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**HLPA Guidance to changes to remuneration for**

**Legal Aid Services in Anti-Social Behaviour Injunction cases**

**April** **2015**

This paper is intended to provide guidance to HLPA members on the circumstances in which they can continue to represent clients and get paid for Anti-Social Behaviour Injunction work under legal aid following the Anti-Social Behaviour Crime & Policing Act 2014. The changes came into effect on 23 March 2015.

It should however, be noted that at present there are still issues upon which clarification is being sought from the Legal Aid Agency (“LAA”). It is therefore likely that further supplementary guidance will be issued once further information is provided by the LAA.

**Background**

As members will be aware, the Anti-Social Behaviour Crime and Policing Act 2014 (ASBCPA) introduces a number of new injunctions and orders, including a series of orders to prevent sexual harm, criminal behaviour orders and the new injunctions under Part 1 dealing with anti-social behaviour (Part 1 injunctions). The new Part 1 injunction will be a purely civil order and will be available against individuals aged 10 years or over. The new Part 1 injunction will replace Anti-Social Behaviour Injunctions (ASBIs) and Anti-Social Behaviour Orders (ASBOs) and several other tools designed to deal with anti-social individuals.

Part 1 injunctions will be available in the County Court or High Court for adults and in the youth court (sitting in its civil capacity) for under-18s. Breach of an injunction will be punishable as civil contempt of court and for over-18s will be dealt with in the county court or High Court. For under-18s, proceedings will be heard in the youth court.

Resisting applications for the new injunctions will fall within the scope of the civil legal aid scheme as a result of amendments made by ASBCPA (see paragraph 49 of Part 1, Schedule 11 ASBCPA) to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”), except on breach, whereupon contempt proceedings are prescribed as criminal for the purposes of legal aid.

**Previous position**

Civil providers have, until recently, been able to represent clients in cases involving a range of Anti-Social Behaviour legislation, including proceedings for breach of a Court order. Certainly prior to the implementation of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”) on 1 April 2013, proceedings for committal for breach of an order of the Court were deemed to be quasi-criminal in nature, but a form of civil proceedings for legal aid purposes. HLPA are aware of civil providers continuing to be granted legal aid by the LAA to defend breach proceedings post LASPO.

The government consulted on proposals to reform the way in which legal aid would be paid for Anti-Social Behaviour work, and whether the work should be carried out by civil or criminal providers. HLPA and other professional bodies responded to the consultation, and essentially sought to persuade the government to preserve the status quo, allowing civil providers to represent clients in cases involving applications for Part 1 Injunctions, any subsequent breach proceedings, and to be paid at civil rates for all of these types of work.

**The new position**

**Part 1 Injunction Applications**

The government agreed that civil providers should be able to represent clients in Part 1 Injunctions (as well as criminal providers) and that this work should be paid at civil rates. This work will therefore continue to be remunerated as normal. The availability of legal aid will be subject to the normal merits and meaans test, set out in the Civil Legal Aid (Merits Criteria) Regulations 2013 and the Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 respectively.

Work will be remunerated at the standard hourly rate for certificated civil legal aid work. For solicitors see regulation 6 and Part 3, Schedule 1 Civil Legal Aid (Remuneration) Regulations 2013 as amended by regulation 2 Civil and Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015. For barristers see regulation 7 and Schedule 2 Civil Legal Aid (Remuneration) Regulations 2013. Details of the rates paid for work in Part 1 Injunction cases can also be found at Table 1 of the Government’s Response to Consultation (see the following link):

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398008/asbcpa-consultation-response.pdf>

HLPA members with a civil contract will also be able to exercise delegated functions in emergency cases (see paragraphs 5.2-5.4 of the 2013 Standard Civil Contract Specification (as amended)).

Members will have been sent revised contracts by the LAA and are advised to read the amendments to the contract for further detail.

**Breach Proceedings**

The government consider that as breach of a Part 1 injunction will be punishable as contempt of court, with the potential to attract a penal sanction, and is subject to the criminal standard of proof (beyond reasonable doubt), these proceedings will be in scope of the criminal legal aid scheme (by virtue of regulation 9(v) of the Criminal Legal Aid (General) Regulations 2013 (as amended)). Accordingly, the government’s view is that breach of Part 1 injunctions should be treated as criminal proceedings for the purposes of legal aid. This means that even if HLPA members are representing a client in concurrent possession proceedings, any application for legal aid to represent them in breach proceedings would fall within criminal legal aid, and would not be covered by a civil legal aid certificate.

However, the government recognised that in some cases there could be compelling reasons why it would be appropriate for civil providers to represent clients in breach proceedings, particularly in situations where the civil provider has represented the client in the previous Part 1 Injunction proceedings. Therefore, the government has advised that civil providers can apply for an Individual Case Contract (ICC). If justified and agreed by the LAA, a civil provider could represent an individual in breach proceedings under an ICC under the following conditions:

* where the provider has had substantial involvement in the original proceedings;
* where continuing to act for the individual represents value for money; and,
* where it is in the interests of justice for an ICC to be granted.

The government has not given any detailed guidance on exactly when it would be appropriate for civil providers to apply for an ICC. Nor is there guidance on how this would operate in urgent cases. The Consultation Response does give the example of an ICC potentially being of benefit to clients with incapacity issues or learning difficulties, who might suffer from loss of continuity of representation. Further information has been requested from the LAA on this issue.

The application for an ICC would need to be made by way of a cover letter accompanying a CRM14 (criminal legal aid) application form. This will be an application for criminal legal aid, which civil housing providers will not be familiar with. This link is to the LAA online training, which provides further guidance on this issue: <http://legalaidtraining.justice.gov.uk/>

Representation in criminal proceedings is funded pursuant to s16 LASPO. By s17(1), the determination as to whether to fund representation is to be made subject to the individual’s means, and the interests of justice. The 2010 Standard Crime Contract Specification indicates that there will be no means test where the work is undertaken in a civil court (see paragraph 10.165 part B of the 2010 Standard Crime Contact Specification). However, the interests of justice test will still apply. In deciding what the interests of justice consist of for these purposes, the following factors must be taken into account:

(a) whether, if any matter arising in the proceedings is decided against the individual, the individual would be likely to lose his or her liberty or livelihood or to suffer serious damage to his or her 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 or her 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.

HLPA members would need to address these factors in completing form CRM14 when applying for an ICC.

The government consider that as the focus of breach proceedings will be on proving beyond reasonable doubt whether breach has occurred, these proceedings should be simpler in terms of process than those for applications, variations, discharges or appeals. For this reason, and because such matters are prescribed as criminal for the purposes of legal aid, the government have decided that remuneration should be based on the rates currently payable under the criminal legal aid scheme for representation in the magistrates’ courts (being those which previously applied to similar proceedings, such as breach of an ASBO). These rates apply to both criminal and civil providers undertaking this work. These rates do not apply to appeals

Paragraph 5A, Schedule 4, Criminal Legal Aid (Remuneration) Regulations 2013 (as amended by the Civil and Criminal Legal Aid (Remuneration) (Amendment) Regulations 2015), provides details of the applicable fixed fees and hourly rates as follows:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | **Lower fee****(£)** | **Lower fee****limit (£)** | **Higher fee****(£)** | **Higher fee****Limit (£)** |
| Uncontested  | 158.27 | 272.34 | 380.70 | 471.85 |
| Contested | 279.45 | 467.84 | 640.94 | 779.64 |

|  |  |
| --- | --- |
| Preparation hourly rate  | £45.35 |
| Advocacy hourly rate | £56.89 |

Under this system, solicitors will be remunerated in accordance with paragraph 10.174 of Part B of the 2010 Standard Crime Contract Specification. Where the “core costs”, if they have been assessed at hourly rates:

• do not exceed the Lower Standard Fee Limit, as appropriate, then the appropriate Lower Standard Fee will be payable;

• exceed the Lower Standard Fee Limit, as appropriate, but do not exceed the Higher Standard Fee Limit, the appropriate Higher Standard Fee will be payable;

• exceed the Higher Standard Fee Limit, as appropriate, the core costs should be claimed based on the Hourly Rates.

In calculating “core costs” the following costs are taken into account:

(a) any preparation;

(b) routine letters written and routine telephone calls;

(c) advocacy;

(d) work done by a fee-earner acting as agent for the solicitor; and

(e) Unassigned Counsel’s preparation and advocacy

**Use of Counsel in breach proceedings**

The use of counsel is dealt with at paragraphs 10.164-10.174 of Part B of the 2010 Standard Crime

Contract Specification. The expectation is that “unassigned counsel” will be used. This use of “unassigned counsel” is dealt with at paragraphs 10.45-10.54. The key point is that a fee should be agreed in writing in advance. While this does not have to be at the hourly rates set out in the regulations, where a non-standard fee is payable the solicitor will only be reimbursed at the prescribed rate and so anything above the standard hourly rate would seem to be unfair and unrealistic. Clarification has been requested from the LAA as to the procedure for the instruction and payment of Counsel in breach proceedings.

**Travel and waiting in breach proceedings**

The government has also reconsidered its position on payment of travel in relation to breach proceedings. They concluded that travel and waiting should be paid to all legal aid providers where they are involved in breach proceedings in all courts. Travel and waiting will therefore be remunerated at £24 per hour and will be in addition to the fixed fee payable for representation under the criminal legal aid scheme referred to above, including cases where the escape threshold has been reached. Travel costs (of both solicitors and Counsel) are not taken into account when calculating the “core costs” referred to above. These costs are paid in addition to the relevant fixed fee. Disbursements are also paid in addition to the relevant fixed fee (see paragraph 10.172 of Part B of the 2010 Standard Crime Contract Specification.

**Appeals**

Appeals against decisions in respect of a Part 1 injunction will be remunerated at the standard civil legal aid rates, no matter the venue or the type of anti-social behaviour being addressed. Barristers in independent practice, involved in appeals against a Part 1 injunction in the Crown Court or High Court, will be remunerated at the standard civil rates applicable to the county court or High Court, respectively.

**Summary**

Therefore in summary, from 23 March 2015 (the date the changes came into effect), the following will apply:

* Civil and criminal providers will both be able to represent clients in Part 1 Injunction Applications.
* Part 1 Injunction applications will be remunerated at civil legal aid rates.
* Breach proceedings will be dealt with (primarily) by criminal legal aid providers.
* Breach proceedings will be paid at criminal legal aid rates.
* Civil providers can apply for an individual case contract to represent clients in breach proceedings in appropriate cases, but will also be paid at criminal legal aid rates for such work.
* Appeals of Part 1 Injunctions will be paid at the standard civil legal aid rates.

Legal Aid providers should have received correspondence from the LAA detailing the changes above and enclosing details of the amendments to the Standard Civil Contract.

For more information members are referred to the Government Consultation Response itself. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398008/asbcpa-consultation-response.pdf> as well as to the amendments to the Standard Civil Contract and the relevant regulations referred to in this guidance.

**Housing Law Practitioners Association**

**20 April 2015**