

# July 07 Legal Aid Reforms

## Unified Contract draft Civil Specification 2007

### General Provisions

*(NB. Category specific provisions (those sections of the specification relating to the different categories of law) are not included in this summary.)*

The Legal Services Commission has published the final draft of the Unified Contract Civil Specification. These notes summarise some of the more important provisions contained within the draft Specification which is proposed to have effect from October 2007 under the Unified Contract.

The summary is designed to provide an overview of the main proposals and you should not therefore assume that all you need to know is included in this summary. A full copy of the consultation can be accessed from the LSC's website or by copying the following link into your internet browser:

[http://www.legalservices.gov.uk/docs/civil\\_contracting/070712\\_General\\_Provisions.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/070712_General_Provisions.pdf)

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### Part A - Provisions for Contract Work

#### Transitional provisions

The draft specification is to have effect from 1 October 2007 in relation to Controlled and Licensed work under the Unified Contract.

For matters opened prior to 1 October 2007, the previous applicable contract specification will apply (i.e. either the Unified Contract Specification (in force from 1 April 2007 to 30 September 2007) or the General Civil Contract Specification.

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#### Section 1 – General Rules for Suppliers

##### Providing information

- The requirements are the same in relation to file transfers i.e. on request from another supplier the provider must give the client's file to the new supplier. However, the extra requirement is that you must provide the new supplier with reasons for the termination.
- The transfer of a file to a new supplier must be as soon as practicable. Following the consultation, the requirement to transfer the file within 7 days has been removed.

#### Misrepresentation regarding Contract Work

- Any false statements or representations made by the client in obtaining legal help or legal representation must be reported to the Regional Office.

#### Reporting Controlled Work

- All claims for controlled work must be submitted on the Legal Services Commission's Contract Report Form which will require organisations to state their profit costs (calculated in accordance with hourly rates contained in the Payment Annex), disbursements, counsel's fees and VAT.

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## **Section 2 – Applications for Controlled Work**

### Funding Code Criteria

- The Funding Code must be applied to all Contract Work undertaken.

### Financial eligibility

- Satisfactory evidence of means **must** be obtained before assessing eligibility (i.e. completion of the Legal Help form) unless:
  - (i) It is not practicable to obtain it before commencing Controlled Work;
  - (ii) Pre-signature telephone advice is given; or
  - (iii) Exceptionally, the personal circumstances of the client make it impracticable for evidence to be supplied at any point in the case (e.g. client's age, mental disability, homelessness).

Unless paragraph (iii) above applies, you must require the client to provide evidence as soon as practicable.

- If evidence is not supplied or it shows that the client is not eligible, the work can be claimed provided that: you have acted reasonably in undertaking the work before assessing financial eligibility; that you have acted reasonably in assessing financial eligibility; and, if the matter is remunerated at hourly rates then you cannot claim an

amount representing more than two hours' profit costs, nor any disbursement beyond those incurred in the period before it is practicable to obtain the evidence of means.

- The Specification states that the Commission will monitor the number of cases that fall into this category and if it is high they may carry out investigations and take appropriate action (appropriate action is not explained). It is made clear that cases falling under paragraph (iii) above will not be monitored by the Commission.
- In licensed work, the assessment of means must be carried out before carrying out work except in relation to emergency work.

### Previous Controlled Work

- If a client has received controlled work on the same matter from another supplier within six months, you can only accept instructions if:
  - (i) There is a gap in time and circumstances have changed materially;
  - (ii) The client has reasonable cause to be dissatisfied with the service provided;
  - (iii) The client has moved;
  - (iv) The first supplier has confirmed that they will not be making a claim for payment.
- Under the draft Specification, reasonable enquiries must be made to determine whether the Funding Code applies, including:
  - (a) asking the Client;
  - (b) examining any documentation made available by the Client for reference to another Supplier; and
  - (c) considering the length of time that the issue or matter has been in existence and any steps in the issue or matter which have occurred.
- If you fail to make reasonable enquiries in this situation any claim for Controlled Work in relation to this matter will be disallowed.
- You must obtain the consent of the client (as soon as practicable and in writing) to contact the previous supplier in order to:
  - (i) Confirm the reasons for the termination of the retainer; and
  - (ii) Request a copy of the casefile.

If the client refuses to provide consent, you may not provide Controlled Work and a claim for payment cannot be made.

- If a request for a file has been made from a previous supplier, work cannot be carried out until the file is received and the contents considered, unless it is absolutely necessary to take steps to protect the client's interest or meet a court deadline.

- If the client is justified in being dissatisfied with the service provided by the previous supplier, you must, on request, signpost the client to the appropriate regulator and should provide your Regional Office with details of the previous supplier.
- If you undertake work to protect the client’s interest and on receiving the file realise you were not entitled to exercise the devolved power you must cease acting for the client immediately but a claim for payment can be made. The Commission will monitor the number of cases that fall into this category and if the number is high they may carry out investigations and take appropriate action.

Controlled Legal Representation

- The grant of the CLR will take effect from the date of the signature on the “Declaration and Grant” section on the (properly completed) application form. The Declaration must only be signed by one of the organisation’s Approved Personnel.

Refusing contract work

- The draft specification includes provisions to stop suppliers from ‘cherry picking’ cases.
- You may refuse work with good cause, for instance, where you lack matter starts, lack capacity or the necessary skill, or for other professional conduct reasons such as conflict of interest.
- However, you cannot turn clients away on grounds of cost. If work is undertaken on a fixed or graduated fee basis, then you are not permitted to avoid cases which are likely to cost more than the value of the fee received.
- The Legal Services Commission says that suppliers will not lose out over the long term because of the ‘swings and roundabouts’ principle. The Commission has provided that case mix can be changed but only by broadening the range of cases (i.e. providers who previously only dealt with more complex cases could accept a wider range of cases including more simple cases in order to maintain profitability).
- The Specification has an anti-discrimination provision. You must not refuse to accept contract work on the grounds of sex, race, racial group, ethnic or national group, religion or belief, sexual orientation, disability or age.
- When assisting a client with a review of refusal of a certificate, it will not constitute a separate matter start and you may not claim a separate Standard or Graduated Fee.

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**Section 3: Scope of Contract Work**

- Help at Court may only be provided in relation to proceedings for which advocacy may be funded in accordance with directions under s. 6(8) or para 2 of schedule 2 to the Act in accordance with s. 2.4 of the Funding Code Guidance.
- Controlled Legal Representation applies to the Mental Health Review Tribunal (MH category) and the Immigration and Asylum Tribunal (Immigration category).

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#### **Section 4: Scope of Licensed Work**

- Licensed work comprises:
  - (a) Family Help Higher – only in family category; and
  - (b) Legal Representation – in the form of Full Representation or Investigative Help (the latter is not available in the family category).
- Provided you have a supervisor in the relevant category, you may carry out the following actions:
  - (i) Grant or refuse an application for emergency representation;
  - (ii) Amend or refuse to amend a certificate for emergency representation;
  - (iii) Amend or refuse to amend certain limitations on a substantive certificate for Legal Representation (not including an emergency certificate); and
  - (iv) any actions set out in the category specific provisions (sections 10-16)
- The powers above are subject to the following:
  - (i) You do not have the power to grant, amend or refuse to amend an Emergency Certificate for a judicial or statutory review in the Immigration category unless the Legal Services Commission has granted the power in writing; and
  - (ii) You do not have the power to grant or amend an application on the ground that the case has a significant wider public interest.

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#### **Section 5: Carrying out Controlled Work**

##### Self authorisation of additional matter starts

- You may not exceed the maximum number of matter starts specified in your contract schedule unless the application is:
  - (i) A matter falling within para. 3 of the Lord Chancellor’s Direction on 1 February 2000 on CLS funding priorities (Special Children Act proceedings) and civil proceedings where the client is at real and immediate risk of loss of life or liberty; or
  - (ii) By a client who is suffering from severe mental or learning difficulties;

and the matter is so urgent that it is not reasonably practical to obtain permission from the Regional Office. In such a case, the relevant Regional Office must receive notification from you within five working days of the grant of the application.

Controlled Work Category of Law and Matter Start Boundaries

- This section of the Specification guards against the creation of ‘artificial’ matter starts in order to claim a Standard or Graduated Fee where it is appropriate to carry out the work under one matter start.
- The Legal Services Commission has said in the response to the consultation on the draft Specification that its main concern was that the previous specification (under the General Civil Contract) contained few controls to prevent suppliers from defining a client’s retainer or problem so that it could be treated as ‘completed’ prematurely or after minimal work, and then open a new matter start for the client when they inevitably returned to the office. The old specification was drawn up under an hourly rates regime where defining matters was not of the essence of the scheme.
- In this Specification, there are category specific rules relating to separate matter starts and also general provisions which must be observed. These seek to base the test more on whether the client needs further help in relation to the same problem and an objective period of time has elapsed.

*General provisions*

- A separate matter start can only be created where the client has a separate and distinct legal problem. The problems will generally be regarded as separate and distinct if:
  - (i) They fall under separate SQM categories; or
  - (ii) both:
    - (a) If legal proceedings were started, or other appropriate remedies pursued, for each problem it would be appropriate for such proceedings to be both issued and heard separately, or for other remedies to be dealt with, separately; and

(b) Each problem requires substantial legal work which does not address the other problem(s).

‘Substantial legal work’ must consist of at least 30 minutes preparation or advice; or separate communication with other parties on legal issues.

- The fact that circumstances have changed or developments have occurred as the case has progressed will not mean that a separate matter start is required if the work continues to be provided on the same overall legal issue.
- Where the client raises several issues at the first meeting, a single matter start should be completed to identify the issues and provide general, preliminary advice. If one legal issue is identified, the same matter start should continue to be used. However, more than one matter start may be opened at that meeting if justified (i.e. separate and distinct problem, as set out above).
- Where you have completed a matter (under this specification or any previous specification), a new Matter Start should not be subsequently commenced for that problem unless:
  - (i) A period of at least six months has elapsed since you submitted the claim for that matter; or
  - (ii) There has been a material development or change in the client’s instructions and a period of at least three months has elapsed since you submitted your claim (such a further period is not required if the reason for closing the previous matter was the client’s failure to give instructions for three months); or
  - (iii) The assistance provided on the problem formed only a minor part of the previous matter, such that the problem did not qualify as a separate and distinct legal problem.
- Where you act for more than one client in the same matter, a single New Matter Start should generally be used unless the following are satisfied:
  - (i) If proceedings were issued each client would be party to those proceedings;
  - (ii) Each client has a separate legal interest in the problem or issue; and
  - (iii) Where Legal Help is provided, there is sufficient benefit for each client in receiving Legal Help, having regard to the Legal Help provided to each other client.
- Any advice given by telephone before the client has signed the application form will count as the same matter start as work carried out after it is signed. If the client subsequently does not sign, you may not claim for the work or claim it as a matter start.

- Outreach work is remunerable without the prior agreement of the Legal Services Commission as authorised by your Office Schedule.
- You may only cease working on a matter and may make a claim for the work when any of the following occurs:
  - (a) the client decides not to proceed, or indicates that they wish to take the matter forward themselves;
  - (b) the client fails to give instructions for three months (unless the matter is on hold);
  - (c) Funding is granted under Section C of the funding Code procedure or the matter begins to be funded outside the contract;
  - (d) You consider the matter is completed (having regard to the specification);
  - (e) You have informed the client that the provision of Controlled Work is no longer justified;
  - (f) You can no longer act through a conflict of interest or other reason of professional conduct.
- Once you have made the decision to grant emergency representation (or other Licensed Work funding), then all work carried out that day may be claimed under the certificate. In the response to the consultation, the Legal Services Commission set out that, in its view, once the decision to grant Emergency representation has been made, the grant operates from that day (not from a particular time of day), and therefore, all subsequent reasonable work can and should be claimed under the certificate. In these circumstances, a separate Legal Help matter start is not justified (unless Legal Help is required on matters not covered by the Licensed Work funding).
- If the client has a financial interest in your costs, (e.g. the Statutory Charge applies or the client is obliged to make a contribution) the client must, on a regular basis, be notified of this, be provided with an update on your costs and be told that they are able to make representations about the level of your costs.
- If the client has or is likely to have a financial interest in a matter paid by Standard Fee or Graduated Fee the information to be provided must include the level of the fee or any other additional payments payable, the point at which the costs may increase (as an Exceptional Case or higher level of Graduated Fee), and the costs that would be payable if the matter were paid at hourly rates. Except where urgent work is required, you must notify the client before undertaking work that may lead to the matter being paid as an exceptional case or at a higher level of Graduated fee.

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## **Section 6: Carrying out Licensed Work**

- Subject to the availability of investigative help, Legal Help is normally the appropriate level to carry out initial investigative work (at least to point where sufficient information is available to certify prospects of success).
  - In cases where the costs of investigation are likely to be substantial, an application should be made for investigative help.
  - Work should be carried out necessary to comply with pre-action protocols under Legal Help unless Category specific provisions of the specification provide otherwise.
  - Civil cases which are likely to incur high costs will be subject to separate contracts issued and managed by Special Cases Unit.
  - The Legal Services Commission may give prior authority to incur certain types of costs if you apply in writing to the Director.
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## **Section 7: Payment for Controlled Work**

- Working under a fixed fee should not affect the conduct of any matter or case, save as instructed by the client.
- Where the costs of any claim covered by a Standard or Graduated Fee, exceeds the exceptional Threshold for the relevant category, you may apply for the claim to be treated as an exceptional case and paid individually outside of the Standard/Graduated Fee system (at hourly rates). Guidance on the procedure is to be issued shortly.
- The level of the fee may be amended if the average costs (as assessed on hourly rates) of all claims in a category of law are, in the Legal Services Commission's reasonable view, for a period of six months at least 20% less than the value of the fee.
- The Standard Fee may also be amended where new access to justice legislation and/or changes to the Funding Code results in a significant effect on the costs of carrying out cases.
- This new draft of the Specification specifically incorporates the notice and consultation provisions in the Unified Contract (clause 13) in relation to the Legal Services Commission's reserved right to amend the level of the fee.

- Licensed Work will be paid (subject to the Family category specific provisions) at the hourly rates specified in sections 9 and 10 of the Payment Annex (rates are exclusive of VAT).

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## **Assessment Procedures**

- Claims must be made within 3 months of the matter ending.
- Claims for Controlled Work covered by Standard or Graduated Fees will not be reduced on assessment but the Legal Services Commission may take into account the results if the assessment in:
  - (i) Considering the level of the Standard and Graduated Fees for tolerance matters;
  - (ii) Assessing your performance under the Contract; and
  - (iii) Deciding whether your work should be subject to quality assessment (e.g. peer review) or another form of audit.
- If the client has a financial interest in any claim or assessment, they are entitled to make representations in relation to the claim.
- Although it is moving away from auditing towards other performance management tools such as File Assessment and Key Performance Indicators, the Legal Services Commission has reserved the right to assess individual Controlled Work Matters.
- When the Legal Services Commission assesses a sample of your Controlled Work claims, it may apply any findings to your other claims for payment for Controlled Work.
- The Legal Services Commission has reserved the right to assess all your claims for Standard Fees or Graduated Fees (subject to the provisions of the Contract and in accordance with the particular sections of the Specification).
- Assessment decisions may be appealed. The new draft allows appeals within 28 days of notification of the assessment decision (as opposed to 21). You may request that the 28 day time limit be extended (up to a maximum of a further 14 days) for good reason.
- The appeal will be dealt with by the assessor on the papers only; there is no general right for either party to attend or be represented on the appeal.

- At any point after the submission of an appeal, but no later than 21 days after receipt of the Assessor's final decision, either you, the Director or the Assessor may seek clarification of a Point of Principle of General Importance.

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## **Part B – Payment Annex**

The relevant fee tables are set out in the Payment Annex. A copy of the Payment Annex can be accessed from the LSC's website or by copying the following link into your internet browser:

[http://www.legalservices.gov.uk/docs/civil\\_contracting/070712\\_PaymentAnnex.pdf](http://www.legalservices.gov.uk/docs/civil_contracting/070712_PaymentAnnex.pdf)