence can only be used if the third party is agreeable to his identity being disclosed to the applicant. If the third party remains unwilling then it would not be appropriate for the Inspector to use the evidence in his decision.

In assessing the impact of evidence given "in confidence" the Inspector may also need to consider the credibility of the third party and whether they may have an interest in the outcome of the case. For example, evidence from an applicant's next door neighbour that the applicant "already has a cooker" will possibly be treated with more caution than if the same evidence is supplied by the applicant's Social Worker. That said, Inspectors should also take care in how they use information provided by social workers and other such professionals. For example, a social worker or health visitor may recall making a recent visit to the applicant and say they remember seeing a cooker in the kitchen. This may well be the case but it does not necessarily follow the cooker was in full working order.

Cases involving evidence supplied "in confidence" are likely to be rare. Nevertheless where such information is given, appears credible, and potentially has a major impact the Inspector should be slow to set the information aside purely because of the confidentiality aspect. In some cases, for example, a visit by the Inspector to the applicant may be an appropriate way to resolve any apparent conflicts in the evidence.

### ***The applicant's silence***

The applicant may remain silent by failing to respond to questions posed by the DM, Reviewing Officer and/or Inspector. This could include situations where it is reasonable to probe the evidence and the applicant appears to be evasive.

As long as any questions were framed in the right way (including being easy to understand, open, transparent, and neutral), and were pertinent (i.e. aimed at helping to resolve genuine issues with evidence) it may be appropriate to give weight to the lack of a response. This could mean concluding that the applicant has not established a need; or has not shown a qualifying need to be urgent or important.

Reminders in cases where an applicant fails to respond are not automatic. It is important, therefore, that the SOI emphasises the significance of providing the necessary information, and makes it clear what the consequences will be if the applicant fails to do so.

*N.B. Occasionally, an applicant may refuse the Inspector permission to contact a third party. If this is the case the refusal may be treated in much the same way as if the applicant had failed to respond to the Inspector's enquiries. The Inspector may decide that withholding permission to seek evidence from a third party who is in a position to provide crucial information, amounts to evasion or unwillingness to have the evidence tested. However, Inspectors should be cautious about relying on this as a sole deciding factor in a case and should not give it greater weight than it deserves. The weight to be attached will depend on the context of the case and the weight of other evidence available.*

### ***Making an award in cases where evidence has been rejected***

When considering if the applicant has established a need for an item, the Inspector may retain doubts about how that need arose even after making appropriate enquiries; but nevertheless is still able to accept the other facts show, on balance, that a genuine need exists. However, these cases are likely to be rare. Generally speaking the likely outcome - having rejected the evidence about how a need arose – will be to refuse an award on the basis of there being ‘no qualifying need’. This is because, in effect, the Inspector will be rejecting the evidence that formed the basis of that part of the application.

## **Summary**

Problems with evidence can generally be resolved by taking a systematic approach to sorting the relevant from the irrelevant, and assigning the appropriate weight to each piece of relevant evidence.

Greater weight is likely to be given to evidence that is:

- Detailed and comprehensive
- Accurate and clear
- Consistent
- Plausible and realistic
- Direct, first hand (something the person giving the evidence actually witnessed or experienced)
- Impartial and disinterested
- Given at the earliest opportunity
- Given by an expert on the subject
- Corroborated (where seeking corroboration is justified)

Less weight will generally be given to evidence that is:

- Vague or evasive
- Inconsistent or contradictory
- Inherently unlikely or illogical
- Hearsay (where the person giving the evidence reports what he has been told by someone else)
- Incomplete, despite the applicant being given a reasonable opportunity to fill any crucial gaps
- Introduced late in the course of the application, where it is apparent that it is material to the relevant issues
- The opinion of an unqualified source

If, on balance, the Inspector cannot accept one or more aspects of the applicant's evidence, and where this could be crucial to the case, it will be necessary to question the applicant further. In such cases it is important that the Inspector:

- Explains clearly why he has doubts about the evidence and explains the possible consequences if the applicant fails to answer the questions satisfactorily
- Retains an open mind and asks questions in a neutral way. What at first may seem implausible may in fact be proved accurate if the right questions are asked, and are asked in the right way. Nevertheless, it is important that Inspectors do not accept evidence at face value if it would be wrong to do so.

When questioning the applicant's evidence it is important that the right tone is adopted. Inspectors should be upfront in explaining why they have doubts about the evidence, but the questions should not be accusatory or belligerent to the point where applicants may be deterred from responding.