

## 23. Tribunal Representation

### 23.1 General

1. The Legal Aid Scheme has always concentrated funding on legal representation before the main civil courts, primarily because it is in Court proceedings that legal representation will be most beneficial to clients. By contrast most tribunals are very well suited to the needs of unrepresented clients. The scope rules of CLS funded representation, contained in paragraph 2 of Schedule 2 of the Act and the Lord Chancellor's Directions therefore covers advocacy in only a limited range of tribunals as explained below.
2. CLS funding can, however, have an important role in providing initial advice and help to clients involved in tribunal proceedings. Subject to the usual means and merits criteria, Legal Help can cover any services in relation to tribunal proceedings other than advocacy or instructing an advocate in the proceedings. However, the amount of Legal Help which may be provided in relation to a tribunal case will depend on whether there is sufficient benefit to the client in so doing, taking into account the prospects of a successful outcome for the client and the cost benefit of the work being undertaken.
3. By contrast, Help at Court, and Legal Representation may only be provided in tribunal proceedings, allowed for under paragraph 2 of Schedule 2 of the Act and the Lord Chancellor's Directions. See also Funding Code Criterion 1.2.
4. The following are the tribunals for which Legal Representation may be funded as part of the CLS. The authority for funding and the method by which funding is provided under the Code procedures is also specified.

<b>Tribunal</b>	<b>Authority for Funding</b>
Employment Appeal Tribunal	Schedule 2, paragraph 2(1)(f) funded as licensed work
Mental Health Review Tribunal	Schedule 2, paragraph 2(1)(g) funded as Controlled Legal Representation
Immigration Adjudicators and Immigration Appeal Tribunal	Schedule 2, paragraph 2(1)(h) (as inserted by the Community Legal Service (Scope) Regulations 2000) funded as Controlled Legal Representation
Protection of Children Act Tribunal	Lord Chancellor’s Direction set out at 24.2 below, funded as licensed work
General and Special Commissioners of Income Tax	Lord Chancellor’s Direction set out at 24.2 below, funded as licensed work
VAT and Duties Tribunal	Lord Chancellor’s Direction set out at 24.2 below, funded as licensed work
Proscribed Organisations Appeal Commission	Schedule 2, paragraph 2(1)(i) (as inserted by Schedule 15 of the Terrorism Act 2000), funded as licensed work.

5. For all other tribunals funding can be provided only for exceptional individual cases where application is made under section 6(8)(b) of the Act. See Section 3.12 of this Guidance.
6. Guidance on the Employment Appeal Tribunal is at Section 21.1 in this volume. Guidance on Controlled Legal Representation is contained in Volume 2. Guidance on Controlled Legal Representation generally is a section 5 of the General Civil Contract Specification and guidance on Immigration and Mental Health are at sections 12 and 14 of the Specification respectively. Guidance on the new tribunals brought in by the Lord Chancellor’s Direction is at sections 24.3 and 24.4 below. Guidance on the Proscribed Organisations Appeal Commission is at 24.5 below.

### **23.2 Text of Lord Chancellor’s Direction of 2 April 2001**

1. This is a direction by the Lord Chancellor under section 6(8) of the Access to Justice Act 1999 (“the Act”). It authorises the Legal Services Commission (“the Commission”) to fund in specified circumstances services generally excluded from the scope of the Community Legal Service Fund by Schedule 2 of the Act.
2. References in this direction to services which the Commission may fund are to the levels of service defined in those terms in the Commission’s Funding Code (“the Code”).

3. All applications under this direction remain subject to the relevant regulations under the Act and all relevant criteria in the Code.

### **Protection of Children Act Tribunal**

4. The Lord Chancellor authorises the Commission to fund Legal Help, Help at Court and Legal Representation in all proceedings before this tribunal.

### **The General and Special Commissioners of Income Tax <sup>1</sup>and VAT and Duties Tribunal**

5. The Lord Chancellor authorises the Commission to fund Legal Help, Help at Court and Legal Representation in all proceedings before the General and Special Commissioners of Income Tax and before the VAT and Duties tribunal in the circumstances specified below.
6. The circumstances are where:
  - (a) it is in the interests of justice for the client to be legally represented and therefore, that Legal Help, Help at Court and Legal Representation be granted; and
  - (b) the proceedings concern penalties which the courts have declared to be criminal in ECHR terms or where an appellant reasonably seeks to argue that the penalties under consideration by the tribunal are criminal in ECHR terms.

### **Protection of Children Act Tribunal, The General and Special Commissioners of Income Tax, and VAT and Duties Tribunal**

7. Appeals from, or reviews of, the above tribunals to the High Court, the Court of Appeal and the House of Lords may also be funded in the same specified circumstances.
8. For the avoidance of doubt, the Lord Chancellor authorises funding for cases which fall within sections 4 to 7 of the Direction and arise out of the running of a business.
9. Only organisations authorised to do so by contract with the Legal Services Commission may provide Legal Help, Help at Court and Legal Representation under this Direction.

## **23.3 Protection of Children Act Tribunal (PoCAT)**

1. The Protection of Children Act Tribunal is a new tribunal which came into operation in October 2000 under the Protection of Children Act 1999. The tribunal exists to hear appeals against decisions taken by the Secretary of State which restrict peoples' right to work with children.
2. Two groups of people can appeal:

- (a) child care workers can appeal against having been placed on a list of people forbidden to work with children. In such cases the decision for the tribunal is whether a person on the list was guilty of misconduct which harmed a child or placed a child at risk of harm and whether that person is unsuitable to work with children.
  - (b) teachers and other people working in schools who have either been banned from working there or whose right to do so has been restricted and who has been placed on a list of banned people, can also appeal. In such cases, a question for the tribunal is whether the Secretary of State was right to put that person on the list.
3. Further information on the tribunal and copies of application forms may be obtained from the secretary of the tribunal. Telephone: 020 7921 1629, fax: 020 7921 1620, e-mail: [pocat@gtnet.gov.uk](mailto:pocat@gtnet.gov.uk).
  4. Proceedings within the scope of PoCAT are fully within the scope of CLS funding. Cases may be funded even if the case arises out of the client's business (see paragraph 8 of the Lord Chancellor's Direction). However the normal financial eligibility rules for Legal Representation apply.
  5. Legal Representation for POCAT is funded as licensed work. Applications must be made for a certificate in the normal way but all such applications should be sent to the Commission's Cambridge Regional Office at: 62-68 Hills Road, Cambridge CB2 1LA, DX 5803 CAMBRIDGE. As for other licensed work, only firms with a General Civil Contract with the Commission may apply, unless there are circumstances justifying the grant of an exceptional case contract (see section 15.14 of this Guidance). Remuneration for Legal Representation before PoCAT is at the same rates as apply to Controlled Legal Representation before the Mental Health Review Tribunal. For ease of reference the rates that apply for 2 April 2001 are as follows:

	London	Outside London
	£	£
Preparation	61.20	57.25
Travel/Waiting	30.30	29.45
Letters written/Telephone Calls	4.40	4.10
Advocacy	69.60	69.60
Attending tribunal with counsel	32.55	32.55

<sup>1</sup> Commissioners for the general purposes of the income tax, referred to as "General Commissioners in the Taxes Acts and commissioners for the special purposes of the Income Tax Acts, referred to as "Special Commissioners" in the Taxes Acts.

6. Representation for PoCAT does not fall into any existing franchise category. Applications will be considered under the General Funding Code. All the normal standard criteria for Legal Representation will apply. Applications will be refused on the grounds that alternative funding is available (Criterion 5.4.2) if the client is a member of a trade union which can reasonably be expected to provide assistance in the proceedings. Proceedings before PoCAT by their nature are not suitable for conditional fee agreements.
7. The consequences of being prevented from working with children can be severe for the client, both in terms of their livelihood and the stigma which may be attached to being placed on the Protection of Children Act list. Therefore, many appeals to PoCAT will have overwhelming importance to the clients involved. Such applications are unlikely to be refused on cost benefit grounds. The most important consideration for the Commission is likely to be whether the application to the tribunal has sufficient prospects of success to justify funding. Cases that have overwhelming importance to the client can be funded if they have at least borderline prospects of success; other cases can only be funded if the prospects of a successful appeal to the tribunal are at least 50%. Applications for funding are therefore likely to be refused if the client has serious criminal convictions which clearly justify the Secretary of State's decision to place the client on the list. By contrast, if the client does not have any serious relevant criminal convictions or has been placed on the list as the result of an isolated incident, so that there is doubt about the correctness of the Secretary of State's decision, funding will usually be granted.

#### **23.4 The Revenue, VAT and Duties Tribunals**

1. The Lord Chancellor's Direction brings into scope certain proceedings before the General and Special Commissioners' of Income Tax and the VAT and Duties Tribunal. These tribunals have wide jurisdictions dealing with a range of matters relating to tax and duties. However, the Direction only brings the tribunals within the scope of CLS funding for a small range of cases, namely those where the following two pre-conditions apply:
  - (a) it is in the interests of funding for the client to be legally represented and therefore, that Legal Help, Help at Court and Legal Representation be granted; and
  - (b) the proceedings concern penalties which the Courts have declared to be criminal in ECHR terms, or where the appellant reasonably seeks to argue that the penalties under consideration by the tribunal are criminal in ECHR terms.
2. Applications for funding for these tribunals are subject to the same procedures as apply to representation before PoCAT as described above. Therefore cases are funded as licensed work and all applications must be made on the normal forms to the Cambridge Regional Office. These tribunals are also subject to the same remuneration rates as apply to PoCAT as described at paragraph 24.3.5 above.

3. Since these cases are funded as Licensed Work the starting point is that only firms with a General Civil Contract may apply to do the work. However the Commission will be prepared to use its powers to issue Exceptional Case Contracts in appropriate cases (see section 15.14 of this guidance). Such contracts may be issued to firms holding a General Criminal Contract or to any other firms or organisations, including accountants or others, who satisfy the Commission that they have specific expertise and ability in dealing with cases before these tribunals. In due course consideration will be given to including such representation as Associated CLS Work within the scope of the General Criminal Contract.
4. When applications are made, the first issue to be considered by the Commission will be whether the application relates to criminal penalties as required by the Direction.

### **What Cases will be Treated as Criminal Penalties in ECHR terms?**

5. Article 6.3 of the Human Rights Convention imposes certain minimum safeguards for people who are charged with a criminal offence. ECHR case law establishes that a case may be treated as criminal for the purposes of Article 6 even if domestic law classifies it as a civil matter. See the leading case of Engel v Netherlands [1979-80] 1 EHRR 706. Whether the case should be treated as criminal for ECHR purposes depends primarily on three criteria:
  - (a) the classification of proceedings in domestic law;
  - (b) the nature of the offence or conduct in question; and
  - (c) the severity of any possible penalty.
6. This issue has now been considered in detail by the VAT and Duties Tribunal itself. In the case of Han and Yau and Others v the Commissioners of Customs and Excise [13 December 2000, Stephen Oliver QC] the tribunal considered the nature of penalties imposed under Section 60 of the VAT Act 1994 and section 8 of the Finance Act 1994. The penalties were held to be criminal in ECHR terms. The facts of particular relevance to the tribunal's conclusion were that:
  - (a) the penalties were enacted as civil penalties; but
  - (b) the function of the statutory provisions was not to compensate the Commissioners; the tax or duty assessment in any interest assessment compensates the Government's lost revenue. The penalties imposed under section 60 and section 8 are there to deter and to punish;
  - (c) in common with many crimes, the penalties require a finding of dishonesty.

7. The Lord Chancellor's Direction applies where either the courts have declared proceedings to be criminal in ECHR terms, or where the appellant reasonably seeks to argue that the penalties are criminal in those terms. For the time being (Han and Yau is being appealed to the Court of Appeal) the Commission will treat penalties under section 60 of the VAT Act and section 8 of the Finance Act 1994 as coming within the Direction and, in relation to other types of case, will consider the merits of any arguments put forth as to criminality. If the nature of the penalty is to deter and punish, the Commission will treat the matter as falling within the Direction, especially if the penalty is based on a finding of dishonesty.

### **Other Considerations**

8. Once it is concluded that the proceedings are criminal in ECHR terms, the Commission must consider the interests of justice test as required by the Direction. In practice once it is decided that a case is criminal, taking into account the nature and severity of the penalty imposed, it usually will be in the interests of justice for representation to be provided. The Commission will apply this test in the same way that the Court applies the interests of justice test in mainstream criminal proceedings. The size of the penalty imposed, the significance of the proceedings to the client and the complexity of the issues of fact or law arising will all be relevant considerations.
9. Once it is decided that a case comes within the Lord Chancellor's Direction and is within scope, the application is nevertheless then subject to the criteria in the General Funding Code. However, the Commission will give a wide interpretation to what may constitute a successful outcome for the client for the purpose of applying prospects of success criteria. Once it is established that the proceedings are to be treated as criminal in ECHR terms, the ability of the client to present his or her arguments (including arguments in mitigation) to the Court will be treated as a successful outcome. It is not therefore necessary to demonstrate a particular percentage prospect of avoiding the penalty in question. However, if the client had no substantive arguments to put before the Tribunal because it was clear that the penalty was entirely justified, it is likely that the application would be refused on the grounds that the interests of justice do not require Legal Representation.
10. Similarly these applications are subject to the cost benefit test for unquantifiable claims (Criterion 5.7.4 in the General Funding Code), namely the private client test. If the Commission is satisfied that it is in the interests of justice for representation to be provided, this criterion will generally be treated as being satisfied.
11. Applications for Legal Representation for these tribunals are subject to all the normal financial eligibility criteria which apply to Legal Representation under the CLS. Applications will be refused where a client has access to alternative funding to pay for representation for the tribunal.

## 23.5 Proscribed Organisations Appeal Commission

1. This tribunal was established with effect from 19 February 2001 under the Terrorism Act 2000. A number of organisations are proscribed under Schedule 2 of that Act. Under Section 3 of the Act the Home Secretary (or in the case of organisations concerned in terrorism connected to the affairs of Northern Ireland, the Secretary of State for Northern Ireland) has power to remove an organisation from the Schedule. Section 4 provides for any proscribed organisation or any person affected by a proscription to apply to the Secretary of State for deproscription. Following any refusal to deproscribe, the organisation or the individual has a right of appeal to the Proscribed Organisations Appeal Commission. The Commission's function is to consider whether the Secretary of State's refusal was flawed, applying judicial review principles.
2. Organisations appealing in this way will not be able to obtain CLS funding since such funding is only available to individuals. Individuals may apply for Legal Representation. Applications for such certificates will be considered under the General Funding Code. Two of the most important considerations in determining such applications are likely to be;
  - (a) prospects of success. Applications will always be refused if the prospects of a successful appeal to the Commission are poor. As for any other case, applications will be refused if the prospects of a successful appeal are only borderline, unless the case is of overwhelming importance to the client or has a significant wider public interest;
  - (b) alternative funding. Although an application to the Commission may be brought in the name of an individual, the organisation itself will also benefit from any decision by the Commission that it should be deproscribed. Therefore in appropriate cases the Regional Office may require an explanation as to why the appeal could not be brought and/or funded by the organisation itself. Consideration will be given to refusing such applications under criterion 5.4.2 (Alternative Funding). However the Regional Office will always take the interests of the individual applicant into account. In some cases the individual will have a strong interest in deproscription, for example where this could lead to the quashing of a conviction under section 7 of the Terrorism Act 2000.
3. All applications to fund Legal Representation before the Proscribed Organisations Appeal Commission should be made to the Cambridge Regional Office. Cases will be funded as licensed work unless the usual criteria for issuing an individual case contract are met. Pending any revision to the General Civil Contract, remuneration for cases before the Proscribed Organisations Appeal Commission will be at rates no higher than those for High Court work under the Legal Aid in Civil Proceedings (Remuneration) Regulations 1994, as amended.