

## **AMENDMENTS TO GENERAL CRIMINAL AND GENERAL CIVIL CONTRACTS**

**For consultation and proposed implementation in April 2006**

### **OUTCOME OF CONSULTATION**

The 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 received and the Commission's decisions (in *italics*). Responses were received from the Advice Services Alliance, the Law Society, and the Legal Aid Practitioners Group.

A copy of this document will be made available on our website [www.legalservices.gov.uk](http://www.legalservices.gov.uk) along with:

- The original consultation document (including the proposed amendments in appendices);
- A Notice of Amendment showing the changes;
- Updated versions of the Manuals.

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

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**A Amendments to General Civil and General Criminal Contracts**

**A1 Peer review performance indicator – Annex to Contract for Signature**

Following the conclusion of consultation on peer review and the publication of the Commission's policy on it, we propose to introduce a consequential peer review Performance Indicator (under Clause 8 of the Contract Standard Terms) in an Annex to the Contract for Signature and require compliance with it. We also propose an 'avoidance of doubt' amendment to the Criminal Specification to refer to all work authorised by the Contract and funded by the Commission.

Following extensive consultation, the Commission published (accessible at [www.legalservices.gov.uk](http://www.legalservices.gov.uk)) its definitive peer review process in November, in a document entitled "Independent Peer Review". The proposed amendment enables providing services at the appropriate peer review "Level" to be specified as a performance indicator.

Summary of responses

*There was some comment on the peer review process itself, which has been forwarded to the Commission's peer review team. That apart, there was strong support for independent peer review as a measure of the quality of legal services, but concern that the process had not yet had enough time to "bed down" and, therefore, ratings of 5 should not automatically lead to termination of the category of work or contract.*

*Concerns were also raised over whether a category of work, or an entire contract, would be terminated, recognising that in some cases the termination of an entire contract would be appropriate. It was suggested that both the peer review process and the Commission's response to Ratings of 4 and 5 should be set out in the contract.*

Commission's decision

*The independent peer review process was established after considerable consultation and the proposed amendment is merely to give it practical effect.*

*While it is true that a final peer review rating of 5 is likely to mean that either the category of work or the entire contract will be terminated, termination does not follow automatically. The Commission still has to decide what is an appropriate response to the breach of contract. What is more, if the contractor does not accept the Commission's decision, they have the right to apply for a review by the Contract Review Body.*

*The Commission will make its decisions on contract sanctions as a responsible public body.*

*Attempting to describe, in the contract, the circumstances when a contract, rather than a category of work, will be terminated would not be helpful, as each case will turn on its own facts.*

*The Commission does not consider that it is appropriate to set out, or summarise, the independent peer review process managed by the Institute of Advanced Legal Studies, in the contract. It is possible that the process will be further developed e.g. in response to comments by representative bodies or individual contractors.*

*The Commission will proceed with this amendment, but has amended the proposed text to identify the independent peer review process as that managed by the Institute of Advanced Legal Studies.*

## **A2 Rules on leaflets etc – Amendment to the Specifications**

We propose a minor amendment to the rules so that they match the rule on visits and telephone calls.

### Summary of responses

*Respondents understood the logic in making the rules relating to the marketing of services by leaflets consistent with the rules relating to marketing by visits or telephone calls. However, one respondent sought a review of all restrictions on marketing.*

### Commission's decision

*The amendment is merely housekeeping and the Commission will proceed with it.*

## **B Amendments to General Civil Contract Only**

### **B1 New Focus Reforms – Consequential amendments to the Specification**

Following extensive consultation, amendments to the Funding Code were implemented earlier in the year to give effect to some of the amendments proposed in the New Focus consultation paper – most of these took effect from 25 July 2005.

Minor consequential amendments to the Specification are, therefore, required to ensure that the Funding Code and the Specification match.

### Summary of responses

*Respondents had no comments on any of the proposed amendments except the proposed new text relating to clinical negligence.*

### Commission's decision

*The new text was intended simply to match Section 18 of the Funding Code Guidance – Clinical Negligence. Rather than duplicate the text the Commission has decided simply to include a reference to the relevant part of the Funding Code Guidance, which is already in effect following consultation.*

### **B2 Annex C Fixed Fee Schemes [Voluntary and Mandatory] – Amendments to the Schedule**

We propose to make appropriate amendments to reflect the extension of the scheme under this Schedule and to align the voluntary and mandatory schemes. Amendments are required to reflect the fact that the Tailored Fixed Fee (TFF) scheme has been extended. The Commission also considers that, given that there

has been an extension, there is no longer any justification for differences between the voluntary and mandatory schemes – so minor amendments are required.

We also propose to move the guidance on TFF fixed fees (which has already been subject to consultation) from the contract overview to the Specification.

### Summary of responses

*Respondents had no comments on the alignment of the voluntary and mandatory schemes but requested changes to the scheme to allow for inflation-linked increases, for the removal of disbursements and for upward reviews for individual contractors. One respondent objected to the proposal to move the guidance on fixed fees from the Contract Overview, which is not part of the contract, to the Specification, which is part of the contract, on the grounds that it had never been subject to formal consultation.*

### Commission's decision

*The Commission will proceed with the amendments to align the voluntary and mandatory schemes and has noted the proposals to change the schemes, but has no present plans to do so.*

*The Commission considers that the present consultation would constitute sufficient formal consultation for the purposes of incorporating the guidance on fixed fees, which is presently in the Contract Overview, into the Specification. However, as there appears to have been a genuine misunderstanding as to the effect of moving the guidance from the Overview to the Specification, the Commission will not proceed with this amendment on this occasion.*

## **C Amendments to General Criminal Contract and Guidance Manuals**

### **C1 Expansion of scope: Advocacy Assistance**

An amendment to the Criminal Defence Service (General) (No 2) Regulations 2001 came into force on 31 October 2005, bringing several types of proceedings into the scope of the Criminal Defence Service. These are proceedings relating to:

- Notification Orders, Sexual Offences Prevention Orders, Foreign Travel Orders and Risk of Sexual Harm Orders under the Sexual Offences Act 2003.
- Parenting Orders for failing to comply with orders under the Powers of Criminal Courts (Sentencing) Act 2000, in cases of exclusion from school, and in respect of criminal conduct and anti-social behaviour.

Two other types of proceedings, not themselves in effect at the time of writing, will come into the scope of legal aid at the time of their commencement.

- Intervention Orders in cases where an Anti-social Behaviour Order has been made, under the Drugs Act 2005.
- Restraining Orders against a defendant who has been acquitted, under the ~~Family Law Act 1996~~ Protection from Harassment Act 1997 (as amended by the Domestic Violence, Crime and Victims Act 2004).

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The orders under the Sexual Offences Act replace the old Sex Offender Orders under the Crime and Disorder Act 1998, and so references to the latter have been removed. The amended Regulations also change the wording relating to Closure Orders to widen the scope of proceedings covered by this section.

The funding regime and rates for these orders will follow those established for other similar proceedings and includes the Advocacy Assistance scheme and the Court Duty Solicitor scheme. In exceptional cases the Commission may grant Representation for such proceedings in the Crown Court.

Given the length of the list of proceedings now dealt with in this way, we have revised the wording of the Specification and Manuals to avoid unnecessary duplication.

This change affects

- General Criminal Contract Specification Part A 3.2.1 and Part B 8.2.3
- Criminal Bills Assessment Manual 1.3.2
- Duty Solicitor Manual 2.13
- Police Station and Court Duty Solicitor Manual 10.3

### Summary of responses

*These amendments received no adverse responses and were positively welcomed by some respondents. There was one query on the reference to the Family Law Act 1996 in the Narrative, which is an error (the reference should be to the Protection from Harassment Act 1997).*

### Commission's decision

*The Commission will proceed with the amendments.*

## **C2 Expansion of scope: Incidental proceedings in civil courts**

The scope of the General Criminal Contract expressly includes proceedings in the High Court that arise from (are 'incidental' to) criminal proceedings. The principal example is confiscation and restraint proceedings brought under the legislation prior to the Proceeds of Crime Act 2002.

The Commission has, however, had enquiries in some cases relating to proceedings in the County Court that might be regarded as incidental to criminal proceedings, principally where an application must be made to obtain papers from a civil case that are relevant to those proceedings. Under the current regime, such proceedings are outside the scope of both the General Criminal Contract and the civil scheme. The proposal allows such work to be covered under the Contract subject to a procedure for prior approval, which is intended to keep the resulting expenditure under proper observation and control.

As for High Court work under the contract, the rates and claiming procedures will follow the same principles as those for civil work.

Also, Part E 3.6 of the Contract purports to set out the rates applicable to High Court Representation under the Contract. As the accompanying Note makes clear, these are intended to reflect the rates paid for Legal Representation under the General Civil

Contract. However, due to an error the rates shown are different. The proposal is simply to amend the table so that it shows the correct rates.

This change affects

- General Criminal Contract Specification Part A 3.2, Part C 1.7 and Part E 3.6
- Criminal Bills Assessment Manual 1.3

#### Summary of responses

*The principle of these amendments received no adverse responses and was positively welcomed by some respondents. However the LAPG response correctly pointed out that we had incorrectly used the table of rates for non-franchised firms from Schedule 1 of the Regulations.*

#### Commission's decision

*The Commission will proceed with the amendments, using the table of rates for franchised firms from Schedule 2 of the Regulations.*

### **C3 Wasted Costs and Central Funds**

The General Criminal Contract recognises that there are circumstances in which wasted costs orders may be made against prosecuting authorities, or in which the court may order the defendant's costs to be paid from central funds. In both cases, the legal service provider is obliged to account to the Commission for the relevant costs.

At a time of particular pressure on legal aid expenditure, with costs drivers in criminal cases subject to particular scrutiny, the Commission is keen to improve its monitoring of such orders and to ensure they are applied for where appropriate.

The proposal obliges legal service providers to consider such orders and apply for them where appropriate, taking into account the costs of the application itself. It obliges them to inform the Commission as soon as possible where the amount of the order, if made, would exceed £1,000.

The guidance also applies to work authorized by the Contract, including Crown Court work.

This change affects

- General Criminal Contract Specification Part C 1.21 and 1.22
- Criminal Bills Assessment Manual 10.5 and 10.6

#### Summary of responses

*There was broad agreement with the principle that wasted costs should be applied for where appropriate. However, there were several points made about the current scheme of wasted costs and criticisms of the way the amended scheme would operate.*

*The following specific points were made:*

- *Making an application in some cases is an unwise use of resources because of the small amounts that would be recoverable.*
- *There is no advantage to the client in making a wasted costs application but there are overheads for the solicitor, and risks of 'being viewed with contempt' by the prosecution and facing counter-applications from them.*
- *There is some unfairness in the fact that orders against the prosecution are met by the Attorney General, the Home Office or the CPS, whereas orders against the defence are met by individual defenders.*
- *The Commission's standard fee regime means that in many cases the additional profit costs involved would not be reflected in the fee received. These profit costs may also be outweighed by the administrative costs of accounting to the Commission for sums recovered.*
- *Practitioners should not be penalised on peer review or audit for making the judgement not to apply for a wasted costs order.*

*Some respondents proposed an alternative solution, to encourage wasted costs applications by allowing providers to be remunerated for them at private rates. It was further proposed that in standard fee cases the provider should retain the amount of the order on the basis that the same fee would have been payable with or without the wasted costs involved.*

#### *The Commission's decision*

*The Commission accepts that the standard fee system may have an impact on the wasted costs regime. It notes the alternative proposals from respondents, which would encourage applications by paying for them at private rates. It is unclear whether such applications would be remunerated if unsuccessful, or how remuneration would be effected (under the Representation Order at rates set out in the Contract, or otherwise). Depending on the detail of the scheme, regulatory as well as contractual changes may be needed.*

*The Commission is concerned not to encourage inappropriate applications, and to retain the principles of obligation and notification. Further consideration is needed on how any regime should relate to current and proposed standard, fixed and graduated fee structures.*

*The Commission will therefore continue to consider this area and would welcome continuing dialogue with representative bodies on the subject. In the mean time, it will not proceed with the amendments at this time.*

#### **C4 Advice and Assistance applications for 'distant' clients**

The Contract allows applications for Advice and Assistance to be accepted by post, or for other persons to attend on a client's behalf, where there is good reason to do so. It refers to the rules on 'distant solicitors', later in the Contract, for guidance on what amounts to a good reason.

Unfortunately, the reference is ambiguous. This is because some of the factors mentioned in the guidance on distant solicitors relate to whether the legal service provider may take instructions from a distant client at all, while other factors relate to whether travel times for attendance on such a client may exceed the usual limits. The current wording could be read to include only the first set of factors. The result is that where a legal service provider legitimately accepts instructions from a distant client, either they or the client may have to travel purely for the purpose of completing an application.

The Commission considers this inappropriate. The proposal ensures that all clients who for good reason cannot attend the legal service provider's office should be able to make an application by post or to use another person to complete the application on their behalf.

This change affects

- General Criminal Contract Specification Part B 2.1 and 2.2

Summary of responses

*This amendment received no adverse responses.*

Commission's decision

*The Commission will proceed with the amendment.*

**C5 References to Revenue and Customs**

By virtue of the Commissioners for Revenue and Customs Act 2005, HM Revenue and Customs has replaced the Inland Revenue and HM Customs and Excise. References in the Contract and guidance need to be amended as a result so that references to 'officer/s of HM Customs and Excise' become 'officer/s of HM Revenue and Customs'. In particular, a reference to Revenue investigations in the Specification, saying that they will be out of scope of the police station scheme, as Revenue officers had no power of arrest, needs to be amended to reflect the fact that HMRC officers do have a power of arrest.

This change affects

- General Criminal Contract Standard Terms, definitions
- General Criminal Contract Specification Part B 3.5.2
- Criminal Bills Assessment Manual 4.20.20 and 7.4.4
- Duty Solicitor Manual
- Police Station and Court Duty Solicitor Costs Assessment Manual

Summary of responses

*These amendments received no adverse responses.*

Commission's decision

*The Commission will proceed with these amendments.*

**D Amendments to Criminal Guidance Manuals Only**

**D1 Work done in connection with the Proceeds of Crime Act 2002**

The 2002 Act imposes obligations on solicitors to prevent money laundering, which the Commission recognises will give rise to additional work. Guidance has been produced and consulted upon for Civil work. The proposal is to insert an amended version of that guidance into the Criminal Bills Assessment Manual.

Summary of responses

*One response noted that the version of the Guidance appearing at Appendix D1 was out of date, having been superseded by a version published in issue 48 of our newsletter FOCUS in August 2005 (pages 22-23). The amendments reflected amongst other things the impact of the Bowman v Fels [2005] Court of Appeal judgement.*

Commission's decision

*The amended version will be substituted.*

**D2 Video links**

It is increasingly possible to arrange conferences with clients in custody by way of video link. The Commission has received enquiries on what costs may be remunerated in connection with video links installed at the premises of legal service providers, and has produced guidance as a result.

Summary of responses

*Concern was expressed that the amendments would discourage the use of video link technology, which could achieve significant savings by reducing travel costs and delays by enabling conferences at short notice. It was proposed that the cost of video conferencing in relation to a particular client should be paid as a disbursement. Particular mention was made of the facilities available at some magistrates' courts.*

*One respondent proposed that a further method of reducing travel costs would be to allow remuneration for a fee earner to research the best value fares available.*

The Commission's decision

*The Commission accepts that video link facilities could lead to the savings suggested, and is keen to encourage their use. We recognise that larger firms may choose to invest in installing such facilities for their own purposes, which may not be limited to publicly funded work. We also recognise that current remuneration structures (with travel, waiting and related disbursements paid separately) do not adequately encourage such investments, and are actively pursuing remuneration structures to reward outputs rather than inputs as a means of tackling the issue.*

*In the mean time, it is clear that there is a developing market in facilities that can either be installed and used repeatedly, or accessed on an ad hoc basis, and there appear to be no standard arrangements for paying for such facilities. In these circumstances the Commission concedes that it would be appropriate to allow the*

*cost of accessing video link facilities outside the firm's offices, where this is a less expensive option than attending the client in person, to be paid as a disbursement. This does not affect the principle that the costs of in-house video link facilities are an overhead and will not be remunerated by us. The amendment to guidance has been revised accordingly.*

*The Commission rejects the proposal to remunerate fee earners for researching best value travel fares. This work is not integrally involved in the provision of legal services to the client and is properly regarded as an administrative overhead, undertaken in pursuance of the provider's general duty to minimise the costs incurred by the legal aid fund.*

### **D3 Defendants' attendance: reminder letters**

The LSC is currently engaged with partner CJS agencies in an attempt to reduce the number of ineffective hearings caused by the non-attendance of defendants. Following discussions within the inter-agency Defendant Attendance Steering Group, it has been agreed that solicitors should be encouraged to remind their client of an impending court appearance and that this reminder may take the form of a telephone reminder or a letter.

Therefore, from 3 October 2005, where a solicitor telephones their client (or writes a letter) reminding the client of an impending court appearance, the solicitor may claim the standard rate for the telephone call or letter. This reminder telephone call / letter is in addition to the current requirement to inform the client of the next court hearing (as required by the Specialist Quality Mark standard F1.2.)

The reminder call (or letter) does not need to take place on a specific day (e.g. the day before the court appearance) but should take place between the date that the client is first informed of the next court hearing and the actual date of the hearing (including the day of the hearing in the event of a telephone call).

#### Summary of responses

*This amendment received no adverse responses and was positively welcomed by some respondents. We were asked to clarify that emails and text messages would be similarly remunerated.*

#### Outcome of consultation

*The Commission will proceed with this amendment. A sentence has been added to clarify that emails and text messages would be similarly remunerated.*