

## **2010 Standard Civil Contract**

### **GUIDE TO DRAFT CIVIL SPECIFICATION (26 March 2010)**

This document is a guide to the Specification of the draft 2010 Standard Civil Contract. The Civil Specification is the key document setting out how civil controlled and licensed work are to be carried out and remunerated from the start of the new Contract in October 2010. Unlike the Standard Terms, the Specification is specific to civil work. From October 2010, the great majority of civil work will be carried out under this Specification. However certain services such as Community Legal Advice, individual case contracts, CLACs and CLANs have their own contractual arrangements.

#### **Status of the draft Specification**

This Specification has been subjected to extensive consultation with representative bodies which started in April 2009. Although many changes were made to the original contract documentation in this process, agreement could not be reached on all issues. However, now that the consultation is complete, this draft is for practical purposes final. This includes the Family Specification which implements the new family fee schemes coming into force in October. Minor amendments have been made to paragraphs 7.69 and 7.102 of the Family Specification in response to consultation on the CLS (Funding) (Amendment No 2) Order 2010. That Order refers to this version of the Specification.

Between now and the time contracts come to be signed next year there are likely to be some minor changes in the documentation. For example, changes may be needed for any new legislation affecting legal aid within the next few months. However we think it unlikely that major changes will be needed to the text of the draft civil specification. You are therefore entitled to assume that the current text will not change materially during the tendering process or before contracts are signed.

#### **What has changed?**

Although the structure of the new Specification is different from the Specification of the Unified Contract, much of the content in substance remains unchanged. However there have been some very significant changes to reflect policy developments since the Unified Contract. The most important sources of changes for the 2010 Contract are the following:

- (i) Civil Bid Rounds for 2010 Contracts – Consultation outcome. This consultation, full details of which are still available on our website, set out our detailed proposals for procuring Civil Contracts in 2010. As well as covering the tendering process this consultation sets out a range of minimum service standards which must be met by legal aid providers, covering matters such as range of services to be provided, minimum contract size, and presence in each procurement area. These requirements are now reflected in section 2 of the Specification.

- (ii) Family fees. The consultation response on reform of family fees from 2010 was published on 21 October 2009. Full details are available on the website. From 2010 most private law family cases will be covered by standard fees at the licensed work level and advocacy services will be covered by the new Family Advocacy Scheme which is applicable to both solicitors and barristers. All these schemes are reflected in the substantially revised Family Specification.
- (iii) Supervisors' Standards. As we will in future be accepting Lexcel as an alternative quality standard to the SQM, the detailed Supervisors' legal competence standards previously set out in the SQM have now moved to form part of the Civil Contract. General Supervisor Standards covering how to qualify as a Supervisor and the conduct of supervision are in section 2 of the Specification. Every category of law now has specific rules set out in section 10 that include the relevant legal competence standard. Following input from peer reviewers and representative bodies there have been changes to some of the standards but few of them significant.
- (iv) Key Performance Indicators. The bid round consultation outcome confirmed that from 2010 provider KPIs would become part of the Civil Contract. The details of all KPIs are therefore set out in section 2 of the Specification as explained below.
- (v) Out-takes from Standard Terms. Now that the Standard Terms are common to both civil and criminal, the civil-specific parts of the Unified Contract Standard Terms have now moved over to the Specification.

### **Structure of the Specification**

We have significantly re-structured the Specification since the Unified Contract. In part this is to accommodate the new Service Standards deriving from the Bid Round consultation and elsewhere, but it is also intended to make the Specification easier to understand and navigate.

We have therefore set out separately the rules relating to Controlled Work and Licensed Work, which were to some extent intermingled under the Unified Contract, and have separated out procedural and remuneration provisions. This leaves us with a Specification with six main general sections (plus the Payment Annex):

1. General provisions – the structure and scope of the scheme, the schedule and various provisions equally applicable to Controlled and Licensed work;
2. Service Standards – all the new standards from the Bid Round consultation and KPIs, plus rules on exclusive categories and Supervisor Standards taken from the SQM;
3. Carrying out Controlled Work – including all the Matter Start rules;
4. Remuneration for Controlled Work;
5. Carrying out licensed work; and
6. Remuneration for licensed work.

For the category specific provisions we have separate sections of the Specification for Family, Immigration and Mental Health, including the relevant category specific fee schemes. All other category specific rules (including supervisor requirements) are contained in Section 10.

## **Section 1 - General Provisions**

Most of section 1 is self-explanatory and derives either from the Unified Contract Specification or the Bid Round consultation outcome. However, it is worth highlighting the new rules relating to the Schedule and Matter Starts (MS).

Although the Unified Contract had some rules regarding the power to issue extra MS during a Schedule, in a procurement landscape it is important to have greater certainty about the limits on new awards. We have therefore set out the rules more clearly, including when it would be appropriate or necessary to hold an open competition, allowing for new entrants to bid for available MS. At paragraphs 1.31 to 1.34 we have set out some principles or circumstances in which allocations will be appropriate, for example, where a provider is “running hot” i.e. running out of MS because clients are choosing that provider compared to others in the region.

The power to issue Supplementary MS is subject to a “50% rule”. A provider can receive, in addition to their initial Matter Start allocation a further discretionary allocation of up to 50% of the original figure in any category, calculated either by reference to that provider’s original allocation or the median original allocation in that procurement area, whichever is greater.

We have retained the important power to reduce MS limits on notice where providers are not making use of them, so that MS can be redistributed where necessary. However we have not retained the powers to reduce MS on the grounds of low Hourly Rates values or high exceptional case costs although those issues are subject to the new provisions on KPIs.

We have retained the 80% guarantee for next Schedules and have extended the guarantee to the Immigration and Personal Injury Categories but have recognised that this should be subject to any budget direction from ministers. This appears prudent in the current financial climate.

Finally, we have not retained in the Contract a specific power to introduce MS for Licensed Work during the life of this Contract.

## **Section 2 - Service Standards**

Much of the text of Section 2 did not appear in the Unified Contract and derives from the Bid Round consultation outcome. This sets out all the new requirements of minimum service combinations, minimum Matter Starts, range of services to be provided and presence in the procurement area. It is important to note that these provisions of the Contract set out minimum standards. As made clear at paragraph 2.2 additional standards may be required in office schedules to reflect standards promised as part of the tendering process.

Paragraph 2.4 is important in that it sets out the general right to undertake Contract work which from 2010 will depend on receiving “schedule authorisation” to carry out work in that category or being permitted to carry it out as tolerance work – see further paragraphs 2.39 to 2.45.

There are also new rules on the use of agents, counsel and experts which should be read with Clause 3 of the Standard Terms. Note that under this and paragraph 2.37 a self-employed agent may act as a caseworker under this Contract provided detailed supervision arrangements are in place (paragraph 2.8).

The generic Supervisor Standards at paragraph 2.20 to 2.34 derive from those in the SQM in force under the 2007 contract but have been updated and clarified during consultation.

## **Section 2 – Key Performance Indicators (“KPIs”)**

Paragraph 2.70 onwards sets out the detailed provider KPIs applicable either from 2010 or, in the case of KPIs which are new, April 2012. The KPIs have been developed from existing provisions and have been the subject of consultation with representative bodies.

KPIs are unlike most other contractual obligations in that they typically involve performance and outcomes which are not entirely within the control of providers. Because of this any breach of the KPI is subject to special procedural safeguards contained in Clause 11 of the Standard Terms. These will ensure that breach of a KPI will not automatically lead to contract sanctions but more usually to dialogue or an action plan for future work. Fundamentally, KPIs are aimed at ensuring good quality services and outcomes for the client and value for the fund, rather than as a route to imposing contract sanctions. However we need to reserve the right to apply sanctions where providers materially or persistently fail to operate within the KPIs or terms of any action plan.

The scope and definition of KPIs are set out in detail on the face of the Contract to ensure that they are consistently and objectively applied and will not be varied during the life of the contract except via the amendment provisions in the Standard Terms. Some KPI thresholds have been adapted to better reflect differing Funding Code criteria relating to licensed work.

New KPIs have also been included concerning minimum use of ADR, successful damages recovery in clinical negligence and police claims and the importance of early resolution of family disputes. These new provisions will not however be enforceable under the Contract until 1 April 2012.

## **Section 3 – Carrying Out Controlled Work**

Most of the provisions in this section are similar to those in the Unified Contract. We have updated the Matter Start Rules at paragraphs 3.40 to 3.60. These are largely unchanged in substance. The fundamental rule is at 3.42 which emphasises the need for problems to be genuinely separate and distinct before a second Matter can be opened for the same client.

Note that we propose to delete the rule about Controlled Work carried out by a previous provider from the Funding Code Procedures (currently Rule B9) as this sits more readily within the Matter Start rules, paragraph 3.47 (as amended).

Provisions relating to the instruction of counsel at the Legal Help level have been expanded:

- (i) To confirm that counsel's fees cannot be taken into account in calculating whether a Matter reaches the exceptional case threshold; and

- (ii) To ensure that whatever fee for counsel is claimed as part of an exceptional case claim reflects the agreed obligation between the provider and counsel.

We have adapted the rules about when a client needs to personally attend your office for face-to-face advice to make them more flexible. There is now a much wider definition of “good reason” at paragraph 3.15 but this is subject to an important restriction that the total volume of Matters provided through postal, telephone or email application must not exceed 10% of the total volume of Matters within the schedule period (paragraph 3.28).

#### **Section 4 – Remuneration for Controlled Work**

There are no major changes to remuneration for Controlled Work or for Non-Family Licensed Work but the following should be noted:

1. The rules on setting, amending and reconciling Standard Monthly Payments have moved from the Standard Terms to the Specification. As now, it is proposed that the detail of the rules will be in a separate SMP protocol published on the website the contents of which are subject to discussions with the representative bodies.
2. The list of non-allowable disbursements has been extended. This, in part, reflects the amendments to the Funding Code Guidance in relation to non-allowable disbursements in family proceedings. Further amendments confirm that certain other payments, which have been the subject of enquiries to the LSC, cannot be claimed as disbursements: fees for implementing pension sharing orders and fees, e.g. in relation to registration of a Lasting Power of Attorney, to the Office of the Public Guardian.
3. The time of claiming for Controlled Work Matters is stated to be 6 months rather than 3 months. This reflects an agreement reached in consultation in relation to the October 2007 Specification.
4. We have clarified the position in relation to case balancing where costs are recoverable in respect of work at the Controlled Work level in non-family matters. Previously, this has been addressed only in relation to family proceedings. These provisions have been substantially further amended following consultation.

Where the costs are recovered at the Controlled Work level, the provider must elect whether to retain costs recovered or claim from the fund if costs have been recovered in full. However, if there has only been partial recovery of costs, providers can claim either the standard/graduated fees or the exceptional case costs for which costs have not been recovered inter partes, as appropriate.

Where the costs award or agreement has been made after the issue of a certificate, the position in relation to the costs at the controlled work level depends on whether these costs were claimable as an Exceptional Case. Where an Exceptional Case has been claimed, we will only recoup prescribed rate costs for the work covered by the inter partes costs. This ensures that providers are not prejudiced by inter partes recovery for controlled work and take the benefit of it. Where the controlled work costs were claimed as a standard fee, we will recoup whichever is lower of the relevant fee or the costs recovered. This ensures that neither the provider nor (via the statutory charge) the client is penalised by inter partes recovery.

## **Section 5 – Carrying out Licensed Work**

The general rule is that all decisions relating to Controlled Work are devolved unless the Contract specifies otherwise, whereas for Licensed Work the presumption is that most decisions are not devolved. We have included wide powers to extend devolved powers in Licensed Work particularly with a view to facilitating the roll-out of Delivery Transformation during the life of this Contract. This will give flexibility to extend devolved powers as required on a regional or case type basis in light of assessments of fund risk.

In one respect there is a potential narrowing of devolved powers. There is no guaranteed power to grant an emergency certificate for judicial review other than for certain urgent homelessness matters. Under the Unified Contract this restriction only applied in immigration judicial reviews. Wide powers do however exist to extend devolved powers for judicial review on a provider-by-provider basis following a risk assessment process.

The provision permitting the costs appeals process to be followed on a refusal of prior authority has been removed, because of the administrative burden this places on the Commission and the potential delays this may create. Where prior authority has been refused, it is of course still possible to seek to justify the costs on assessment.

Provisions have been added in relation to the statutory charge. These confirm the fact that the client's certificate does not cover subsequent representations against a decision of the Commission in relation to the statutory charge (which would of course tend to increase the amount of the client's charge liability). It is also stated expressly that providers should not sanction arrangements that might prevent or hinder enforcement of the statutory charge (for instance by agreeing consent orders allowing payment of a client's recovery directly to a third party), and must not provide misleading information in relation to the client's recovery or preservation of property in the case.

References are made in sections 5 and 6 to the possible roll out of Delivery Transformation provisions in relation to applications and claims for Licensed Work.

## **Section 6 – Remuneration for Licensed Work**

Provisions relating to payment of claims in respect of Licensed Work, including claims for payments on account, have been moved from the Standard Terms to this section of the Specification.

We have removed from the Contract the presumption that bills in excess of £2,500 should be assessed by the Court. We intend that most assessments will be carried out by the Legal Services Commission, which will save court fees and result in faster payment. However this reform is still under discussion with the Court Service and the way in which the powers will operate will be made clear prior to the 2010 Contract.

Express provision for disallowance of costs for late claiming has been reintroduced in circumstances where the client has a financial interest in the case. Reference had been previously made in the costs assessment guidance to the fact that a claim might be disallowed where the failure to submit a claim delayed payment to the client of damages or contributions. Additionally, delay in submitting a claim may prejudice the Commission's position where a certificate has been revoked, given that the

limitation period for recovery from the client commences at the date of revocation itself.

The requirement for prior authority for instruction of counsel in the magistrates' court has now been removed.

Provision is made for balancing of any costs claimed in respect of detailed assessment proceedings with costs recovered inter partes for the substantive proceedings. That is to ensure that the recovery of the costs of the detailed assessment proceedings themselves is pursued from the paying party.

Like the Unified Contract Specification, Section 6 contains some provisions on payments on account and final payments to counsel.

### **Section 7 – Family Specification**

The Family Specification has been substantially updated and expanded to cover the new fee schemes recently announced for private law licensed work and for advocacy in both public and private law cases, covering both solicitors and barristers. In relation to counsel the new Family Advocacy Scheme replaces the current Family Graduated Fee scheme and is also confirmed by the CLS(Funding)(Amendment No 2) Order 2010 which amends the 2007 Funding Order to give effect to the new schemes.

Full details of the new family fee schemes are set out in the consultation outcome which can be found on our website and are not repeated here.

In addition to the new fee schemes, the draft Family Specification contains revised family service standards (see paragraphs 7.151 to 7.157) which have also been the subject of discussion with representative bodies.

### **Section 8 – Immigration Specification**

Immigration is a complex area and the previous Specification had become unwieldy. We have therefore updated the section and shortened it significantly. We have re-structured the Immigration Specification to follow the format of the general rules. There have been some drafting amendments intended to clarify the existing rules and we have also removed a number of provisions which whilst perhaps helpful did not expand on the general Specification rules or guidance.

The Immigration Specification now includes a new right to claim a stage payment in relation to disbursements six months after the start of the case or the previous billing point (see paragraph 8.110).

The proposed Immigration Service Standards from the Consultation paper have been incorporated, including the new requirements for caseworker ratios.

The Immigration Specification reflects the transfer of immigration cases to the new Tribunal system under the Tribunals and Courts Enforcement Act 2007. This change has been subject to recent consultation by the Ministry of Justice and will also affect the existing Unified Contract when the new system comes early in 2010.

The most significant change of the new framework relates to appeals to the Upper Tribunal. Under the current Unified Contract hourly rates are payable for these appeals but no payment may be claimed at all unless the judge makes an order to that effect. Under the new system all appeals to the Upper Tribunal, which will take the place of the previous review and reconsideration process, will be subject to an application for permission; it is this permission hurdle which will future govern the right to payment. Therefore the rules now provide that payment for appeals is contingent upon permission being granted (save for fast track cases or appeals brought by the UK BA). For those appeals where payment is at risk but permission is granted by the Upper Tribunal, higher hourly rates will be payable.

The Immigration Specification also contains rules for work subject to exclusive schedule arrangements relating to immigration removal centres and the early legal advice process (ELAP) scheme.

### **Section 9 – Mental Health Specification**

The Mental Health Specification has been amended to incorporate the policy proposals in the Civil Bid Rounds for 2010 Consultation and should be read in conjunction with Section 2 – Service Standards.

As for Immigration, there is a new right to apply for a payment on account of Controlled Work disbursements after 6 months (see paragraph 9.50).

The Supervisor Standard has been included. In addition there are a number of minor amendments which seek to incorporate clarifications issued by the Commission's Mental Health Unit.

### **Section 10 – Other Category Specific Rules**

This section is primarily an amalgamation of existing category specific rules in sections 15 to 16 of the current Unified Contract Specification with the category specific Supervisor Standards from the SQM.

New standards have been introduced for Actions Against the Police, etc (Abuse in Care) and Consumer (Professional Negligence) and (Disability Discrimination) to ensure that providers working in these sub-categories are able to demonstrate their competence. These will be alternatives to the general standard in these categories although we do propose that Supervisors in Consumer should satisfy one of the specialist standards from October 2012. Other notable changes are:

- Following consultation with representative bodies, an amendment was made to the housing supervisor standard to remove the obligation to have undertaken legal representation in a disrepair case, as this type of work does not arise in all parts of England and Wales.
- In Actions Against the Police, etc sections a, c, d, e have been incorporated into one group and the wording updated. This reflects past revisions to the matter type codes and ensures that the standard cannot be met with a narrow range of cases.
- The MH1 and MH2 Mental Health standards have been amalgamated.

- In Employment Section A 'Wrongful Dismissal' has been incorporated into the 'Unfair Dismissal' section.

Where necessary in the view of peer reviewers and representative bodies, other standards have been updated for minor changes in law, practice or terminology.

At paragraphs 10.32 to 10.70 we have updated and expanded the rules of the Housing Possession Court Duty Scheme, which is also subject to exclusive schedule arrangements, clarifying the relationship between work under these schemes and mainstream housing work.

### **Payment Annex**

A fully revised payment annex contains comprehensive payables for all the standard fees, graduated fees and hourly rates payable to civil controlled and licensed work under the new Contract. The majority of the changes relate to the new family fee schemes.

Other points to note are the inclusion of new figures for personal injury Legal Help which can now be carried out as tolerance work as announced in the Phase 1 Fee Scheme. Immigration fees are also set out more clearly including those relating to detained cases. The different hourly rates applicable in immigration cases, which were previously dealt with by transitional provisions under the Unified Contract, are now set out in separate tables 8a, b and c of the Payment Annex.