

Justices' Clerks' Society

Guidance on the Consideration of Defence Representation Order Applications

Ref: 53.0010

Date: June 2007

Justices' Clerks' Society
2nd Floor, Port of Liverpool Building, Pier Head, Liverpool L3 1BY
Tel: 0151 255 0790 e-mail: secretariat@jc-society.co.uk

Issue 06/07

Background

The authority to grant a right to representation is contained in the Access to Justice Act 1999 (section 12 and 14 and schedule 3). The statutory provisions include the criteria that apply when considering whether an application should be granted in the interests of justice.

Guidance in relation to the interpretation was last given by the then Lord Chancellor's Department in November 2002 and this followed previous guidance issued by the Department and by the Justices' Clerks' Society.

This current guidance is intended both to reiterate some of the earlier guidance and to expand upon it. It is also intended to assist Magistrates' Courts' staff to apply the statutory criteria consistently. The guidance should ensure that all relevant details are provided in applications, that consideration of applications is undertaken in a structured fashion and that the justifications for decisions are fully documented.

Contents of Guidance

The guidance notes are divided into two sections:

- a)** Instructions to assist solicitors in the completion of application forms.
- b)** Guidance to those considering applications.

Section A

Instructions To Assist Solicitors In The Completion Of Application Forms

Introduction

To enable the court officers to properly and fully consider applications for defence representation orders all relevant information must be supplied. **If insufficient information is provided application forms will be returned.**

General Considerations

Every application for a right to representation must be considered on its merits and must be determined in accordance with the provisions of the Access to Justice Act 1999. The specific criteria that are relied upon must be identified clearly in the application form. These guidance notes are intended to assist solicitors so that all relevant information is contained in applications so enabling full and timely consideration by an appropriate officer of the court.

In some cases the interaction of two or more factors may dictate that a right to representation should be granted when neither by itself would have sufficed. When such interaction is relied upon this should clearly be noted on the application form.

FORM A (PART B) – COMPLETION

Section 1 -Question 1a. Describe briefly what it is that you are accused of doing;

Bald statements such as “Theft” or “ Criminal Damage” will not suffice and sufficient information should be provided to enable the proper officer to fully determine the relative seriousness.

The Act/Section under which the applicant is charged should be stated where necessary to make clear whether a more serious or less serious form of the offence has been charged.

Some outline examples are detailed below.

Assault – Common/ABH/GBH/GBH with intent.

- Which form of assault is charged?
- Description of any alleged injuries.
- Use of weapon?
- Any relationship to victim.
- Age of victim (if very young or old or significant age disparity).

e.g. “Assaulting my eleven year old daughter by hitting her with a belt causing lacerations to her back and legs”.

“Common assault on a stranger in a pub by pushing him over when he spilt my drink – no injuries occurred to my alleged victim.”

Burglary

- Nature of premises dwelling/commercial/shop/school etc.
- Value of property taken.
- Description of what occurred – Criminal Damage (with value) – Assault (with injuries).

e.g. Burglary of a school – computer taken valued £890 – damage done to property and some graffiti.

Criminal Damage

- Value
- What property
- Owner of the property and relationship (if any) to defendant.

e.g. damaging windows and doors in my girlfriend’s house – value £920

Deception S.15 Theft Act

- The amount of any loss sustained (if appropriate).

- The method.

e.g. Using a stolen cheque card to obtain goods valued at £1,500.

Forgery/False Accounting

- What kind of document or thing?
- Any ulterior intent alleged.
- Any tangible loss.
- Breach of trust.

e.g. altering records in course of employment – overall loss £6,500.

Excess Alcohol (drive)/Excess Alcohol (In charge)/Fail to Provide Specimen

- The Section the defendant has been charged under.
- Any measurement of alcohol content.
- Description of specimen – Breath/blood/urine.
- Whether roadside or evidential specimen (where refusal to provide is alleged).

e.g. “Driving with Excess Alcohol – reading 120 breath S.5 (1) R.T.A. and failing to provide roadside specimen”.

Possession of Controlled Drug Without/With Intent to Supply

- Nature of drug and classification under the Misuse of Drugs Act.
- Quantity.
- In what circumstances?

e.g. possession of 200gms.of cannabis resin (Class C) with intent to supply.

Possession of an Offensive Weapon/Bladed Instrument

- Describe the weapon.
- Describe the circumstances.
- Specify the statute and section.

e.g. “Possession of a knife in the street (S.139 CJA 1988)” “Possession of a knuckle duster at a football match (S.1 PCA 1953)”.

Public Order Act 1986 Sections 4 and 5

- Description of behaviour and who is alleged to have been affected.
- Specify whether section 4 or 5.

e.g. "Shouting and swearing at police officers S.5 POA" "Threatening my neighbour with violence S.4 POA"

Theft

- In what circumstances – breach of trust/pick-pocketing/shop etc?
- What is alleged to have been stolen and its approximate value if actual value not known.

e.g. six offences of theft when employed as a Deputy Manager at the Little Chef Restaurant – 10 offences to be TICs – total loss £2,654.

Breach of Community Order

- Indicate whether revocation of order is sought (if known).
- Indicate details of original offences when revocation is sought.

e.g. Probation Service will be applying for revocation, as this is the third breach alleged. The original offence was burglary of a dwelling.

Failure to Surrender to Custody

- Indicate nature of failure e.g. police bail, court bail – and stage in proceedings when alleged failure occurred.

e.g. failure to attend on date fixed for trial – "I will be saying I had a reasonable excuse in that I was in hospital at the time".

"Prescribed Proceedings"

With effect from April 2007 defence representation orders may be granted for proceedings where formally a solicitor could authorise representation by way of advocacy assistance. A full list of the proceedings defined as prescribed proceedings is shown as Annex A (page 14) of this guidance.

Full details of the application/ proceedings should be given and in addition detail as to why representation is required. For prescribed proceedings relevant factors include whether there is a real risk of an order being made which if breached could deprive the defendant of his or her liberty.

e.g. this is an application for an anti social behaviour order and I am contesting the grounds and need for an order. If an order is made I do not think the proposed requirements are justified. If an order is made and I am found subsequently to be in breach of it I am likely to be sentenced to custody.

Paragraph 1(b)

Are there any co-defendants in this matter?

Insert name of all co-defendants i.e. those jointly charged with the defendant or those charged with offences arising from the same incident. If the defendant believes there are co-defendants but is not aware of their names the prosecution may assist with the details of those defendants.

Paragraph 1(c)

“Give reasons why you and your co-defendants cannot be represented by the same solicitor”

You should advise the applicant that he/she must select the same solicitor as the co-defendant unless a conflict of interest exists.

If there is such a conflict then this should be described if you feel it is appropriate to do so:

e.g. “I am unable to be represented by solicitor X because she acts for my wife in divorce proceedings”

However if you feel that it is inappropriate for reasons of confidentiality and/or legal professional privilege to detail the nature of the conflict or there is another reason why you do not feel able to represent co-defendants you should indicate as follows:

“The professional code of conduct for solicitors would prevent the solicitor I have chosen from representing co- defendants in this case”

The Law Society advises as follows on the question of co-defendants and conflict:

“Practitioners are reminded that they should not act for more than one client where there is a conflict or a potential conflict of interest. Any practitioner in doubt should seek the advice of the Law Society Ethics Helpline, and note their file accordingly. Solicitors are reminded that in a case of conflict subsequently arising there is a real risk of a Wasted Costs Order being made against them, and/or disciplinary proceedings being commenced against them, and they are referred to guidance on the Law Society website, and the conflict rule. If you are satisfied that there is no conflict, or potential conflict, practitioners may act for more than one co-defendant.”

Paragraphs 2 and 3 – Self Explanatory

Paragraph 4 – Reasons for Wanting Representation

Points to note under each paragraph

Paragraph 4(a) “It is likely that I will lose my liberty?”

“A community *punishment* order is not properly to be regarded as depriving the accused of his liberty” – R v Liverpool City Magistrates Court ex p McGhee (1993) – Loss of liberty does include however the likelihood of a hospital order or similar form of confinement as well as a suspended prison sentence.

Describe the feature of the offence that will affect sentence and why this criterion is met. You may need to expand on the particulars given at paragraph 2(a).

In some cases the court accepts custody is the most likely penalty merely by reference to the offence charged. Offences in the ‘Indictable Only’ category generally fall within this group.

For offences that can be heard in the Magistrates’ Courts you should make reference to the appropriate starting point contained in the Magistrates’ Court Sentencing Guidelines or to guidance from the Court of Appeal or other legal authority.

If the starting point is not custody and you wish to rely on the “custody” ground specify the features of the allegation that take it over the custody threshold. The court cannot assume it will attract custody because you say it will. The proper officer has to establish the reasons in support of a grant.

In McGhee the Court of Appeal went on to say however that “the list of factors in what is now Schedule 3 of the Access to Justices Act 1999 is not exhaustive and the possibility of a community *punishment* order may be a factor to be considered when considering whether or not to grant a right of representation” If this feature is relied upon it should be shown under criterion 5 (j) – any other reason

Previous Convictions

Where previous convictions are relied on and particularly when they are said to take the case over the threshold for custody, you should provide as much detail as possible. Justices generally disregard offences of a totally different character from those currently before the court. Spent convictions are almost without exception, ignored completely as are those that resulted in a caution rather than conviction. It therefore follows that the proper officer will be unable to decide whether a defendant’s previous convictions will take the present case beyond the custody threshold unless:

- a) The offences are described.
- b) The date (or approximate date) of conviction is given.
- c) The sentence is outlined (this will generally indicate the relative seriousness of the previous offence).

The best evidence is the standard police form of recorded convictions. If this is not available to you the defendant’s verbal account or other sources (e.g. a pre-sentence report) may be sufficient as long as the offences are sufficiently described and have an approximate date.

Paragraph 4(b): “I am subject to....”

Please comply with the request on the form for details if these are matters upon which your client wishes to rely as either increasing the likelihood of a custodial sentence or presenting some other reason in support of a grant of an order. If your client is before the court for breach of a community order you should detail this as the offence charged and indicate whether revocation of the order is being applied for.

Paragraph 4 (c): “It is likely that I will lose my livelihood?”

If the defendant is pleading guilty and could receive a sentence which will affect livelihood, it is unlikely that this will qualify for a grant unless representation is justified to submit mitigation that could not otherwise be put sufficiently and/or where the mitigation will help the defendant avoid a penalty which might interfere with his employment.

Paragraph 4 (d) –“It is likely that I will suffer serious damage to my reputation?”

Note the criterion is **serious** damage. The fact that a person of previous good character risks being convicted of an offence may satisfy this criterion. However in every case the court will consider the offender’s **current reputation** and the **nature of the offence** charged so it is essential that the proper officer is given detail under both headings in most cases. It is accepted that some offences of themselves will cause serious damage e.g. rape, indecent assault, etc. Most however would require further detail:

e.g. “I am a teacher and will suffer serious damage to my reputation if convicted of this offence of assault”.

If the defendant is pleading guilty it is unlikely that an order will be granted under this heading unless it can be shown that representation may assist the defendant to preserve their reputation.

Paragraph 4 (e) - A Substantial Question of Law is Involved

State what the question of law is and follow the instructions to provide details of cases as instructed on the form. Some of the following frequently given answers in this paragraph, which are insufficient, are:

- “All elements of the offence”
- “Awaits AI”
- “Intent”
- “The mens rea and actus reus of the offence”
- “Recklessness”
- “Identification”

These are not acceptable without more information, as it is possible that these issues entirely turn upon fact and not law. In cases of identification, for example, whilst a defendant may not be aware of the guidance in Turnbull, the court, having heard the evidence, is bound to consider whether the evidence is of sufficient quality. This is essentially a consideration of what facts are found proved. Where, however, there is

question of the admissibility of identification evidence based on PACE, then clearly an unrepresented defendant would not be able to present such arguments, nor can the legal adviser assist as he/she will not be aware of the defendant's version of events. In such a case one would expect to see the following information in paragraph e).

E.g. "I will argue that the court cannot rely upon the identification evidence which may be submitted by the prosecution as I always disputed the matter and an identification parade should have been held in accordance with R v Forbes 2001"

Paragraph 4(f) – "I may be unable to understand the court proceedings or state my own case".

"My understanding of English is inadequate".

You should detail the language the defendant normally speaks and make reference to the degree to which English can/cannot be understood and why this would make the court proceedings, including consideration of any pre court documentation, too difficult for the defendant to deal with.

If the defendant is charged with an offence for which a representation order would not normally be granted to a defendant with an adequate command of English, explain why it would not be sufficient simply for the applicant to be provided with an interpreter.

E.g. "I speak Urdu and have a little knowledge of Basic English but would be unable to understand the advance information or follow technical/ legal phrases adequately".

"I am pleading not guilty and would not be able to cross-examine the prosecution witnesses".

"I suffer from a disability"

Include details of any physical or mental incapacity and describe its effect on the defendant's ability to conduct the case in person. e.g. "I have a speech impediment which would make it impossible for me to cross-examine the prosecution witnesses and would substantially prolong the proceedings". (see letter from my Doctor attached)

In cases of disability general non-specific reference to mental or other incapacity without confirmation or a diagnosis will not usually suffice. Whilst it will often not be necessary to have a detailed medical analysis of the condition said to be relevant there should be some supporting information in relation to the assertion that the applicant is suffering from a disability e.g. "I was an in patient at X hospital for six months last year" or "I have been prescribed Y medication by my G.P for my condition"

Other

Circumstances such as the young age of the defendant may be applicable here.

e.g. “The defendant is 13 years old and has learning difficulties. He will not be able to properly present his case without a solicitor”.

Paragraph 4(g) – Witnesses may need to be traced and/or interviewed on my behalf

The court expects the circumstances to be outlined. If a witness has to be traced explain why tracing is necessary.

e.g. “The incident was witnessed by a railway guard on duty on the platform. He is not known to me and my solicitor requires a statement to be taken from him.”

If the defendant knows the witness then this should be disclosed on the form and the proper officer will assess the basis upon which it is necessary for a proof to be taken from such a witness in the light of the issues involved in the case. It follows that such a ground needs supporting with the kind of evidence the defendant is seeking to adduce via this witness.

e.g. “My solicitor needs to interview my neighbour who may be regarded as independent. I do not know if he will give evidence that is favourable to my case and it is important for me not to speak to him on the subject in order that his independence is preserved”.

The proper officer takes account of the fact that the calling of a witness for the defence does not of itself justify a grant on this ground. Many summary trials are conducted quite satisfactorily with the defendant calling his own witnesses.

Paragraph 4(h) – The Case may involve expert cross-examination of a prosecution witness

It is unlikely that this statement alone will automatically qualify for a grant without there being information in other parts of the form leading to the conclusion that the defendant could not satisfactorily conduct a trial without legal representation. This is not merely established by saying that the defendant is ignorant of court procedures, as the proper officer will assume in the absence of any other information that the defendant will be able to follow them with the assistance of the Legal Adviser.

The proper officer does not assume that cross-examination of any particular class of witness of itself supports this ground. Just because there are, for instance, police officers to be cross-examined does not automatically mean that expert cross-examination is required. The application should refer to the issues in the case that make it difficult for **the particular applicant** to cross-examine them.

e.g. “The case rests on disputed identification evidence. There was a fight involving fifteen people outside a pub late at night. A witness has mistaken me for one of the others. This witness needs to be examined in detail about the precise circumstances of the identification”.

“I am aged 15 and would not be able to properly cross examine the police officers in this case who I say assaulted me first”

Paragraph 4(i) – “It is in someone else’s interest that I am represented”.

This usually involves protection of a prosecution witness in cases of sensitivity where it is not appropriate for the defendant to cross-examine.

e.g. “the victim of the assault I am charged with is a seven-year-old child”.
“the victim is my ex partner and I was acting in self defence”

Paragraph 4(j) – Any Other Reason

Include any other information relevant to why it is in the interests of justice that legal aid should be granted.

Examples of possible reasons are; likelihood of a demanding community order, need for skilful examination of defence witnesses, need to trace or check relevant evidence.

These will usually be matters to be considered alongside other criteria detailed in the application.

ANNEX A

"PRESCRIBED PROCEEDINGS"

(1) For the purposes of this regulation, "the 1998 Act" means the Crime and Disorder Act 1998.

(2) The following proceedings are criminal proceedings for the purposes of section 12(2)(g) of the Act:

- (a) civil proceedings in a magistrates' court arising from failure to pay a sum due or to obey an order of that court where such failure carries the risk of imprisonment;
- (b) proceedings under sections 1, 1D and 4 of the 1998 Act relating to anti-social behaviour orders
- (ba) proceedings under sections 1G and 1H of the 1998 Act relating to intervention orders, in which an application for an anti-social behaviour order has been made;
- (c) proceedings under section 8(1)(b) of the 1998 Act relating to parenting orders made where an anti-social behaviour order or a sex offender order is made in respect of a child;
- (d) proceedings under section 8(1)(c) of the 1998 Act relating to parenting orders made on the conviction of a child;
- (e) proceedings under section 9(5) of the 1998 Act to discharge or vary a parenting order made as mentioned in sub-paragraph (c) or (d);
- (f) proceedings under section 10 of the 1998 Act to appeal against a parenting order made as mentioned in sub-paragraph (c) or (d);
- (g) proceedings under sections 14B, 14D, 14G, 14H, 21B and 21D of the Football Spectators Act 1989 (banning orders and references to a court);
- (h) proceedings under section 137 of the Financial Services and Markets Act 2000 to appeal against a decision of the Financial Services and Markets Tribunal
- (i) proceedings under sections 2, 5 and 6 of the Anti-social Behaviour Act 2003 relating to [closure orders].
- [(j) proceedings under sections 20, 22, 26 and 28 of the Anti-Social Behaviour Act 2003 relating to parenting orders in cases of exclusion from school and parenting orders in respect of criminal conduct and anti-social behaviour;
- (k) proceedings under sections 97, 100 and 101 of the Sexual Offences Act 2003 relating to notification orders and interim notification orders;

- (l) proceedings under sections 104, 108, 109 and 110 of the Sexual Offences Act 2003 relating to sexual offences prevention orders and interim sexual offences prevention orders;
- (m) proceedings under sections 114, 118 and 119 of the Sexual Offences Act 2003 relating to foreign travel orders;
- (n) proceedings under sections 123, 125, 126 and 127 of the Sexual Offences Act 2003 relating to risk of sexual harm orders and interim risk of sexual harm orders;
- (o) proceedings under Part 1A of Schedule 1 to the Powers of Criminal Courts (Sentencing) Act 2000 relating to parenting orders for failure to comply with orders under section 20 of that Act; and
- (p) proceedings under section 5A of the Protection from Harassment Act 1997 relating to restraining orders on acquittal.

Section Two

Guidance To Court Officers Considering Applications For Representation Orders

Checklist

N.B. This checklist should be cross-referenced to the guidance issued to solicitors governing the completion of applications.

One factor on its own can suffice to justify grant.

Where you have decided that a combination of factors merits grant you should note this.

1. Have sufficient details been provided on the application form?

If not, can the Prosecutor supply the missing detail?

Are details of previous convictions sufficiently identified?

If insufficient details have been provided and cannot be obtained you should return the form to be properly completed.

2. Likely loss of liberty – Have you got all the details required? If the offence is indictable only this will normally suffice. If it is an either way offence or summary only you will need sufficient details to gauge the likelihood of custody. Refer to Magistrates' Sentencing Guidelines, Court of Appeal guidance etc. If local sentencing is a factor note this in the decision-making record. (See notes in solicitors' guidance concerning custody/community orders and prescribed proceedings).

For prescribed proceedings please note the extra factor to be borne in mind i.e. that if the order applied is made and subsequently breached there is a real risk that the defendant will be deprived of his liberty.

3. Loss of livelihood – If the defendant is pleading guilty and could receive a sentence which will affect livelihood, it is unlikely that this will qualify for a grant unless representation is justified to submit mitigation that could not otherwise be put sufficiently and/or where the mitigation will help the defendant avoid a penalty which might interfere with his employment.

4. Serious Damage to reputation - Note the criterion is **serious** damage. The fact that a person of previous good character risks being convicted of an offence may satisfy this criterion. However in every case you should consider the offender's **current reputation** and the **nature of the offence** charged so it is essential that you are given detail under both headings in most cases. It is accepted that some offences of themselves will cause serious damage e.g. rape, indecent assault, etc.

If the defendant is pleading guilty it is unlikely that an order will be granted under this heading unless it can be shown that representation may assist the defendant to preserve their reputation.

5. Substantial question of law is involved - Ensure that the application clearly identifies what the issue of law is as opposed to fact. Note what is "substantial" about the point.

6. I shall be unable to understand the court proceedings or state my case –

If the defendant is charged with an offence for which a representation order would not normally be granted to a defendant with an adequate command of English then this criterion on its own will not be sufficient as an interpreter can be provided. Identify why assistance from a lawyer is needed in addition. You can take into account the need to consider pre court documentation e.g. advance information.

In cases of disability general non-specific reference to mental or other incapacity without confirmation or a diagnosis will not usually suffice. Whilst it will often not be necessary to have a detailed medical analysis of the condition said to be relevant there should be some supporting information in relation to the assertion that the applicant is suffering from a disability e.g. "I was an in patient at X hospital for six months last year" or "I have been prescribed Y medication by my G.P for my condition"

The young age of the defendant may also be a factor under this heading, taking into account other matters such as the seriousness of the offence and whether the charge is contested.

7. Witnesses have to be traced and/or interviewed.

If the defendant knows the witness then this should be disclosed on the form and you should assess the basis upon which it is necessary for a statement to be taken from such a witness in the light of the issues involved in the case. It follows that such a ground needs supporting with the kind of evidence the defendant is seeking to adduce via this witness.

8. Case involves expert cross-examination.

You should not assume that cross-examination of any particular class of witness of itself supports this ground. Just because there are, for instance, police officers to be cross-examined does not automatically mean that expert cross-examination is required. The application should refer to the issues in the case that make it difficult for this particular applicant to cross-examine upon them. The age of the defendant, experience of court proceedings and the complexity of the case may all be relevant here.

9. It is in someone else's interest that I am represented.

You should detail carefully why this applies taking account fully what is known about the plea e.g. if a guilty plea is envisaged this criteria is less likely to apply.

10. Any other reasons

Examples of possible reasons are; likelihood of a demanding community order, need for skilful examination of defence witnesses, need to trace or check relevant evidence.

These will usually be matters to be considered alongside other criteria detailed in the application.

