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Head of Criminal Department

4 May 2004

Dear Sir or Madam,

**General Criminal Contract – Notification of Important Change from 17 May 2004**

I have recently written to you enclosing Contract amendments to be implemented on 17 May 2004. These changes will be introduced as planned, however, the Department for Constitutional Affairs (DCA) has agreed a further change which will enable a claim to be made for up to one hours work in circumstances where an application for a Representation Order is made and subsequently refused. The work could include advice, preparation, attendance, completing an application for a Representation Order and, if necessary, advocacy at an early hearing.

This decision has been taken to protect suppliers from doing work in good faith and then being unable to claim for it. It has been made in response to issues raised during consultation and further Contract amendments will follow shortly. To avoid any delay, misunderstanding or confusion I am writing to all CDS Suppliers now to explain the details of the change. This letter may be relied upon by suppliers pending implementation of the contract amendment.

From 17 May 2004, with the exception of that provided under the Court Duty Solicitor Scheme, post charge Advice and Assistance and Advocacy Assistance for early hearings in the Criminal Proceedings Class of Work, will be removed from the scope of the Criminal Defence Service. However, amendments to the General Criminal Contract from that date will enable advice and representation provided prior to the grant of a Representation Order to be included in the claim made under that Order, if certain conditions are met (reinstatement of former Regulation 44(7) – Legal Aid in Criminal and Care Proceedings (General) Regulations 1989). These changes are set out in the Contract amendment notice which you should have received already.

In the majority of cases it will be clear whether the Interests of Justice test will be met and a Representation Order granted, however in some cases the Representation Order will be refused and there is therefore a risk that work done on behalf of the client would not be remunerated. Currently 95% of applications for Representation Orders are granted and the evidence suggests that CDS Suppliers are good at predicting which cases will attract a Representation Order.

This change is intended to act as an insurance policy which will enable a limited amount of work to be claimed in the event that a Representation Order is subsequently refused.

Details of how this arrangement will operate are detailed below:

- If an application for a Representation Order is refused then a claim can be submitted on form CDS6 for work done prior to receiving notification that the Order had been refused.
- The claim can include work done as preparation, advocacy, letters, telephone calls and travel and waiting at the Magistrates' Court Representation rates (GCC, Part E, table 3.5). Disbursements may be included as part of the claim where reasonably incurred.
- Any claim will be capped at a maximum which is equivalent to one hours work at preparation rates under a Representation Order. Claims will be capped at a maximum of £49.70 outside London and £52.55 in London (excluding VAT). The cap includes any travel, waiting and disbursements and these items may not be claimed separately.
- No financial test will apply to this work.
- The merits test that will apply to this work is the Interests of Justice Test. A claim may be submitted where the solicitor assesses that the statutory test is met (Schedule 3 Access to Justice Act 1999) but the application is subsequently refused by the Court. The test is reproduced below:

In deciding what the interests of justice consist of in relation to any individual, the following factors must be taken into account-

- (a) whether the individual would, if any matter arising in the proceedings is decided against him, be likely to lose his liberty or livelihood or suffer serious damage to his reputation,
- (b) whether the determination of any matter arising in the proceedings may involve consideration of a substantial question of law,
- (c) whether the individual may be unable to understand the proceedings or to state his own case,
- (d) whether the proceedings may involve the tracing, interviewing or expert cross-examination of witnesses on behalf of the individual, and
- (e) whether it is in the interests of another person that the individual be represented.

- A copy of the notification of refusal of the Representation Order must be retained on the file for audit purposes. In the absence of this the claim may be disallowed.
- In cases where a Representation Order is granted all work in the Criminal Proceedings Class must be included in a single standard fee claim under the Order.

These changes will be implemented from 1 July 2004 but will apply retrospectively from 17 May 2004. The proposed Contract amendments will shortly be posted on our website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk) and will be subject to consultation with the Law Society and other professional bodies.

A new Claim Code 2P has been allocated for all claims submitted under this arrangement.

This change is being introduced to reduce the risk of non payment for work done in good faith in circumstances where it is anticipated that there is a realistic prospect of a Representation Order being granted and to avoid delays in the court process. It is not intended to generally replace post charge Advice and Assistance or Advocacy Assistance for early hearings which have been removed from scope following consultation by the DCA.

We will, in conjunction with the DCA, monitor any changes in the volume of applications being made for Representation Orders to individual Courts and any changes in the proportion of Representation Orders refused. If changes in behaviour are identified which indicate abuse of this concession then the position would need to be reviewed either generally or in respect of individual firms.

The current General Criminal Contract has been extended by three months to 30 June 2004 to allow further time to consider the substantive responses received following consultation. A full copy of the Standard Terms and Contract Specification will be provided to all CDS Suppliers with their Contract for Signature. The documents should be received by 24 May 2004.

Yours faithfully

A handwritten signature in cursive script that reads "Richard Collins".

Richard Collins  
**Director, Criminal Defence Service**