

AMENDMENTS TO GENERAL CRIMINAL CONTRACT AND DUTY SOLICITOR ARRANGEMENTS

For consultation and proposed implementation in April 2007

Response to Consultation

February 2007

Contents

Introduction.....	5
Outcome of Consultation	7
A. Revised Magistrates’ Court Standard Fees	7
B. “Market Stability Measures”	11
B.1 Slot Allocation – Amendments to Duty Solicitor Arrangements	11
B.2 Service Requirements	12
B.3 Performance Standards	13
C. Funding of Prescribed Proceedings	14
D. Service Cases	15
E. CDS Act - Reintroduction of Means Testing	16
Annex A.....	17
List of Respondents.....	17

Introduction

This document is the post-consultation response from the Legal Services Commission (LSC) following the consultation on amendments to the General Criminal Contract for proposed implementation in April 2007. The consultation commenced on 19 December 2006 and closed on 9 February 2007.

A total of forty-one responses were received to this consultation. The details of the respondents can be found at Annex A.

This document covers, for each change:

- the background to the consultation
- a summary of the responses to the consultation
- the Legal Services Commission response

We are grateful to all respondents for taking the time to respond to this consultation.

A Notice of amendment to the General Criminal Contract has been sent to contract holders. A copy is available on our website at www.legalservices.gov.uk

Outcome of Consultation

A. Revised Magistrates' Court Standard Fees

Summary

The LSC and DCA first consulted on Lord Carter's proposals for magistrates' court revised standard fees in *Legal Aid: a sustainable future*, published in July 2006. Following this we took into account the arguments put forward that rural and remote providers would be disproportionately disadvantaged, and amended our proposal so that the revised fees would only initially apply to 16 main urban areas in England and Wales. This was set out in *Legal Aid Reform: the Way Ahead*.

We have carefully considered all of the points in the 38 responses on the magistrates' court fees element of our recent consultation on contract amendments. We have decided to implement the proposals as set out in our recent consultation paper on Contract amendments, with a slight amendment to the Higher Limit for Category 3 cases in London. We believe that the revised fees will help prepare suppliers for the move to market competition and will ensure value for money for the taxpayer. We also believe that providers will ensure quality legal advice and representation for clients. The revised scheme will therefore be implemented in the 16 urban areas in April 2007.

Key themes

The following key themes were raised in the responses to the contract amendment consultation:

- The majority of respondents were concerned about the loss of a separate travel and waiting element;
- Around a third of respondents were concerned that the Non Standard Fees included no element of travel and waiting;
- A number of respondents felt that the quality of service to the client would suffer under the revised fees;
- A small number of respondents felt that the creation of 16 urban boundary areas created some anomalies, which would impact disproportionately on rural courts, women and young clients at remote locations;
- A few of the respondents felt that the timing was wrong. They argued that we should wait until full impact of Means Testing was known and for the CASC report.

Travel and Waiting

The current standard fees have been reconfigured to incorporate an element of travel and waiting. This will help prepare the market for best value tendering which will be introduced from October 2008 by encouraging and rewarding efficient practices. Moving to a standard payment for travel and waiting will provide greater certainty of income. The fees have been

Outcome of Consultation – General Criminal Contract – April 2007

calculated to take into account the full range of cases (i.e. Lower Standard Fees, Higher Standard Fees and Non-Standard Fees or “escapes”), with payment weighted towards Lower Standard Fees. This will allow providers to manage costs across their entire caseload by balancing out the impact of more expensive cases with gains on shorter, simpler cases. We do not accept that the fee structures provide a perverse incentive to solicitors to have clients plead when that may not be in their best interests. This system maintains the principle that where a case should be pursued in the client’s interest additional payments will be made. The system is intended to provide an incentive for the early resolution of cases only where that is appropriate.

Providers will be encouraged to avoid incurring travel and waiting costs by working more locally. This approach fits in with the obligations placed on the Lord Chancellor under Section 25 of the Access to Justice Act. We will monitor exceptional costs outside these areas and, if necessary, put in place mechanisms to deal with them before implementing fixed travel and waiting payments more widely.

While several respondents provided examples of cases where travel and waiting might be thought to be consistently high, it is important to remember that these cases were included in the fee calculation. Where a firm takes a case involving particularly high travel and waiting costs, for whatever reason, those higher costs can be balanced by gains made on less expensive cases.

The revised payment regime set out here continues to pay travel and waiting to providers. The level of travel and waiting remuneration that they receive will depend on the case mix – and particularly the proportion of Non-Standard Fee cases that they undertake (where travel and waiting is not paid). There is an incentive for firms to develop a broad business covering all kinds of cases, in line with the recommendations of Lord Carter and the aims of the reform programme.

We have accepted, however, that the Higher Limits should be higher than the Higher Standard Fees and amended the London escape in Category 3 accordingly to £888.85. We will continue to pay for all actual travelling expenses (mileage, train tickets etc) in all of the revised fees.

We accept respondents’ concerns that inefficiencies in the Criminal Justice System can be caused by delays beyond the control of defence practitioners. The implementation of Lord Carter’s reforms will support efficient practices throughout the wider criminal justice system and we are aware of a real responsibility to ensure that criminal defence practitioners are not penalised by inefficiencies and delays elsewhere. This is a priority for us and we are working closely with Her Majesty’s Courts Service, the Crown Prosecution Service, the Office of Criminal Justice Reform, other government departments and the judiciary to achieve greater efficiency throughout the whole system. For example, we have worked with the Office of Criminal Justice Reform to ensure that the needs of the defence are properly taken into account in the revised Listing Guidance for magistrates’ courts.

The revised fees are one element of a wider programme of reform to streamline practices in magistrates’ courts and will be directly supported by the national roll out of Simple, Speedy, Summary Justice (CJSSS). CJSSS pilots in Coventry, Camberwell, Thames and West Cumbria magistrates’ courts have demonstrated significant potential to reduce the number of wasteful hearings and improve the speed of the magistrates’ courts. Success has been achieved through better, proportionate preparation from the point of charge, improved defence preparedness, effective first hearings and robust case progression for cases that need to go to trial. However there is also a cultural dimension. A clear expectation has been set to get it right first time and on time. Criminal justice partners are working more closely, with courts and defence practitioners to identify and resolve difficulties and meet this

expectation. The aim is that all parties are ready to enter an appropriate plea at the first hearing. If a not 'guilty plea' is entered a trial date is fixed within 6-10 weeks and the trial hearing should be the second and last hearing. If a guilty plea is entered, the judge should proceed immediately to sentence where appropriate. This will all have direct benefits for providers operating within the new fee structures.

CJSSS represents a real opportunity to improve the speed and effectiveness of system - to the benefit of all parties, including defendants and defence practitioners. We hope that defence practitioners are able to be involved in the development of local schemes to help deliver these changes during 2007

We are also working to ensure that legal aid and the needs of the defence are properly represented on Local Criminal Justice Boards; the LSC is now represented on 80% of the 42 LCJBs and we are working to achieve 100% in 2007. At a national level, Lord Carter's reforms provide a forum for addressing operational and legal aid related issues through regular stakeholder update meetings and an annual roundtable chaired by the Lord Chancellor. This new framework will enable DCA and the LSC, the Bar Council and Law Society, the CPS and key players in other Government Departments to work together and resolve problems more closely.

Quality

We do not believe that changes to the fee structures will compromise a good quality service for clients and defendants. Quality lies at the heart of Lord Carter's proposals and all legal aid providers will need to demonstrate that they can meet a strict quality threshold. We are currently rolling out the Peer Review scheme and firms wishing to provide legal aid services will be required to demonstrate that they have been rated at a Peer Review Level of 3 "Threshold Competence", 2 "Competent Plus" or 1 "Excellent". Providers who continue to operate in the legal aid market will be expected to demonstrate that they can meet a peer review level of 1 or 2 by the second round of bidding.

Boundary areas

It is also important that the rules of the scheme are kept as simple as possible, consistent with providing appropriate remuneration for magistrates' court cases. This will allow providers to more accurately assess the cost of working in their local market, in preparation for best value tendering.

We believe that initially applying the revised fees to providers based in the 16 urban areas, is the correct approach.

The fees take into account current working patterns, and so make some allowance for travel outside the areas that firms may currently incur. Providers located in the areas will be likely to maximize their profits when they attend their local courts. This creates incentives to make efficiencies in travel and waiting, and for firms to work more locally. Where providers have to travel to a court outside the area to conduct a case, the effect of any reduced profit margins will be mitigated by gains from local working. Applying the revised fees to work done outside the areas by these firms also prevents any potentially perverse incentive for them to travel outside the area to undertake work.

Providers outside the implementation areas will continue to be paid at hourly rates for travel and waiting at their local courts, and any other court which does not fall within the 16 main

urban areas – work undertaken in the 16 urban areas will be paid by the revised standard fees to eliminate any perverse incentive to such firms to travel into urban areas to undertake work. Therefore, providers outside of the 16 urban areas will be at no competitive advantage compared to firms falling entirely within the scheme.

The LSC will continue to monitor the costs of travel and waiting in remote and rural areas, to which the revised fee scheme has not yet been applied. We will look particularly closely at the impact on vulnerable groups, such as young people. When the scheme is rolled out in other areas we will take account of our findings.

Timing

A few of the respondents felt that the timing of the revised fees was premature. We have considered these requests but have decided that it would not be appropriate, or helpful for the market, for us to delay the implementation of the revised fees. The market has been aware of the proposals for over a year and has been consulted on them twice. Providers have informed us that they are already planning for the revised fees and modifying existing systems accordingly. A sudden delay at this late stage, for no good reason, would not inspire confidence or trust in the market. It would also discourage the market from undertaking necessary business planning ahead of future reforms.

We are aware that the recent implementation of the means testing scheme will impact on the volume of work going through the magistrates' costs. There will be a full review of the implementation of the means testing scheme in May 2007, by which time robust data will be available to evaluate the operation of the new scheme during its first six months. The review will consist of a thorough evaluation of the operation of the existing scheme and its impact on the wider criminal justice system.

We will continue to ensure that we take on board the findings from both this review and the forthcoming report from the Constitutional Affairs Select Committee alongside any other reviews on legal aid or the criminal justice system.

B. “Market Stability Measures”

Background

The consultation paper included proposed amendments to the General Criminal Contract and Duty Solicitor Arrangements for each of the options outlined in our consultation paper ‘Market Stability Measures’ which was published on 28 November 2006. The consultation closed on 24 January 2007 and the Commission published the outcome of the consultation on 12 February 2007.

The proposed amendments related to:

- Changes to the allocation of duty solicitor slots
- Changes to the ‘service requirements’ for Duty Solicitor cases
- Reintroduction of performance standards for representation in the magistrates’ court

Summary of Responses

Responses relating to the options that the Commission are no longer planning to implement have not been considered in this document.

B.1 Slot Allocation – Amendments to Duty Solicitor Arrangements

Many respondents stated that they have responded to the “Market Stability Measures” consultation separately and had repeated their comments in their response to this consultation.

None of the respondents specifically commented on the proposed amendments to the Duty Solicitor Arrangements.

Legal Services Commission Response

The proposed amendment contained options that have now been finalised following the publication of the outcome of consultation on “Market Stability Measures”. These are specifically:

- It has been confirmed that slots would be allocated based on volume of work rather than value.
- The volume of all Advice and Assistance at the Police Station will be used to calculate the proportion of slots allocated.
- The period has been specified as 1 December 2005 to 30 November 2006

Additional wording has been added to the amendment to confirm that Court Duty Solicitor slots will be allocated as currently.

B.2 Service Requirements

A number of respondents requested further clarification of the purpose of the requirement that Representatives must be *‘in the full or part-time employment of...the same firm or organisation as the Duty Solicitor’*.

A number of respondents further requested a definition of ‘employment’ as it was suggested that this was not covered in the cited contract paragraph (8.7)

Legal Services Commission Response:

The full wording of Part B 8.7 – Meaning of Employment – was not included in the consultation as there are no amendments to this paragraph. None of the proposed amendments change a provider’s ability to instruct accredited representatives as agents.

For reference the full wording of paragraph 8.7 has been reproduced below.

“8.7 Meaning of “Employment”

1. The question whether a Solicitor or Representative is an employee is a question of fact which must be determined according to the individual circumstances of each case.
2. There are various tests in employment law which identify whether an individual is an employee, i.e. works under a contract of service (employment contract), or self employed, i.e. works under a contract for services as an independent contractor, agent etc. If a person is said to be employed under a contract of service we may require production of the written particulars of employment required by law or the written contract of service itself.
3. If we conclude that the Solicitor or Representative is not employed under a contract of service or there is doubt about employment status, we will go on to consider whether the individual satisfies the “direct supervision” test. There are two elements to this test:
4. **Supervision:** A Solicitor or Representative who is not employed under a contract of service must be under the supervision of your firm. It is generally easier to demonstrate supervision if this takes place regularly, rather than on an ad hoc or individual case basis. It is more difficult to exercise supervision at a distance. The less direct contact there is between the firm and the individual, the less likely there is to be an effective supervisory relationship. Supervision must be exercised directly rather than through a third party.
5. **Integration:** the more fully integrated the Solicitor or Representative is into your firm, the more likely it is that he or she is directly supervised. The greater the degree of continuity in the relationship between the individual and your firm, the more likely it is that the individual is supervised. If the Solicitor or Representative only performs one off or occasional services for you and has done so over a relatively short time period then he or she is less likely to be directly supervised. To demonstrate integration we would normally expect your office to be the individual’s primary place of work.”

B.3 Performance Standards

Most respondents were in favour of the proposal that designated fee earners should conduct 50% of magistrates' court representation.

The Law Society have emphasised their view of the need for flexibility regarding service requirements and performance standards. The burden on providers to monitor performance was also raised.

None of the respondents commented on the wording of the amendment.

Legal Services Commission Response:

The amendment will be introduced as proposed.

The Commission will continue to review the appropriateness of these performance standards.

C. Funding of Prescribed Proceedings

Background

The Commission has previously consulted on changing the funding of prescribed proceedings from Advocacy Assistance to a representation order to bring funding of prescribed proceedings in line with other criminal proceedings in the magistrates' court. Individuals will have to pass a means test as well as the interests of justice test in order to be represented in proceedings in the magistrates' court funded by the Criminal Defence Service.

This change was not introduced in October 2006 as originally planned to enable the Commission to undertake further work to confirm the claiming process. This work has now been completed and discussed with The Law Society.

The majority of the proposed amendments were included in the original consultation but some additional amendments have been included for clarity. These additional amendments were proposed to Part B Rules 4.3 and 6.3.

Summary of Responses

A number of respondents indicated that they had responded to the earlier consultation paper regarding the amendments to the funding of prescribed proceedings and little or no further comment was made.

Legal Services Commission Response

The amendments will be implemented as proposed.

D. Service Cases

Background

The Army, and through them, the RAF and Royal Navy are content that accredited representatives may now advise Service Personnel when they are being questioned by the Service Police¹. Previously, only a solicitor could advise Service Personnel, and amendments to the Contract were proposed to include accredited representatives. This change was proposed at the request of both providers and representatives of the armed forces.

Summary of Responses

- There were no objections to the proposals for Service cases.
- One respondent pointed out that the reference in the narrative to 'Royal Military Police' should have been 'Service Police'.
- One respondent identified that the Armed Forces have defined 'Legal Advisor' in PACE (Application to the Armed Forces) Order 2006 with reference to s71 of the Courts and Legal Services Act 1990. s71(3)(c) specifies that representatives have to have rights of audience, which accredited representatives do not all necessarily have.

Legal Services Commission Response:

- The definition of 'Legal Advisor' has been discussed with the MOD who have confirmed that the Contract amendment should go ahead. Arrangements will be made to amend the Order referred to above to include accredited representative within the definition of a legal adviser.
- The incorrect reference has been noted.
- The amendments will be implemented as proposed.

¹ The Service Police means Royal Navy Regulating Branch, Royal Military Police and Royal Air Force Police.

E. CDS Act - Reintroduction of Means Testing

Background

Following the reintroduction of means testing in the magistrates' court on 2 October 2006, changes were introduced by the Commission, with respect to payment for completion of forms that have not yet been incorporated into the General Criminal Contract. The changes were notified to providers by letter on 27 September and 4 October 2006 and they are already operating under the revised arrangements. The amendments included in this consultation are only intended to update the Contract to reflect these changes.

Summary of Responses

- No respondents raised any objections to the wording of the proposed amendments.
- Some respondents did identify issues with level of payments and other issues with the operation of the means testing process.

Legal Services Commission Response:

The amendments will be implemented as proposed.

This consultation focused on proposed retrospective amendments to the Contract as a result of changes that have already been introduced and are currently already in operation.

Following consultation on changes to Early Cover in December 2006 the Programme Team are reviewing the viability of alternative suggestions raised in responses. Such responses received to this consultation will also be provided to the Programme Team for consideration. All such suggestions are being fully analysed, which will include impact assessment and full cost implications.

Annex A

List of Respondents

The Law Society (adopted by CLSA)
Legal Aid Practitioner Group
ACCLA
LCCSA
Ministry of Defence
Andrew Cosma, Martin Murray & Associates
Richard Prew, Turner Law
S.A. Kelly
Andrew Watts-Jones, Wood Awdry & Ford
Ian Phillip, Myer Wolff
Wendy Cottee, TVEdwards
Simon Tierney
David Potter, Potter Shelley & Co
Tosswill & Co
Jan Steadman, Christopher Harris & Co
Bill Charlton Solicitors
Andrew Bishop, Bishop & Light
Michael Wooldridge, Michael Wooldridge
Michelle Crotty, Bullivants
Roger Mullender, Mullender Law
Franklin Sinclair, Tuckers
John Scruton, Cartwright King
Ash Bhatia, Bhatia Best
Dale Robinson, Bhatia Best
John Wakefield, Bhatia Best
Richard Posner, Bhatia Best
Digby Johnson, Johnson Partnership
Nichola Hornby, Johnson Partnership
Raymond McVeighty
Steven Bird, Birds
Joanne Lee, Birds
Denis Brenan, Dowse & Co
Anthony Mitchell, Mitchell Parikh and Rodaway
Sarah Barnard, Hayes Burcombe Sols
Penny Carne, Mylles & Co
Chet Desai, Bhatia Best
Patrick Keogh, A.Patrick Keogh
Stephen Burdon, Stephen Burdon Solicitors
Jane Hickman, Hickman and Rose
Justin Pierce, BEPS Solicitors
Alphalaw