

# FOCUS

## ON CDS

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- **MAGISTRATES' COURT MEANS TESTING**

FOR MORE INFORMATION ON THE PROVISION IN THE CRIMINAL DEFENCE SERVICE BILL REGARDING THE INTRODUCTION OF MEANS TESTING IN THE MAGISTRATES' COURT, SEE PAGE 02.

- **CDS DIRECT**

FOR DETAILS OF HOW THE COMMISSION INTENDS TO PROCEED FOLLOWING THE CONSULTATION PAPER ON CDS DIRECT, PLEASE TURN TO PAGE 03.

- **POLICE STATION REPRESENTATIVES AND SOLICITORS**

THE COMMISSION HAS RECENTLY ISSUED A CONSULTATION PAPER PROPOSING CHANGES AFFECTING POLICE STATION REPRESENTATIVES. FOR DETAILS TURN TO PAGE 05.

- **ANTI-SOCIAL BEHAVIOUR ORDERS**

FOR A USEFUL REFERENCE GUIDE TO FUNDING ARRANGEMENTS FOR ANTI-SOCIAL BEHAVIOUR ORDERS, SEE PAGE 07.



# CRIMINAL COMPETITIVE TENDERING

**We announced our intention to pilot managed competition through competitive tendering for criminal lower CDS services in London last year.**

Our overall aim is to improve both the quality of criminal work for legal aid clients and value for money.

Work is now well advanced on the development of a consultation paper setting out our thinking. The paper will need to be approved by both the Commission and Ministers at the Department for Constitutional Affairs. Following this process it is anticipated that the consultation paper will be published early in the new year.

A copy of the paper will be sent to all suppliers nationally, both criminal and civil, professional bodies and other key stakeholders; a three month consultation period will follow.

General Criminal Contracts awarded to all London firms are due to expire on 30 June 2005 while our current estimate of the earliest date when managed competition could be implemented in London is late 2005. To bridge this gap we intend to offer an extension to existing contracts and will be writing to suppliers to confirm this.

We will publish a provisional timetable with the consultation paper and a final timetable following consultation. We will arrange a series of meetings with professional bodies and other key stakeholders as part of the consultation process and look forward to working closely with interested parties to ensure that this process is managed in an open and constructive way.

For further information please contact Freddie Hurlston on 020 7759 0081 or e-mail [freddie.hurlston@legalservices.gov.uk](mailto:freddie.hurlston@legalservices.gov.uk)

# MEANS TESTING IN MAGISTRATES' COURTS

**The Criminal Defence Service Bill has commenced its passage through Parliament, having been included in the Queen's Speech in November.**

The main provision in the Bill is the re-introduction of a financial eligibility (means) test in the magistrates' court in determining the grant of a right to publicly funded representation. This is in support of the widely supported principle that those who can afford to pay for the cost of their own criminal defence should do so, if convicted.

The proposals to enact this provision were contained in a Department for Constitutional Affairs Consultation paper, the consultation period for which ran from May to August 2004. A summary of the proposals was contained in Focus on CDS, issue 15, in August 2004.

The DCA and the Legal Services Commission have considered the responses to the consultation, including the scrutiny from the Constitutional Affairs Select Committee, and are grateful for the helpful comments made.

We have refined the proposals in the light of comments received and they are now envisaged to take the following form:

- Responsibility for conducting the means test, together with the existing interests of justice test, will be placed with the magistrates' courts.
- The means test will be conducted as soon as a legal aid application is made, based on a simple assessment of gross income, with a single deduction for average costs of living based on the individual circumstances of the applicant. There will be no system of contributions and the system would only apply in the magistrates' court.
- Defendants would be able to apply for legal aid in the form of a non-means tested advice and assistance scheme running up to and including the first hearing, at which time a means tested representation order would come into force. This involves the re-introduction of a form of post charge advocacy assistance for early hearings.

A number of the responses to the consultation expressed concerns that testing financial eligibility would mean additional bureaucracy for the profession and delays to the court system. We aim to ensure that both of these are minimised. Solicitors will not be required to administer the means test, merely to complete the means information on the application form and provide simple evidence of income.

If we are able to re-introduce non-means tested cover running up to and including the first hearing, this will provide sufficient opportunity for the court to consider merits and means and determine any application for a Representation Order before trial.

We will be establishing a joint project team with the Court Service to take the changes forward. We anticipate the means test to be in operation no earlier than October 2005 and we will keep stakeholders updated with developments.

# CDS DIRECT

The Legal Services Commission has now considered the helpful and detailed responses to its consultation paper published in May 2004. The consultation closed on 16 June and we are grateful to those suppliers and professional bodies who took the time to respond.

The Commission has consulted further with the professional bodies as it intends to proceed on the following basis:

- The pilot will cover the Liverpool region (all schemes except the Community Justice Court) and the Boston scheme for all police station duty solicitor work excluding indictable only cases and those cases where the time of interview is known at the point that the request for a duty solicitor is made. The London region will no longer be included in the pilot covering all duty work but will be included in the national pilot for matters limited to telephone advice only (see below).
- No payment for police station telephone advice will be available if CDS Direct has been involved in the matter.
- The pilot will also cover all duty solicitor work nationally (including the London region) where the matter is restricted to telephone advice only, eg client is detained in relation to a non-imprisonable offence (General Criminal Contract Part B, 8.2.17). If one of the exceptions applies, eg an interview or identification procedure is going to take place (General Criminal Contract Part B, 8.2.18), the matter will

be referred to a duty solicitor by the Duty Solicitor Call Centre.

- The Commission will investigate the option of including the provision of immigration advice for clients detained at the police station until an interview for a criminal offence is to take place.
- The Commission has considered and responded to the points made in the consultation responses and published a further consultation document to the professional bodies. We will also be inviting representatives of those bodies to meet with us to discuss any detailed concerns that remain.
- It is intended that the pilot will commence in May 2005 and last for at least six months.
- A detailed summary of the responses to the consultation has been sent to all respondents and is also available on our website.

The Commission will consider the responses made by the professional bodies and announce its decision in January 2005.

If you have any queries please contact John Sirodcar at [john.sirodcar@legalservices.gov.uk](mailto:john.sirodcar@legalservices.gov.uk)

## VERY HIGH COST CASES REVIEW

Various changes to the Very High Cost Cases (VHCC) system were made in August 2004 as a result of the VHCC Review.

Among other changes, the rates for category 4 cases were raised so that they are now the same as for category 3 cases, and terrorism cases are now automatically in category 1. There are also changes to the Individual Case Contract, Specification and Barristers' Acceptance Form to allow payment in certain circumstances for work that has not been authorised in advance. These changes took effect for all new and existing contracts as of 2 August 2004.

More fundamentally, the definition of a VHCC is now a case with regard to which if the case proceeds to trial, that trial would be likely to last for 41 days or longer. This replaces the original 25-day criterion. The alternative criterion relating to the likely defence costs has been deleted.

The new definition applies to all cases in which a Representation Order is made on or after 2 August 2004. This affects solicitors' notification requirements for these cases only. For cases older than that, solicitors are still obliged to notify the Complex Crime Unit of cases that would fit the old criteria.

If you require any additional information please contact Robert Heard, Complex Crime Unit at [robert.heard@legalservices.gov.uk](mailto:robert.heard@legalservices.gov.uk)

# WARNING!

## *Caution must be exercised when advising clients that judicial review is an appropriate challenge of a decision to prosecute in criminal cases.*

The Legal Services Commission intends shortly to refine its guidance on judicial review (section 7 of the Funding Code) in light of the judgments and directions made in the cases of *Kebilene (R v DPP, ex parte Kebilene [1999] UKHL 43, [2000] 2 AC 326, [1999] 4 All ER 801)* and *Pepushi (R (on the application of Pepushi) v CPS [2004] EWHC 798 (Admin))*.

The core of both judgments and the judicial comments, is that the Commission and: '... those advising prospective applicants for judicial review should always realise that judicial review is very rarely appropriate where an alternative remedy is available. If such a remedy is available, a judicial review application should not be pursued.' (See judgment of *Pepushi* at para 50.)

The judgment also specifically mentioned that in criminal cases the proper course to follow would be: '... to take the point in accordance with the procedures of the Criminal

Courts. In the Crown Court that would ordinarily be by way of defence in the Crown Court and if necessary on appeal to the Court of Appeal Criminal Division.' (See para 49.)

The case of *Kebilene* dealt specifically with the question of the appropriateness of reviewing specific prosecutions on the basis that the national legislation concerned was incompatible with the convention.

At the Court of Appeal, Lord Bingham of Cornhill CJ and Laws LJ agreed that: '... the national court is not precluded from considering the issue of compatibility before completion of the trial ... In principle I can see no reason why, in a clear case where the facts of the case are of no importance, a decision that a provision is incompatible should not be capable of being taken at a very early stage.'

However, the House of Lords overruled the Court of Appeal. Lord Steyn held: '... that absent dishonesty or mala fides or an

exceptional circumstance, the decision of the DPP to consent to the prosecution of the respondents is not amenable to judicial review.'

In accordance with Funding Code criteria 7.5.2 and 7.5.3, the presumption in favour of funding is raised where permission has been granted by the court. This was the position in the case of *Pepushi*. Such a presumption is clearly appropriate. However, the Commission welcomes the greater guidance that these two judgments provide to the courts on when it is appropriate to grant permission to review. We hope the judgments in these cases will ensure that permission is not granted when the action in question is ill founded.

In cases where permission has not been granted, practitioners authorised with devolved powers to grant funding for judicial review should take into account the guidance provided by these two cases when exercising their powers.

## **FUNDING OF APPEALS BY WAY OF CASE STATED UNDER THE GENERAL CRIMINAL CONTRACT**

### **Appeals by way of case stated are mainstream criminal proceedings within section 12(2)(b) of the Access to Justice Act 1999.**

As such they are not prescribed as incidental to the magistrates' court proceedings and must therefore be covered by a separate application to the High Court for a representation order. The original magistrates' court order covers the provision of verbal and written advice on appeal. It also covers making an application for funding for

representation in the High Court, ie time spent completing the legal aid application form and any other work necessary before the grant of the order in the High Court. The application can be made on Form A.

This work is undertaken within the Appeals and Reviews Class under the General Criminal Contract.

If you require any additional information please contact Denise Bradshaw at [denise.bradshaw@legalservices.gov.uk](mailto:denise.bradshaw@legalservices.gov.uk)

# CONSULTATION PAPER

## POLICE STATION REPRESENTATIVES AND SOLICITORS

The Legal Services Commission has issued a consultation paper to professional bodies proposing a number of changes that affect police station representatives. The changes can be grouped under four main areas:

1. A new requirement that an individual wishing to register on the Police Station Register should pass, or be exempt from, the legal examination part of the assessment process for a police station representative prior to registration as a probationary representative.
  2. A requirement that a solicitor must undertake the Police Station Qualification (PSQ) accreditation process in order to undertake police station attendances.
  3. Changes to the Police Station Register Arrangements 2001.
  4. A requirement that if work is undertaken by an accredited representative, payment should be treated as a disbursement and capped at 50% of the hourly rates. This will apply for all attendances save for those undertaken for the firm at which the accredited representative's supervising solicitor is based.
- The Commission believes that these proposals have the potential to improve service to detained clients as well as improving value for money. Such action will directly contribute to two of the CDS's objectives:
- To ensure effective control over CDS expenditure, and progressively improve the value for money of the criminal defence services it provides and purchases.
  - To ensure that the CDS contributes fully to achieving the overall Criminal Justice System (CJS) strategic plan, including by working with the other CJS agencies.
- The consultation paper is available on our website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk) and responses are welcomed. The closing date is 10 January 2005. If you require any additional information please contact Will Hayden at [william.hayden@legalservices.gov.uk](mailto:william.hayden@legalservices.gov.uk)

## AMENDMENTS TO THE GENERAL CRIMINAL CONTRACT: OCTOBER 2004

**Four amendments to the General Criminal Contract came into effect in October 2004. The first change was to the Standard Terms and took effect on 1 October; the remainder are to the Contract Specification and took effect on 31 October 2004.**

They can be summarised as follows:

1. Three Clauses inserted into the Standard Terms in June 2004, Clauses 16.19 to 16.19B, (dealing with the situation where The Law Society intervenes or a receiver is appointed by the firm) took effect from 1 October 2004, with one minor amendment to Clause 16.19.
  2. The provisions on the scope of the Court Duty Solicitor Service have been amended. This allows the duty solicitor to represent clients who have the benefit of a Representation Order on a non-business day, if the duty solicitor is unable to determine whether such an Order exists or cannot contact the assigned supplier. This amendment was made to prevent clients being left without representation in such circumstances and does not affect any relevant professional conduct rules. (General Criminal Contract Part B 8.5.2).
  3. Various changes have been made to the Costs Compliance Appeal Process following detailed and positive discussions with The Law Society and the Legal Aid Practitioners Group. The changes came into effect on 31 October 2004. (General Criminal Contract Part C 1.1, 1.10-13). The Legal Services Commission has also agreed to introduce new customer service targets from the same date. (See *Focus* 46, p 11.)
  4. New provisions have been introduced allowing 'serious offence rates' to be paid to duty solicitors who attend personally at the police station to deal with certain cases. These are where the client is under arrest for one of a specified list of offences or is detained under section 41 of the Terrorism Act 2000, and the case has been referred by the Duty Solicitor Call Centre (or where the Call Centre has been notified if the case has been accepted whilst the duty solicitor is already at the police station). The category does not affect rates for travel, waiting, telephone advice or own solicitor attendances, including those after the end of the initial period of custody. (General Criminal Contract Part E 2.2).
- A detailed Contract Amendment Notice was sent to suppliers during September and is available on the Commission's website at [www.legalservices.gov.uk](http://www.legalservices.gov.uk).
- Please contact your regional office if you have any queries on the above changes.



# STOP PRESS CLAIMING ISSUES

A recent check of CDS6s submitted to our Processing Centres has identified a number of claiming issues. The details are provided below – please ensure anyone involved with preparing claims for submission to the Legal Services Commission is aware of them.

## NEW OUTCOME CODES

New outcome codes were introduced for all cases finished on or after 17 May 2004. A check of recently submitted claims has identified that a number of suppliers are not using the new codes. It is essential that all suppliers correctly use the new codes. The new codes and guidance on when individual codes should be used is contained in Volume 4 of the LSC Manual (Part E, section 3.2).

## IMPLEMENTATION OF SCOPE CHANGES – 17 MAY 2004

A number of amendments were introduced from 17 May 2004 which changed the scope of the General Criminal Contract. A review of recent claims has identified that a number of suppliers appear to be claiming incorrectly. Guidance on claim codes is contained in Volume 4 of the LSC Manual (Part E, section 3.1). Transitional arrangements for the changes are contained in the General Criminal Contract (Part B, 1.5).

The following claim codes are affected:

### 2A – FREE STANDING ADVICE AND ASSISTANCE (CRIMINAL PROCEEDINGS)

With effect from 17 May 2004, Advice and Assistance in the Criminal Proceedings Class was abolished. This claim code may only be used for Advice and Assistance work undertaken prior to 17 May 2004.

### 2B – EARLY HEARING – INCLUDING ADVICE AND ASSISTANCE WHERE GIVEN (CRIMINAL PROCEEDINGS)

With effect from 17 May 2004, Advocacy Assistance for early hearings was abolished. This claim code may only be used for early hearings that took place prior to 17 May 2004.

### 2P – PRE-ORDER COVER (CRIMINAL PROCEEDINGS)

This claim code was introduced from 17 May 2004 for Pre-Order Cover claims only. This claim code must not be used for any other claims. The circumstances in which Pre-Order Cover may be claimed are detailed in the General Criminal Contract (Part B, 5.13).

Pre-Order Cover Claims are capped at a level equivalent to one hour at preparation rates. The maximum claims that may be submitted against this code are as follows:

<b>National</b>	<b>£49.70 (excluding VAT)</b>	<b>£58.40 (including VAT)</b>
<b>London</b>	<b>£52.55 (excluding VAT)</b>	<b>£61.75 (including VAT)</b>

Any enquiries on the claiming under the General Criminal Contract should be directed to the regional office responsible for managing your contract.

# ANTI-SOCIAL BEHAVIOUR ORDERS

An article was published in Focus on CDS 15 (August 2004), p 05, on funding Anti-social Behaviour Orders under the General Criminal Contract. The following table has been produced for reference and shows the relevant funding arrangements.

Both the previous article and this table have been circulated to courts as the Legal Services Commission is aware that a number of representation orders are continuing to be inappropriately granted. These orders have been granted ultra vires and work done under the order may not be claimed from the Commission. In these cases it will be necessary for suppliers to seek an ex-gratia payment from the relevant court.

If you require any additional information please contact Denise Bradshaw at [denise.bradshaw@legalservices.gov.uk](mailto:denise.bradshaw@legalservices.gov.uk)

## REGISTER OF POLICE STATION REPRESENTATIVES – SURVEY 2004

The Legal Services Commission is asking all accredited police station representatives, currently on the Register of Police Station Representatives, to confirm the accuracy of the information held.

Probationary representatives and solicitors acting as probationary or accredited representatives will be excluded from the exercise.

The survey will normally be addressed to the representative's supervising solicitor. If you currently supervise an accredited representative and have not received a copy of the survey by the end of January 2005 please contact Will Hayden of the CDS Policy Team at [william.hayden@legalservices.gov.uk](mailto:william.hayden@legalservices.gov.uk)

# TABLE OF FUNDING ARRANGEMENTS FOR ANTI-SOCIAL BEHAVIOUR ORDERS

Legislation	Section(s)	Court and nature of Order sought	Funding available	Relevant Law
Crime and Disorder Act 1998	1 and 1D	Magistrates' Court. Anti-social Behaviour Order, sought by relevant authority to protect public from anti-social behaviour.	<b>Advocacy Assistance</b> Solicitors self grant using devolved power. In very exceptional circumstances, the LSC can grant Representation Orders. Maximum limit on funding of £1,500 extendable upon application to the LSC. The court duty solicitor can provide Advocacy Assistance. <b>Courts have no jurisdiction to grant Representation Orders in such cases.</b>	Criminal Defence Service (General) (No 2) Regulations 2001 as amended Regulation 6(3)
Crime and Disorder Act 1998	1B(5)	County Court. Anti-social Behaviour Order, sought by relevant authority to protect public from anti-social behaviour.	<b>Civil funding</b> by Community Legal Service, ie Legal Help or a Civil Certificate. Out of scope for funding under the General Criminal Contract.	Access to Justice Act 1999 Section 4
Crime and Disorder Act 1998	1C	Magistrates' Court or Crown Court. Following conviction of an offence where the court considers that the defendant acted in an anti-social manner and an order is necessary to protect the public from further anti-social acts.	<b>Representation Order.</b> Such proceedings are treated as incidental to the main proceedings, therefore funded under the Representation Order granted in respect of the substantive criminal charges.	Access to Justice Act 1999 Section 13(2)(b)
Crime and Disorder Act 1998	2 and 2A	Magistrates' Court. Sex Offender Order, sought by relevant authority where person has acted in such a way as to give cause to believe that an order is necessary to protect the public from serious harm. Replaced by Sexual Offences Act 2003 (see below).	Self-granted Advocacy Assistance, as above. <b>Courts have no jurisdiction to grant Representation Orders in such cases.</b>	Criminal Defence Service (General) (No 2) Regulations 2001 as amended Regulation 6(3)
Crime and Disorder Act 1998	4	Appeal against an Anti-social Behaviour Order by the defendant to the Crown Court. Magistrates' Court.	Self-granted Advocacy Assistance, as above. <b>Courts have no jurisdiction to grant Representation Orders in such cases.</b>	Criminal Defence Service (General) (No 2) Regulations 2001 as amended Regulation 6(3)
Anti-social Behaviour Act 2003	2, 4 and 5	Closure Orders, sought by relevant authority to prevent the unlawful use of the premises for production or supply of a Class A controlled drug and such use is associated with the occurrence of disorder or serious nuisance and the making of such an order is necessary to protect the public from the same.	From 17 May 2004, self-granted Advocacy Assistance as above. Prior to that date, cases could only be funded using the Exceptional Funding route (see below). <b>Courts have no jurisdiction to grant Representation Orders in such cases.</b>	Criminal Defence Service (General) (No 2) Regulations 2001 as amended Regulation 6(3)
Anti-social Behaviour Act 2003	20 and 26	Magistrates' Court. 20. In cases of truancy or exclusion from school where the court believes that the making of such an order will improve the attendance of the pupil at school or their behaviour. 26. Parenting contract in respect of criminal conduct and anti-social behaviour, where the court is of the view that such a contract could lead to the prevention of the child from entering into criminal conduct and anti-social behaviour.	<b>Exceptional funding</b> only. Neither of these sections is within the scope of either the General Criminal or General Civil Contract; hence public funding is not available unless the exceptional criteria are met. Solicitors apply to the Commission's Special Cases Unit, 29-37 Red Lion Street, London, WC1R 4PP (DX 170 Chancery Lane, tel 020 7759 1966).	Not applicable.
Sexual Offences Act 2003	Part 2	Magistrates' and Crown Court.	Exceptional funding only as above.	Not applicable.
Crime and Disorder Act 1998	1 and 1D; 1B(5); 1C; 2 and 2A 4	Magistrates' and Crown Court. Breach proceedings for Anti-social Behaviour Orders and Sex Offender Orders under the 1998 Act.	<b>Representation Order.</b> Granted by court. <b>Note:</b> breaches of Parenting Orders under the 2003 Act are non-imprisonable offences and therefore the Court Duty Solicitor cannot advise or represent.	Access to Justice Act 1999 Section 13(2)(a)
Anti-social Behaviour Act 2003	2, 4, 5 20, 26	Magistrates' and Crown Court. Breach proceedings for Closure Orders and Parenting Orders under the 2003 Act.		
Sexual Offences Act 2003	Part 2	Magistrates' and Crown Court. Breach proceedings.		

