

The Legal Services Commission Contract Compliance Audit

A Guide to LSC Staff and Practitioners

Issued by the Legal Services Commission as an outcome of the Contract Compliance Working Group: made up of the LSC, Law Society and Advice Services Alliance.

CCA Keycard

What is checked?	Why is it checked?	What are the potential outcomes?
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File opening stage		
1. Scope		
Was the case / matter within the scope of Unified Contract (Crime)?	Should the case have been funded? The Access to Justice Act defines what falls within the scope of the Criminal legal aid scheme. The Contract sets out the five broad areas of work which can be undertaken – investigations, criminal proceedings, appeals and reviews, prison law and associated CLS (civil).	File paid in full. Costs reduced if excessive or unreasonable File nil assessed.
2. Financial eligibility / means test		
Was the client financially eligible to receive legal aid?	Should the case have been funded? Advice and Assistance (apart from police station advice and assistance) is means tested. Legal aid in the magistrates' court is only available to individuals who have passed the means test, (or if they have failed the means test, have shown that they do not have sufficient means to pay for their representation). Defendant's have a duty to notify the court if their means change during a case. Providers have a duty to protect the fund and to notify the court if it transpires that the Defendant's means have changed during the case to make him ineligible for a representation order	File paid in full. File nil assessed.
3. Evidence of means		
Is there evidence of financial eligibility on file?	Check eligibility for freestanding (not given in the police station) advice and assistance (all classes of work), Associated CLS Legal Help, and Prison Law advocacy assistance.	File paid in full. File nil assessed.

Throughout the case		
4. Disbursements		
Was it reasonable to incur any disbursement and is the amount claimed reasonable?	Disbursements may only be incurred where it is reasonable and it is in the best interests of the client. A non-exhaustive list of disbursements is at A22.19 of the Unified Contract (Crime) Specification The amount claimed must not be unreasonable.	All disbursements allowed in full. Particular disbursements disallowed or partly disallowed.
5. Sufficient Benefit Test (Advice and Assistance, Advocacy Assistance cases)		
Did the case have 'sufficient benefit' to receive public funding under the terms of the Unified Contract(Crime) (Funding Code for associated CLS work)? Has the Provider set out in a brief file note how the sufficient benefit test was met? And reviewed the Sufficient Benefit Test	Should the case have been funded? For free standing Advice and Assistance and Advocacy Assistance this criterion is that the case had sufficient benefit to be funded. Cases which had minimal benefit to the Client ought not to have passed the sufficient benefit test.	File paid in full. Discussions with firm over contract compliance issues. Files nil assessed if an issue on 10% or more of the initial file sample.

during the case?		
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At the end of the case

6. Reporting		
Has the case been reported correctly?	Accuracy of reporting is checked partly because it is a contract requirement, but also because it impacts on the information that we use to manage you and the legal aid fund. It is in everyone's best interests to ensure that the data we are using to make judgements about your performance is accurate.	<p>Case reported correctly - no issues raised.</p> <p>Case reported incorrectly with no financial implications. Issued raised with firm. For example, incorrect outcome code used.</p> <p>Case reported incorrectly with financial implications. Claim adjusted to correct level.</p>

Introduction

1. The LSC is required to spend public funds appropriately and therefore must have processes in place to ensure that criminal legal aid funded appropriately in accordance with the LSC's statutory obligations. Where the decisions in respect of granting legal aid are devolved to its providers, then those decisions must be open to scrutiny and checked, such that the LSC can assure that National Audit Office (NAO) that the legal aid fund is being properly used.
2. The Contract Compliance Audit (CCA) process is a mechanism by which the LSC ensures that:
 - its providers have complied with the terms of the Unified Contract (Crime), particularly in respect of claiming costs in Contract Work; and
 - it has not paid costs where it has no authority (statutory or otherwise) to do so.
3. The attached key-card sets out the issues that the LSC looks for when doing a CCA. Providers should ensure that they refer to the key-card when carrying out file reviews and before claiming any costs from the LSC. If a they discover that, for instance, on a means tested matter, evidence of means is missing, then they should try to obtain that evidence before including details of that claim on their CDS6 form, making clear on the file that it was obtained after the event. The key CCA issues are:

Is the Client entitled to receive legal aid?

- Was the case within scope of the Unified Contract (Crime) (or the Funding Code for Associated CLS work)?
- Was the client financially eligible (for those levels of CDS funding where there is a means test)?
- Is there evidence of the client's financial eligibility on the file?
- Did the case have sufficient benefit (Advice and Assistance and Advocacy Assistance cases)?

Were the Disbursements claimed proper disbursements payable under the terms of the Unified Contract?

Was the case reported correctly?

- Was it reported in the right class of work?
- Was the correct outcome code used?

Is the Client involved in a criminal investigation, or criminal proceedings, as defined by s12 of the Access to Justice Act?

4. S12 provides that individuals involved in criminal investigations or criminal proceedings may have access to such advice, assistance and representation as the interests of justice require.
5. The Unified Contract (Crime), sets out in greater detail the type of work which falls within the scope of the contract. Essentially, the categories of work are police investigations (as duty solicitor or the client's own solicitor), criminal proceedings (as duty solicitor; or the client's own solicitor acting under a representation order), appeals and reviews, prison law, and associated CLS work (public law challenges on issues arising out of criminal work, and civil Proceeds of Crime Act 2002 work). Each section of the Contract Specification begins with an outline of the Scope and Qualifying Criteria relevant to that part of the Contract.
6. The key criteria considered in the CCA process are:
 - Was the case a matter falling within the scope of the CDS scheme?
 - Was the case within the scope of the supplier's contract?
 - For Advice and Assistance or Advocacy Assistance matters, was the Sufficient Benefit Test satisfied, namely was there sufficient benefit to the client, having regard to the circumstances of the matter, including the personal circumstances of the client, to justify work or further work being carried out?
 - Have the postal application rules been used appropriately?
 - Were instructions received from the client or family logged appropriately with the Defence Solicitor Call Centre in accordance with the contract?
 - Have all police station advice and assistance claims got a reference number from the Defence Solicitor Call Centre recorded?

- Is there a representation order on the file covering the claim being made?

Was the Client Financially Eligible?

7. Some types of work under the Unified Contract (Crime) are not subject to means testing (police station advice and assistance, proceedings in the Crown Court (save where introduced after 4 January 2010) and Court of Appeal (Criminal Division). Other areas are subject to a means test (free standing advice and assistance, and prison law work is governed by the means test in regulation 5 and schedule 1 of the CDS (General)(No 2) Regulations 2001).
8. Magistrates' Court proceedings are governed by the means test set out in the CDS (Financial Eligibility) Regulations 2006 and it is the magistrates' court which assesses the client's means in respect of an application for a representation order.
9. Associated CLS work is governed by the Funding Code and shall only be carried out on behalf of a client who has been assessed as financially eligible in accordance with regulations and guidance. Providers assess the client's means when self-granting Legal Help, and the regional office assess the client's means in respect of an application for a civil legal aid certificate.
10. For advice and assistance work which is subject to the means test, satisfactory evidence in support of the client's information as to their means must be provided to the supplier a copy must be kept on the file.
11. A supplier may assess the prospective Client's means without the accompanying evidence where:-
 - it is not practicable to obtain it before commencing the contract work (e.g., because the Client is unable to access the necessary evidence as a result of bail conditions); or
 - pre signature telephone advice is given; or
 - exceptionally, the personal circumstances of the Client (such as the Client's age, mental disability or homelessness) make it impracticable for the evidence to be supplied at any point in the case.

12. The questions that an auditor should ask and the likely results are:
- Does the means information on the CDS1 and 2 form indicate that the client is eligible - if no, nil assess; if yes, consider the following:
 - Is there is evidence of means - if yes, and the client is eligible, allow the claim; if not, consider:
 - Is there no evidence of means
 - but it was reasonable to carry out work without evidence of means at any time then pay in full;
 - otherwise nil assess;
13. If it is clear to the auditor that a supplier has failed to assess means or, in circumstances where none of the exceptions apply, has failed to see and / or keep the evidence of means then the supplier may have acted in breach of contract and the LSC will not be able to satisfy the NAO that the client was eligible for legal aid and therefore that the LSC had the right to pay for that case.
14. Typically the LSC will seek to reclaim the payments made in such cases. However, if there are just one or two breaches or, for instance in the case of sufficient benefit, there is room for debate, rather than reclaim payment the LSC will highlight the errors and re-schedule a future audit to see that the same errors are not still being made. In serious cases the LSC may also consider the application of a contract sanction. In either case the Supplier will be given the opportunity to make representations and, where appropriate, to provide missing documentation and evidence.

Were the Disbursements claimed proper disbursements payable under the terms of the Unified Contract?

15. The Unified Contract (Crime) makes clear a provider may only incur disbursements where it is in the best interests of the Client and reasonable to

do so. It also requires that the amount of the disbursement is reasonable and that incurring it is not otherwise prohibited by the contract.

16. In particular it makes clear that the following disbursements are not payable in the provision of Advice and Assistance:

Clients' travelling and accommodation expenses
Court fees, except for a search/photocopies

17. If non allowable disbursement is claimed or if the amount claimed is wholly unreasonable then, again, the LSC has no obligation to pay those disbursements (in full or at all) and the provider no right to claim them.

Sufficient Benefit

18. The Unified Contract (Crime) makes clear that the focus of the Sufficient Benefit test (in an Advice and Assistance or Advocacy Assistance matter) is on whether to continue work, rather than making an assessment at the start of the case. In particular, the test is not intended to prevent a supplier from providing Advice and Assistance merely because the Client's case has poor prospects of success. For example, a Client may be entitled to advice about appealing out of time even if it becomes clear that there are no legal grounds for pursuing an appeal.
19. Cases which have only minimal benefit to the client ought not to have passed the sufficient benefit test.
20. In all cases where you have determined that the Sufficient Benefit Test is passed, you should set out in a brief file note your reasoning so that it is clear to the Auditor why you have commenced work on that Matter.

Work Conducted at the Police Station

21. Matters which fall within the scope of CDS Direct are outside the scope of the Unified Contract (Crime), unless one of the exceptions at B1.1.1(5) or (7) apply. Auditor should check that no CDS Direct Matters have had Police Station Fixed Fees claimed for them, unless one of the exceptions applies.
22. The Auditor should check that Police Station Fixed Fees are properly claimed in accordance with the provisions at B1.1.21(1)-(13). In particular, that the provider understands the rules concerning multiple investigations, and when it is permissible to claim more than one fixed fee.
23. The Auditor should check that matters not deployed by the DSCC are appropriately logged with the DSCC in accordance with B1.1.13(4). The best evidence that this has been complied with is a reference number from the DSCC recorded on the file.
24. Duty solicitors are obliged under the contract to retain a matter once it has been accepted from the DSCC. They may only be handed back to the DSCC if one of the circumstances under paragraph B1.1.14(11) applies. If a duty solicitor case is handed back to the DSCC, the Auditor should check that the file clearly records the reason (B1.1.14(12)).
25. All requests for Police Station Advice and Assistance have to be made via the DSCC. If instructions are received directly from the Client to attend the police station, check that the DSCC were informed within 48 hours of the appointment at the police station. If instructions are received directly from the client's immediate family or close friend, check that the DSCC were notified before the client was telephoned or seen. (B1.1.13(3) and (4))
26. Check that appropriate use of Accredited Representatives are used for both Duty Solicitor and Own Client work (B1.1.7 and B1.1.8).
27. The Contract has a Key Performance Indicator which requires providers to accept 90% of calls from the DSCC for police station telephone advice and

Police Station Attendance when that provider's duty solicitors are the allocated Rota Duty Solicitors.

Criminal Proceedings

28. Check that claims for Pre-Order Cover, Early Cover or Means Test Form Completion fees area correctly claimed in accordance with the provisions under B2.3.
29. Check that correct standard fees have been claimed in accordance with B2.2.11(8)

Prison Law

30. Check that free-standing advice and assistance given meets the sufficient benefit test. Broadly, the contract allows:
 - advice and assistance to be given to prisoners on legal issues arising out of their treatment in the prison system (however, issues which relate to a potential claim for damages for personal injury, death or damage to property are not in scope, as they fall within CLS funding).
 - advice and assistance to be given to prisoner on issues arising out of their sentence.
 - advice and assistance may be given to a prisoner in respect of a paper based parole board hearing.
 - Advocacy Assistance may be given to a prisoner in respect of a parole board hearing or a disciplinary hearing before the Prison Governor or an Independent Adjudicator.

Associated CLS

31. Where Legal Help, Investigative Help or Legal Representation under a CLS legal aid certificate is given in relation to actual or proposed proceedings relating to a public law challenge to an act or omission or decision of a public body by way of judicial review or under the Human Rights Act 1998, or habeas corpus,

arising from any matter within the Crime SQM, files should be audited using the Unified Contract (Civil) Compliance Audit check list.

32. Where a civil certificate is applied for in restraint proceedings before the client is charged with a criminal offence, check that the civil certificate is discharged if a representation order is granted in respect of related criminal proceedings.

Accurate Reporting

33. It is essential that claims are reported accurately, not just to ensure that the correct payments are made on that particular claim, but also to ensure that relevant information about, for instance, success rates, is recorded – particularly where that information impacts on contractual key performance indicators.
34. In addition, much of the data recorded from claims is also made available for research on the effectiveness of the legal aid scheme – research which could directly impact upon future funding levels.
35. For this reason auditors are asked to consider whether the case has been reported accurately. If it has been inaccurately reported then this would normally be raised with the provider with no particular cost consequences. If however the inaccurate reporting has led, for instance, to the wrong fixed fee being paid then any over / under payment can be adjusted.

The Auditor's Approach

36. It is not for the auditor to second-guess the Provider but to decide whether the decision, say as to incurring a disbursement, was one properly open to a reasonable decision maker at the relevant time, even if not the decision that the auditor would have taken. In this regard the function is very much a review function.
37. However if the auditor comes across a claim which is clearly out of scope or relates to a financially ineligible client, then they must disallow costs on that claim as to allow the claim to be paid would potentially be ultra vires the LSC's powers.