



The Law Society

Consultation on Draft Criminal Defence Service (Funding) (Amendment) Order 2012

Law Society Response
March 2012



The Law Society has the following comments to make on the proposed changes (where we have not commented on a proposed amendment this indicates that we have no comments on the proposed change).

We welcome the clarification of the position regarding magistrates' court disbursements, and the correction of the error in relation to sentence payments when the advocate is instructed only for sentence.

Article 5: Standard Appearances

Article 5 inserts a new para 'j' within the definition of 'standard appearance' that has the effect of bringing within the standard appearance fee (currently around £87) contested bail act offence hearings:

'(j) a hearing, whether contested or not, relating to breach of bail, failure to surrender to bail or execution of a bench warrant'....

This represents a significant change to the manner in which these appearances have been hitherto treated. Breach of bail conditions and execution of a bench warrant have always been standard appearances (unless a Bail Act offence for failing to appear is alleged/tried/dealt with on the same occasion). However it is quite a different matter to assert that a hearing arising out of the putting to the defendant of a substantive bail act offence of failing to appear and then holding a trial and either acquitting/sentencing him/her for this should count as a standard appearance.

In the cases of R v Shaw and R v Despres, the Court ruled that bail act matters where a bail act charge is put fall into offence class H (the default class where the offence is not specified in any other offence class).

The proposed change also undermines the framework of the scheme whereby an offence equals a case.

The Society cannot accept such a radical change without a full consultation with our members.

We suggest that paragraph (j) simply mention 'execution of bench warrant'.

Pages of Prosecution Evidence (PPE)

Article 6 (2C) has the effect of handing the decision to pay for exhibits served electronically entirely to the discretion of the 'appropriate officer'. Such documents may well include documentary exhibits which would have been printed out before – all or in part. Any pages printed out and served as paper would thus have been counted automatically as PPE, rather than being left to the discretion of an individual.

The inclusion of (2C)(b) - 'has never existed in paper form' – gives rise to concerns previously raised by the Society, i.e. the difficulty of determining whether or not something has previously existed on paper or not. How will this be determined and on what basis will it be decided whether or not to pay for the consideration of such documents?

The Society appreciates the Ministry's wish to avoid the use of the phrase 'would have been converted...(etc)' as being too imprecise. However the proposed wording removes the certainty that existed before that certain evidence would always be counted as PPE, and replaces this with an individual opinion as to whether it is 'appropriate' to include an item as PPE or not. This decision will

be made at the end of the case, meaning that litigators could risk undertaking a considerable amount of work which could then all be disallowed.

The Ministry, Legal Services Commission and the Society have already spent some time discussing the changes needed to the Funding Order, and were all in agreement that any amended wording should not have the effect of introducing uncertainty regarding items that are currently paid for automatically as PPE. The proposed wording will have precisely this effect however, as it gives the appropriate officer the discretion to allow or to refuse to allow items that are now paid as PPE with no uncertainty involved.

The proposed wording is far too uncertain and subjective, particularly in the absence of any guidance as to what constitutes 'appropriate'. On what basis will the 'appropriate officer' decide whether or not an exhibit, or part of an exhibit should be paid as PPE? The Society would need to see clear guidance as to the circumstances in which payments will be made or refused before we can agree this wording. We would be happy to discuss the drafting of any such guidance with the Ministry.

Article 8 / Schedule 1 (14): This amendment raises similar issues to Article 6 (2C) in that all decisions are left to discretion; the key difference being that with regard to Special Preparation there is already an element of discretion on the part of the appropriate officer.

Again this raises the concern that there is no guidance to indicate the circumstances in which the appropriate officer will consider it 'reasonable' to make a payment under the special preparation provisions, nor as to when she/he will not consider it 'appropriate' to include the exhibit as PPE.

The Society is concerned that the lack of certainty introduced by the proposed amendments will lead to an increase in the number of appeals, which is time-consuming and costly for all concerned. It is unclear from the draft Order where the appeal process will be set out, as it does not seem to be referred to anywhere in the Order. This process needs to be set out clearly. However the need to pursue the appeal route could be negated in many cases by clearer wording and guidance as to the circumstances in which special preparation will be paid.

Schedule 1

Interpretation (2A)(e):

We welcome the recognition that records of ABE interviews (s27 YJCEA) should be counted as PPE (and note that these have in fact been paid for ex gratia since last year). However we have concerns that the proposed amendment as currently worded may in fact give rise to a result that is contrary to the Ministry's intention. The concession granted last year related simply to the transcript counting for PPE purposes. The proposed wording of the Funding Order requires it to be served as part of the prosecution case or with a NAE (as with all other evidence). The difficulty that arises here is that for CPS purposes there is no evidential need to serve those transcripts, and the CPS has never normally served them. Given the financial implications from the CPS perspective (for instructed counsel), it seems unlikely that they will change their current policy by serving the transcript formally as part of their case. The effect will be that the defence will in fact no longer be able to claim payment for consideration of these transcripts.

To remedy this potential problem we suggest the removal of the requirement that this evidence be served as part of the committal/sending or with a NAE.

We suggest the inclusion of records of evidence given under not only section 27 Youth Justice and Criminal Evidence Act 1999, but also section 28. Section 28 is only partially in force but this amendment, presumably unobjectionable in principle given the concession in relation to section 27

would act to 'future proof' the funding order and prevent any future situation where such evidence might not be claimable.

Schedule 5

Magistrates' court rates: 'Category 1A' cases: We have some concerns regarding a lack of clarity in relation to the Category 1A definition; in particular some further definition is required as to what is covered by 'either-way guilty pleas'. We note that indictable only cases heard in the Youth Court fall within Category 1A. However would a youth in the youth court pleading guilty to theft constitute an either-way offence for the purposes of this definition? Whilst this offence could only be dealt with in the youth court, we are of the view that this should fall within Category 1A, however this is not clear from the proposed definition since it is not an indictable only offence.

Category 1A cases should, for the sake of completeness also include any either-way matter which is adjourned sine die, or stayed for an abuse of process or plea in bar.