

**AMENDMENTS TO GENERAL CRIMINAL CONTRACT
AND GUIDANCE MANUALS**

For consultation and proposed implementation in October 2006

OUTCOME OF CONSULTATION

The Legal Services Commission's consultation on the above amendments has now closed. The following document contains the original proposals in full together with summaries of the responses and the Legal Services Commission decisions (in *italics*). A list of respondents is attached at annex 1.

The original consultation document (including the proposed amendments in appendices), a Notice of Amendment showing the changes, and updated versions of the Manuals will be made available on our website www.legalservices.gov.uk

For ease of reference we have used the same section numbers here as in the other documents.

A further urgent consultation was issued to The Law Society and other representative bodies on 7 July and closed on 21 July 2006. The consultation proposed the amendment of the General Criminal Contract to extend the scope of the Criminal Investigations Class to include applications for warrants for further detention to the High Court. The outcome of this further consultation is provided under section E of this document.

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NARRATIVE

A CDS Act Changes

The Criminal Defence Service Act 2006 was passed earlier this year. By amendments to the Access to Justice Act 1999, it empowered the Lord Chancellor to make regulations introducing two major changes relating to criminal Representation Orders: the transfer of the power to grant such orders from the courts to the Commission; and the reintroduction of means testing.

The regulations to introduce both changes to the magistrates' courts only are planned for implementation on 2 October 2006. Neither change requires an amendment to the General Criminal Contract ('the Contract') in itself, and both will take effect whether any amendments are made or not. The Commission's proposals are intended to achieve the following objectives:

- to introduce an Early Cover scheme to complement the system of means tested representation;
- to reform the process of granting and paying for legal services in 'prescribed proceedings' (such as those relating to Anti-social Behaviour Orders); and
- to ensure that the wording of the Contract reflects the reality of the new system.

A1 Early Cover

Background

The government and the Commission have made clear during the development of the means testing policy their commitment to ensuring the provision of effective legal advice at the earliest possible stage of criminal proceedings. Advice at the first hearing from a defendant's own solicitor can be a crucial factor in determining whether that hearing is effective, by ensuring that the correct advice is given on plea and mode of trial and that the defendant is properly represented.

The current provisions in the Contract ensure that urgent work performed for a defendant who is later granted Representation can be claimed under that Order, and that some work (capped at the equivalent of one hour's preparation) can be claimed where an application for Representation is refused. The court duty solicitor is also available for eligible defendants who have not secured the services of a solicitor in time for the first hearing.

The Commission considers that these provisions will adequately provide for the majority of defendants. However, it is keen to ensure that, where uncertainty exists at the time of the first hearing because the defendant has not yet received a decision in respect of an application for a Representation Order, he or she should nevertheless be able to secure the services of his or her own solicitor. In practical terms, this means there should be some guarantee for the solicitor that the services provided will be adequately remunerated.

Controls

It is not the Commission's intention that these services should be provided to defendants who do not qualify for Representation on the interests of justice test (the existing Pre-order Cover scheme already provides for them if appropriate conditions apply). Nor does it intend to provide for services that do not progress the case, or for representation that amounts to no more than an unjustified request to adjourn.

The Commission is concerned to ensure that applications for Representation are made properly and promptly, so that decisions on means and merits can be made before the first hearing wherever possible. Finally, it is concerned that the payment regime should be simple to understand and administer, and should not encourage excessive or unnecessary work.

Proposal

The Commission's proposal is therefore to pay a flat fee of £75.00 to solicitors who represent a defendant at their first hearing where:

- A properly completed application for Representation has, with the help of the solicitor, been submitted and received by the representation authority, within two working days of the client being charged;
- No decision on that application has been made before 9 am on the day of the first hearing;
- The first hearing advances the case and any adjournment is justified;
- The eventual decision is that the case passes the merits test but the defendant does not pass the means test.

The purpose of the deadline is to ensure that decisions are made on representation before the first hearing. Whilst there is a commitment to process applications within two working days, there will be cases (for instance where the defendant is kept in police custody) where the first hearing takes place before there has been an opportunity to submit the application so that it is received within the target deadline. In these cases, the draft amendment sets out the circumstances in which the solicitor may still qualify for an Early Cover Fee.

A consequential change is proposed to the Pre-Order Cover provision, to ensure that it continues to fulfil its purpose to provide cover for those who fail the interests of justice test (provided conditions apply), but does not also apply to those who fail the means test only.

The following chart shows the overall provision for work done before an order is granted:

Decisions by Representation Authority:	Interests of Justice test passed	Interests of Justice test not passed
Financially Eligible	Claim under Representation Order as Pre-Order Work	Pre-Order Cover (where conditions met)
Not Financially Eligible	Early Cover	Pre-Order Cover (where conditions met)

Summary of Responses

Several respondents raised concerns about the workability of the scheme, particularly with respect to the time limits imposed on receipt of applications in order to qualify for Early Cover. One respondent suggested that the interaction of Pre-Order Cover and Early Cover was confusing, and that there should be a combined fee applying to both schemes.

The Law Society raised a concern about the appropriateness of the fee level, saying that in some cases a large amount of work would be undertaken at the earliest stage of a case, and raising the point that other initiatives in the criminal justice system are stressing the importance of early preparation. They proposed an escape from the fixed fee and/or separate fees for additional hearings.

Legal Services Commission decision

£75 is not enough

The £75 figure is intended to be a share of the risk that the solicitor may take in representing someone where the outcome of a representation order is not known. Where a representation order is granted the work will be rolled into the standard fee. In circumstances where a representation order is not granted because the client's financial circumstances are such that they are deemed to have the means to pay for their defence, the fixed fee is intended to compensate the solicitor for the work carried out up to that point and the risk he has accepted in so doing.

Subsequently, the solicitor can enter into a private fee-paying agreement with that client in order to continue to represent them. As payment under the Early Cover Scheme does not qualify as 'legal aid', and as the defendant in these circumstances will have already been judged financially ineligible, this approach is not inconsistent with the rule that solicitors must not charge privately where a client is legally aided.

We are committed to reviewing the policy and with that the level of remuneration in light of the implementation of means testing and other CJS initiatives.

When hardship applied for additional early cover payments should be available to cover subsequent hearings.

Further payments are not available. These hearings will be paid for under the standard fee system if a representation order is granted. Where a representation order is refused as the detailed assessment has shown that the client has the means to pay for their own defence it is expected that they will meet the costs of work done on their behalf.

The Legal Services Commission (LSC) is resourcing the Hardship Unit to process an estimated 50,000 – 70,000 applications during the first year of implementation. It is also preparing for a higher initial intake whilst the system settles in.

Time limits

The early cover fee is designed to cover the hearings that are listed so close to the charge that it is more of a risk that an application for a representation order will not have been processed. Where there is more time between charge and first hearing an application can be made and where granted the solicitor will be paid for the work under the standard fee.

The time limits will be reviewed with the policy when the market and practice have had the time to accommodate the changes.

Claim early cover if failed the Interests of Justice Test?

We would like to reiterate that the Pre-Order Cover procedure for claiming for work where an application is made in good faith and refused on the interests of justice remains unchanged. A non-standard fee capped at the equivalent of one hour's preparation (£49.70 outside London, £52.55 in London) can be claimed in these circumstances.

Defendants in custody

Concerns have been raised about cases where defendants in custody need to obtain and supply evidence to support their applications (because they are not in receipt of passported benefits or below the lower income threshold). In response to these concerns we will extend the Early Cover Scheme to allow defendants 5 working days, rather than 2, to supply supporting evidence. Early cover time limits will be extended to cover this.

A2 Prescribed Proceedings: Changes to Contract and Guidance

The definition of criminal proceedings in section 12 of the Access to Justice Act 1999 includes (in paragraph 12 (2) (g)) any proceedings prescribed as such by the Lord Chancellor. This allows him to provide that some proceedings, which are classed as 'civil' for most purposes, can be classed as 'criminal' for legal aid purposes, allowing qualifying individuals who are the subject of such proceedings to instruct Criminal Defence Service suppliers to represent them.

The Criminal Defence Service (General) (No 2) Regulations 2001, as amended, lists the various proceedings in the magistrates' and Crown Courts that have been prescribed in this way. Among them are proceedings relating to anti-social behaviour orders, closure orders, football banning orders, various types of parenting order, and orders under the Sexual Offences Act 2003. They also include proceedings in which an individual faces a risk of imprisonment for failing to pay a sum due or obey a court order in civil proceedings.

The 1999 Act provides that it is the Commission rather than the courts that has power to grant Representation in these cases. However, for administrative convenience, the Commission has allowed suppliers to act instead under the Advocacy Assistance scheme, which allows solicitors themselves to grant applications under devolved powers (up to a costs limit of £1,500). The scheme is remunerated by non standard fees and is non means tested.

The Commission considers that with the transfer of the power to grant Representation in the magistrates' courts, the distinction between 'mainstream' and 'prescribed' criminal proceedings for legal aid purposes should fall away. Furthermore, it would be anomalous to allow a non means tested scheme to continue for such cases while all other criminal proceedings were means tested.

The Commission therefore proposes to withdraw the Advocacy Assistance scheme for such proceedings in the magistrates' courts, on the basis that they will now be dealt with by way of Representation Orders. A proposed amendment to the remuneration provisions in the Contract would allow such cases to be remunerated under the usual standard fee scheme that applies to other criminal cases.

Summary of responses

The Law Society questioned whether a means test should apply to prescribed proceedings, because they were different in kind from mainstream criminal proceedings and required a different type of input. They requested costings to indicate what an average claim of this type would cost.

They also commented that it was premature to comment on whether the fees are likely to be adequate for this type of work, given that the new fees for representation work in the magistrates' court will not be known until Lord Carter produces his final report.

Legal Services Commission decision

The Legal Services Commission does not accept there is any case in principle to exempt prescribed proceedings from means testing, which also applies to civil legal aid. However, it accepts that it would be desirable to look again at the costs involved in these cases in the light of Lord Carter's proposals on magistrates' courts fees, and to provide appropriate figures on average case costs as part of this process. For this reason, it has decided not to proceed with the proposed amendments at this time.

A3 Consequential and drafting changes

A number of references in the Contract should be changed to reflect the new system.

Summary of responses

There were no responses to these proposals.

Legal Services Commission decision

The Legal Services Commission will proceed with the amendments as proposed.

B Other Changes to the General Criminal Contract and Guidance

B1 Change of Solicitor

This proposal clarifies the remuneration arrangements that apply when a representation order is transferred from one firm to another. Confirming current practice, it specifies that mergers and restructuring etc do not amount to a change of solicitor justifying two standard fees. A similar, but broader, amendment was proposed in a consultation paper last year. Respondents to that consultation endorsed the clarification on mergers and restructuring etc. However, they felt that the other amendments proposed were too wide in scope. They also objected to the proposal that the LSC should determine the division of payments between firms. In response to these concerns, we have reduced the scope of the other proposed amendments and have removed the provision for the LSC to determine the division of payments.

Summary of responses

The Law Society had no objection to these proposals and there were no other responses.

Legal Services Commission decision

The Legal Services Commission will proceed with the amendments as proposed.

C Changes to the Guidance Manuals

C1 Rationalisation of the Guidance Manuals

The General Criminal Contract is supplemented with three guidance manuals, which are intended to assist both suppliers and the Commission's own staff in interpreting how the Contract works. They are the Criminal Bills Assessment Manual, the Duty Solicitor Manual, and the Police Station and Court Duty Solicitor Costs Assessment Manual.

The manuals are available online. They supplement guidance in the Contract itself, and complement Volume 4 of the LSC Manual.

The Commission recognises that this combination of documents is confusing, and is committed to an ongoing process of simplifying them. As a first step, it proposes removing some parts of the two smaller manuals that simply duplicate parts of the contract, and merging together the two manuals that deal with costs assessment issues.

Summary of responses

The Law Society had no objection to these proposals provided there was nothing added to the Manuals. There were no other responses.

Legal Services Commission decision

The Legal Services Commission is happy to confirm that there will be nothing added to the Manuals, and will proceed with the amendments as proposed.

D Change to the Police Station Register Arrangements 2001 (as amended)

D1 Former solicitors holding PSQ to be treated as accredited

These Arrangements govern the circumstances in which the Commission allows an individual to register as a police station representative (enabling his or her advice at police stations to be remunerated under the Contract). An issue has emerged for individuals who obtain the Police Station Qualification (PSQ) while working as a solicitor, but then cease to be a solicitor. Under the current Arrangements they would be required to start re-training as a probationary representative. The Commission proposes that provided they hold the PSQ, they should be treated instead as if they were accredited representatives.

Summary of responses

The Law Society agreed with this proposal but suggested 3 changes, namely:

- *That the proposed power of the CDS Policy Team to refuse registration where there is a good reason to do so should be subject to prior consultation with the Law Society;*
- *That instead of a requirement to hold the PSQ there should be a requirement to have held it in the past;*
- *That the requirement to prove CLAS membership should be removed.*

Legal Services Commission decision

The power of the CDS Policy Team (without consultation) to refuse registration where there is a good reason to do so applies to new entrants in all other circumstances. It is needed to protect clients' interests, but is used rarely. The Legal Services Commission considers that a consultation procedure would be administratively cumbersome and unnecessary.

The Legal Services Commission considers that a requirement for recent and ongoing experience in police station work is necessary to protect clients' interests. This can be shown by current CLAS membership or current holding of the PSQ, and the requirement to prove this should not impose a significant burden on applicants. However, it is accepted that either qualification would be sufficient by itself, and it should not be necessary to prove both. The amendment will be changed accordingly.

In addition the Legal Services Commission will make a further amendment to these Arrangements, and also to the Duty Solicitor Arrangements 2001, to provide a right of appeal to the Regional Duty Solicitor Committee for refusals under this paragraph.

E Warrants of Further Detention

E1 Extend scope of Criminal Investigations Class

Section 23 of the Terrorism Act 2006 amends Schedule 8 to the Terrorism Act 2000 (TACT 2000) to extend the maximum time suspects arrested can be detained prior to charge from 14 days to 28 days. Under Schedule 8 of the TACT 2000 suspects can be held initially up to 48 hours after arrest under section 41, and warrants for further detention may be sought by application to a judicial authority (meaning District Judge (Magistrates' Court) designated by the Lord Chancellor to hear such applications). These warrants can be extended by up to seven days at a time up to a maximum of 28 days. Any application for a warrant which would take the period of detention beyond 14 days from the time of arrest, must be made to a High Court Judge.

A consequential change is proposed to the General Criminal Contract to extend the scope of the Criminal Investigation Class to include application for warrants for further detention to the High Court.

In addition, minor drafting amendments are required to the relevant sections of the General Criminal Contract to reflect the current number sequences.

Summary of responses

The Law Society confirmed that they had no objections to the proposed amendments, however, some changes to the draft were requested.

Legal Services Commission decision

The Legal Services Commission will proceed with the amendments with minor amendments as agreed with The Law Society.

Annex 1: List of Respondents

Responses were received from the following:

- The Law Society
- Justices' Clerks' Society
- Graham Hooper, Justices' Clerk (Nottingham), Her Majesty's Court Service
- Dyfed Powys Duty Solicitor Committee
- James Brotherton, Wannop & Fox