

LSC Response to the Consultation on CDS5 Guidance

1. Introduction and Background

- I. In response to comments from providers and the Court of Appeal, we consulted on revised guidance with the aim of (1) ensuring consistency of approach with the LSC and (2) improving understanding of LSC processes / decision making in this area of work.
- II. The guidance review included prison law within its scope, although prison law work will be moving to a new fee regime in the near future. It is intended that the guidance as it relates to prison law will still be relevant to exceptional cases under the new scheme.
- III. The guidance document that resulted from this review has been created based upon the provisions of the Unified Contract (Crime) and current office best practice across the three crime processing centres. The guidance was drafted and reviewed by caseworkers that specialise in processing CDS5 applications from across the three centres. These caseworkers also took input from the Commission's Legal and Governance Team and the Registrar of Criminal Appeals.

2. Summary of Responses

- I. Responses were received from 3 bodies representing solicitors specialising in appeals and prison law work, as well as the Law Society, a not for profit supplier, the Registrar of Criminal Appeals and one individual solicitor.
- II. Broadly speaking, the responses deal largely with either Prison Law or Appeals and Reviews along with Travel and the use of Counsel as it affects those areas of funding. Only limited comments were made in respect of Investigations, Proceedings and CCRC funding.
- III. Many constructive comments were made in respect of Prison Law and Appeals and the Commission has been happy to take such feedback on board. Several areas of the guidance will be revised or reworded as a result of the feedback received.
- IV. A number of responses asked for amendments that would be in direct opposition to the provisions of the Unified Contract (Crime). As the guidance is designed to give practical effect to the Unified Contract it has not been possible to amend the guidance to accommodate these suggestions.

- V. In all areas, it should be also noted that the guidance is simply that, guidance. It is not an absolutely rigid document, except where provisions are set by the Contract. The guidance would not be rigidly interpreted by caseworkers in every case. As in all areas of funding, where justification can be provided or where exceptional circumstances arise, caseworkers always have the discretionary right to disregard the guidance where it is necessary and appropriate to do so, provided that sufficient justification is provided. Each case is decided on its own merits.
- VI. The Commission would also note that a right of appeal exists for all CDS5 decisions, which can be reviewed by an independent costs assessor.
- VII. One submission noted that this guidance refers to both CBAM and CDS4 guideline rates at various points, and suggested that these should be incorporated in full within the guidance. It would seem unnecessary to duplicate guidance that relates to other areas of funding wholly or in part in this document. From an internal perspective, caseworkers will have easy access to the referenced documents. However, from a supplier's viewpoint, the Commission would agree with the intention that there should be an integrated and consolidated guidance manual relating to all areas of criminal work. The overall intention is for this guidance to be incorporated as a part of CBAM and to be published as such.

Review and Response by Guidance Area

3. General and Detailed Checks

- I. Only one of the responses received commented on the initial checks performed by a caseworker to ensure that a form has been properly completed. The response suggested that the new guidance insisted on the CDS1-3 forms being completed by the client. This is not the case and neither the forms nor the guidance require this. It is only the case that all the information on the forms must be correctly and fully completed.
- II. There have been any number of instances where applications have been submitted but no means assessment has been carried out, despite one being required, and equally concerning, instances where clients and even solicitors have signed a declaration stating that a form has been fully completed and all the information given is correct when the form is not complete and in some cases is even blank apart from the signatures. This is to be discouraged.
- III. The self-granting of Advice and Assistance or Advocacy Assistance is subject to the proper exercise of devolved powers and the guidance in this area exists to reinforce that.

- IV. One response also noted that the time standard for completing a CDS5 has previously been 3 units while the guidance currently limits this to 2. This has been one of the areas of inconsistency between the 3 crime processing offices and when drafting the guidance, the consensus was that 2 units would usually be sufficient, given the amount of information that is usually provided on the form. As ever, this is a guideline, which can be departed from if the level of detail provided on application forms suggests this is appropriate.
- V. However, in many cases it is noted that the lengthier or more verbose applications usually include much information that has been standardised and is present on all applications submitted by a firm, so length of the various paragraphs provided would not be the sole determining factor in whether more time should be allowed.
- VI. The Commission would also wish to re-emphasise its commitment to electronic working and would note that the progressive role out of e-Forms will include CDS5 forms. Use of these forms will speed up completion and submission of a CDS5, particularly the submission of subsequent applications as the system will already hold all previously entered data.

4. Travel

- I. The travel provisions set out in the guidance simply paraphrase or directly quote the relevant sections of the Unified Contract (Crime), paragraphs A16.6 – A16.9.
- II. The contract explicitly states that travel should not exceed a 2 hour return journey. It explicitly states that travel of up to 4 hours return can be justified in certain circumstances; it then allows travel of up to 6 hours return if the client is in custody and one of those circumstances applies. There is no provision in the contract for journeys longer than this.
- III. These provisions are not new, and the guidance is merely repeating restrictions that existed under the General Criminal Contract as well as the Unified Contract (Crime).
- IV. In cases where travel is regularly 6 hours return or more, the cost of travel time and expenses over the length of the case will almost certainly outweigh the cost in preparation time of another solicitor taking conduct of the case.
- V. Responses note that many prisons are located in remote areas, but this is already provided for by the Contract, as one of the circumstances that would justify lengthy travel is where the most local firm is more than 2 hours return from the establishment.

- VI. However, the Commission will be amending the section in the guidance relating to 6 hours so that it says travel over 6 hours will only be justified in the most exceptional cases rather than never justified. The Commission accepts that there may be rare cases where such travel can be justified by the circumstances of the case, and while the Contract makes no provision for travel over 6 hours, it does not prevent it. As noted in the Contract, such circumstances will be highly exceptional, and such lengthy travel would require a high degree of justification.

5. Counsel

- I. In terms of Counsel's funding, the majority of concerns noted in the responses seem to relate to the use of Counsel in the Appeals and Reviews class of work. The guidance does not appear to effectively explain the difference between Counsel doing the work of a solicitor, and Counsel doing the work of Counsel.
- II. Where Counsel is simply reading documents sent to him by a solicitor, that a solicitor has not considered, the consideration of those documents is fee earner work, and not Counsel work. This work is remunerated at the prescribed legal aid rates irrespective of whether the solicitors choose to undertake this themselves, or pass it on for Counsel.
- III. In providing Counsel's advice, the Commission accept that Counsel will of course have to consider the key papers in the case and this is included in the fixed/maximum fee for Counsel set out in the guidance. As already noted in the guidance, some cases by their complexity will require more work than the 5 hours or fixed fee allows for, and in such cases Counsel should provide a full breakdown.
- IV. However, it is frequently the case that solicitors will apply to the Commission for extensive funds to consider the papers in a case, and will then submit a further application for Counsel to do precisely the same work. We consider this to result in double handling of work. If solicitors have already considered the papers, then they should be in a position to provide a detailed brief to Counsel, a copy of their detailed attendance note relating to the papers, and only the key relevant documents that they have identified.
- V. The maximum rate for Counsel in the guidance is £80.00 per hour when doing the work of Counsel. Several of the responses received suggested that there should also be a higher rate of £100.00 for more complex or exceptional cases.
- VI. A higher rate has previously existed, but the three offices were highly inconsistent both in their use of the rate and in terms of the level of this rate. In response to the concerns raised, the

Commission has looked again at a higher rate and has amended its guidance to allow for higher rates to be claimed in exceptional cases.

- VII. It would seem from the responses that the current guidance regarding Counsel is ambiguous in the distinction between Counsel undertaking the work of a solicitor and Counsel providing advice as Counsel. This section of the guidance will be expanded to provide greater clarity both to caseworkers and suppliers.

6. Investigations

- I. Only 2 points were raised by any response in relation to the Investigations class of work. The first was in relation to the example given in terms of the sufficient benefits test. The response indicated that though the example may not lead to imprisonment, it would still meet the test because it could lead to a conviction and this will have an impact on someone's life.
- II. If this view of the sufficient benefits test were followed, public funding would be justified in every criminal matter, because the potential outcome of every criminal proceeding could have a negative impact on someone's life. Such a view of the test would defeat the purpose of the test and the Commission does not agree that the test should be interpreted in such a way. In every case, a solicitor must be able to justify why the client needs legal advice and the simple fact that they are facing criminal proceedings is not sufficient justification.
- III. The second was that the response could see no reason why Counsel could not be instructed for warrants of further detention. The reason for this is that the instruction of Counsel is explicitly prohibited by the Unified Contract (Crime). Paragraph B1.3.6(1) states that *You may not instruct Counsel in relation to this Unit of Work*. This section of the guidance will be amended to clearly indicate that this is a contractual requirement.

7. Prison Law

- I. In terms of the sufficient benefits test under paragraph 7, one response gave an example of:
[A]n indeterminate sentence prisoner adjudicated for disobeying a lawful order. As punishment he receives a caution. He complains to say that the order was not lawful. Despite the conclusion already of his adjudication (at which he was effectively not punished) there is scope for the Parole Board to subsequently make something of the fact that his behaviour record was blemished.
- II. The response appeared to indicate that the definition given to the sufficient benefits test would prevent funding for such a complaint. The Commission disagrees with that assessment. The Guidance only indicates that a complaint that does not achieve a result but

is simply complaining about, for example, the prison's speed of response, is unlikely to be justified. Such a complaint may give the client satisfaction, or even an apology from the Prison, but do not achieve any legal benefit for the client. A complaint in the circumstances given by the response clearly does achieve a result in relation to his chances of getting parole.

- III. The Commission does accept that no mention has been made of treatment issues within the prison, and areas of work relating to issues such as resettlement or license conditions, where undertaken within the prison. While treatment issues such as these are clearly fundable within the Prison Law scheme, the nature of the work involved means that they rarely exceed the initial limit and so do not often feature on CDS5 applications that this guidance is concerned with.
- IV. The fact that such work is not included in the guidance obviously does not preclude it being undertaken by a supplier, so long as it meets the definition of Prison Law as well as the sufficient benefits test and means test laid down in the contract. Obviously, to be undertaken within the Prison Law class of work, the advice must relate to treatment or discipline within the prison system, as stated by the Unified Contract (Crime) paragraph B4.1.1. Where such work is undertaken outside of the prison, it falls outside the scope of this unit of work.
- V. Under 7b, the Commission notes the comments made by two responses in relation to Category A re-categorisation, and the guidance will be modified to place further emphasis on the significance of this review compared to others and also the greater need for face – to – face instructions.
- VI. However, the Commission sees no reason to depart from the standard 2 minutes per page for considering security dossiers, as suggested by one response. For a prison law practitioner, the dossier comprises of a series of documents that they should be readily familiar with and are common to all prisoners. While such documents may indeed be complex, the complexity lies within a prison law solicitor's field of expertise. Further time to consider documents may certainly be considered where a dossier includes complex reports that are outside of a prison law solicitor's field of expertise, such as complex or technical medical and psychological reports, but this would not justify longer time for the whole dossier.
- VII. Under 7c, the Commission concedes the point that no mention was made of the need to interview witnesses in some cases. This was an oversight when drafting the guidance and will now be included.

- VIII. Under 7e, the Commission also recognises the omission of oral hearings in recall matters and readily accepts that such hearings are fairly common. These have now been included in the guidance.
- IX. With regard to Judicial Review and the judgement handed down in *Betteridge v The Parole Board*¹ the Commission is aware that case law has developed since the version of the guidance that was sent for consultation was drafted. The Commission has had regard to cases such as *Pennington*², *Spicer*³ & *Wells*⁴ and our Legal Advisor for Crime is keeping this area under close review. The Commission is aware in particular that the effect of *Betteridge* and subsequent case law is not to prevent Judicial Review in all cases of delay, and as the Law Society have noted, the judgement in *Betteridge* is in part based on the fact that the Parole Board and MoJ were addressing the underlying causes of the problems and that the decision could be reviewed if these efforts do not come to fruition.
- X. The guidance in this area will be redrafted to reflect recent case law.

8. Ancillary Prison Matters

- I. Only one response commented on this element of the guidance and raised concerns with regard to the Vetting and Barring Scheme and the duplication of work that would be involved if these matters have to be referred to a civil supplier.
- II. Our Special Cases Unit have confirmed that if the work done in relation to these matters is within the scope of Civil funding, then some funding may also be available for Crime suppliers under an exceptional case contract. The guidance will be amended to reflect this.

9. Appeals

- I. This area of the guidance attracted the most criticism – broadly because of the perception that it represented a much more tightly defined criteria for LSC funding based on the concept of “provisional grounds of appeal”.
- II. There was some suggestion that Advice and Assistance should be used to fund work that has not been granted by the Court, however the Commission would note that this is prohibited by the Contract.

¹ R (on the application of *Betteridge*) v Parole Board [2009] EWHC 2296 (Admin)

² R (on the application of *Pennington*) v Parole Board [2009] EWHC 2296 (Admin)

³ R (on the application of *Spicer*) v The Secretary of State for Justice [2009] EWHC 2142 (Admin)

⁴ R (on the application of *Wells*) v Parole Board [2009] EWHC 2458 (Admin)

- III. In drafting this section of the guidance, the Commission initially consulted with the Court of Appeal and this element of the guidance was sent to the Court for review before the wider consultation started. Although the Court have suggested numerous changes to this section, which the Commission fully endorses, the majority of those changes are formative, relating to terminology and process rather than being substantive changes relating to the way this work should be funded.
- IV. The Commission sets out in the guidance that the appropriate point for the transfer of funding to the Court is the point at which Form NG is submitted. Advice and Assistance is only available to identify grounds of appeal and prepare the submission for the Court. Once this has been done, it is appropriate for the Court to begin to case manage the appeal, including any funding requests. The Court and the Commission agree that there should be no Advice and Assistance available from the point of submission, as the work that Advice and Assistance provides for has been completed.
- V. As part of the Consultation process, the Commission met with representatives of the Court, Law Society and CALA where it was confirmed that any applications once form NG had been submitted, or matters relating to renewed appeals should go before the Court and not the Commission.
- VI. Under 9b, the Commission accepts the concerns raised regarding the ability of a client to identify a case. We accept entirely the point that clients will not be able to identify grounds of appeal and that this is the role of the solicitor. We accept that many clients may have learning difficulties or be of limited understanding and may be only able to provide limited instruction as to why they want to appeal.
- VII. Nevertheless, funding in this area, as in any other area of public funding must be justified. The fact that a client has instructed solicitors that he wants to appeal would not meet the sufficient benefits test to justify funding. We do not expect a client to precisely identify why there are grounds for appeal, but some of the reasons outlined in the guidance are there as examples of reasons that would be justified. These are not exhaustive and there may be many other reasons why funding is justified in a particular case. Solicitors must be able to justify why funding is necessary in a case beyond saying that the client wishes to appeal.
- VIII. With regard to the section of the guidance relating to provisional grounds of appeal, this section has been extensively redrafted following the constructive meeting with the Court and providers. As noted above (9, IV & V), the position will now be that all

funding after the submission of Form NG is a matter for the Court. All funding prior to this will be a matter for the Commission. The Commission will be looking at all applications to ensure the work requested is necessary only for the preparation of grounds of appeal and not preparation for the appeal itself.

- IX. With regard to expert reports, the Commission will consider funding such reports in cases where solicitors have provided detailed justification outlining why such a report will be necessary. The Commission will also consider whether an initial or preliminary report is a more appropriate way to investigate a matter before granting funding for a full report.

10. CCRC

- I. We note the comments made by several of the responses regarding the time taken to undertake initial case screening in a CCRC. However, as noted in the guidance, these limits are set down in the Contract.

11. Conclusion

- I. The Commission wishes to thank all the organisations for taking the time to respond to our consultation. The responses have provided much valuable feedback and the Commission has been very happy to take on board the comments made by the profession.
- II. Many areas of the guidance will now be amended as a result of the feedback received as described above.
- III. The revised version of the guidance, once approved, will be made available on our website in due course, and it is our intention for it to eventually be incorporated into the Criminal Bills Assessment Manual, the next version of which is due to be published in July 2010.