

Criminal Legal Aid Applications and Better Case Management – a briefing for LITs

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1. Background – How Does Legal Aid Interact with Better Case Management?

Most defendants in criminal proceedings are publicly funded. The Legal Aid Agency (LAA) has a duty to ensure that funds are directed to those most in need, and enacts this duty by assessing all applications for Criminal Legal Aid¹ received from defence practitioners on behalf of clients. The information and evidence contained within an application enables the LAA to conduct two tests (an Interests of Justice test and a means test), the results of which determine whether the applicant is eligible for legal aid, and the level of contributions to their defence costs they have to pay. If a decision to grant legal aid is reached, a Representation Order is made and issued so that the client, defence practitioner, and other CJS agencies can see what legal provision the LAA is prepared to fund.

Better Case Management (BCM) procedure emphasises early engagement between the Defence, Court, and the CPS, with a view to bringing more cases to a conclusion at a single, effective, Crown Court hearing – the Plea and Trial Preparation Hearing (PTPH). The PTPH will normally take place 28 days after the case has been sent from the Magistrates’ Court (several weeks earlier than the PCMH).

As the processing of an application generally takes place either before or early in the period between sending and the PTPH, this step can, if completed quickly, support the principles of BCM in terms of:

- Confirming to the practitioner that work conducted on the case will be remunerated², giving them the confidence to engage with the Court/CPS
- Affording the LAA the opportunity to share contact details of the defendant’s representative with the Court (and in future potentially the CPS), facilitating case progression.

This briefing aims to raise awareness amongst LIT members of cross-agency processes associated with legal aid applications, outline the steps each participant should take to make those processes operate effectively, and give an account of the issues reported in the BCM Early Adopter Areas to date.

2. The Applications Story

The ‘model’ BCM sequence of events would see the defence practitioner submitting an application at the point of charge, having assisted the client while they were still at the police station. Defendants would be able to locate all of the information and evidence needed to allow the LAA to make a full determination of their eligibility and issue a Representation Order. This would facilitate early service of the IDPC and discussion of the key issues, well before the first hearing in the Magistrates’ Court.

¹ The processing of Criminal Legal Aid applications transferred from HMCTS to the LAA on a phased basis from September 2014. As of July 2015, all applications are processed by the LAA.

² Unlike for Magistrates’ Court cases, where practitioners can be remunerated for work carried out prior to a Representation Order being made (‘Pre-Order Cover’), there is no facility for the LAA to back-date a Representation Order covering proceedings in the Crown Court.

In reality, this is far from always being the case. Only around 50-60% of those arrested seek representation at the police station; often the first opportunity for the CPS to hold dialogue with the Defence occurs at the first Magistrates' Court hearing, where the practitioner is advising the defendant under the Duty Solicitor scheme. Applications may also be made once the case has left the jurisdiction of the Magistrates' Court. Defendants find locating evidence of their income can be difficult, delaying the practitioner's efforts to make the application.

2.1 Making an Application for Criminal Legal Aid

2.1.1 Defence

An application for legal aid can be made as soon as the practitioner has taken initial instructions from the client, be that at the point of charge, the first Magistrates' Court hearing, or at any time up to the PTPH.

Applications can be submitted either electronically (via the *eForms* system) or on paper. Around 88% are now made electronically, and the LAA recommends this method as the system prompts practitioners as to which fields must be populated (to reduce the likelihood of the application being rejected), allows tracking of progress, and issues an automatic notification when a decision has been reached (which avoids the need to wait for (postal) receipt of the Representation Order).

Information on using eForms can be found here:

<https://www.gov.uk/guidance/legal-aid-eforms>

Criminal Legal Aid applications are made using form *CRM14* (electronic or paper). Under some circumstances (where the client has more complex means) an additional form (*CRM15*) is required. These forms capture information on the defendant, the proceedings, and the defendant's financial means (at household level) to enable the LAA to carry out both a means assessment and an Interests of Justice test. These forms, together with detailed guidance on how to complete them, can be accessed here:

<https://www.gov.uk/government/publications/criminal-legal-aid-application-forms>

Eligibility criteria and evidence of means requirements vary between Magistrates' Court and Crown Court cases, and are explained in more detail in the Criminal Legal Aid Manual – the primary reference work for the legal aid applications process:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/455645/criminal-legal-aid-manual-aug-15.pdf

The following points are particularly relevant to BCM:

- ❖ For a majority of applicants (those in receipt of a passported benefit, e.g. income support), only their National Insurance number is required as evidence, to enable DWP records to be checked
- ❖ For indictable-only offences, or cases that have already been sent to the Crown Court, it suffices to provide information on the client's means at the point of application. The LAA allows a further 14 days for requisite evidence to be submitted, but can grant legal aid straight away upon receipt of a fully completed form. Thereafter there is no risk to the practitioner that the Representation Order will be withdrawn, as it is only the client who can be sanctioned if the necessary evidence is then not submitted
- ❖ The threshold beyond which a defendant is ineligible for legal aid in the Crown Court is high - £37,500 of disposable household income per annum. An on-line calculator is provided to assist practitioners in gauging whether a client is likely to qualify, particularly in borderline cases:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/314808/LA-A-financial-eligibility-calculator-for-criminal-legal-aid.xlsm.

2.1.2 HMCTS

On occasions where it is important for a decision on a legal aid application to be made on the same day it is submitted (e.g. the PTPH is taking place on that day), the Court can ask the LAA to expedite processing. Part 9, Section 12 of the Her Majesty's Courts and Tribunals Service (HMCTS) Crown Court Manual (accessible within MoJ only) outlines the process to be followed:

<http://libra.lcd.gsi.gov.uk/hmcts/documents/crown-courts-work/ccm/ccm-section12.pdf>

2.2 Processing an Application for Criminal Legal Aid

2.2.1 LAA

Upon receipt of an application, an LAA caseworker performs an initial check to confirm that the form has been fully completed and that required evidence of the client's means is present (if required at the outset). If this is not the case, the form is returned to the practitioner with reasons for its rejection. A 'Soft Reject' policy is in place – the caseworker will attempt to contact the practitioner by phone and pinpoint areas where information is missing (or inconsistent), with a view to having these errors corrected quickly. Tips on avoiding rejects are included later in this section.

The LAA has a target (which is consistently met) to reach a decision on 90% of applications within 2 working days. That decision can be to grant or refuse legal aid, reject the application, or refer it internally to another team which conducts means assessments where the client's financial circumstances are more complex (e.g. they are self-employed). This latter team is also expected to reach a decision on 90% of applications within 2 days of receipt into the team. Therefore, where the application has been fully completed, the final decision to grant (or refuse) legal aid normally takes no longer than 4 days.

Delay to the grant of legal aid can occur when the LAA has to reject an application back to the practitioner, who must then correct any errors or omissions and re-submit the form. It should be noted that rejects often result from difficulties encountered by the practitioner in sourcing information/evidence from the defendant.

The following table lists the most common reasons why an application may be rejected:

All Applications

Tell us about the offence

Applications will be rejected if there is insufficient case information about the offence the client is charged with. This is needed so the LAA can link the application to the correct court proceedings and issue a representation order covering the correct offences. In the past HMCTS processed these applications and were able to check individual court files. But the LAA does not have access to this information.

Missing financial information

A request for further information about an applicant's means of support is the most common financial reason for a reject. The LAA needs as much information as possible about this including cases where the applicant has no income or receives help from family and friends. Where clients have a declared income they need to provide evidence of this. Clients in custody need to show how they were supporting themselves before remand. It is important to include details of their housing costs.

Defendants with complex means

Around 9% of all Crown Court applications relate to defendants with complex circumstances but almost 40% of these are rejected because of missing or incomplete information. Complex financial circumstances include:

- self-employed
- in a business partnership
- a company director
- in the armed forces
- subject to a restraint or freezing order

Complete the right form

The best way to avoid rejects is to use the CRM14 eForm instead of the old paper form. This automatically brings up the appropriate questions to answer in complex circumstances, as long as the case type is correct i.e. summary or either way. If using paper forms then CRM14 and CRM15 are required with all the relevant sections completed, together with a CRM15c if the direction is to provide this.

Send in all relevant documents

A request for further information is the most common reason for rejecting applications with complex financial circumstances. If the applicant is self-employed, they must provide accounts or a tax return (SA100). Unfortunately, a tax calculation sheet (SA302) is not adequate evidence of self-employed income when submitted on its own. It should be accompanied by a tax return, accounts or bank statements. This is because it does not cover all types of income that a self-employed applicant may receive.

If the business is very new or particularly small and there are no accounts or HMRC documents available, it is advisable to submit at least three months' bank statements from all accounts held. These need to be annotated to show which ones are self-employed income credits and which ones are business expenses. If the applicant does not have access to a bank account then a cashbook or invoices are sufficient.

Where the applicant is employed, they must provide the amount of their salary and most recent wage slip or salary advice, which must be from the last three months.

If the caseworker is able to process an application, they will create a new record in the LAA's MAAT system, which in turn feeds information through to the appropriate record in *Libra* (HMCTS). A Representation Order cannot be issued without the record being in existence in *Libra*, though the

lack of a record does not prevent a decision on legal aid from being made – the caseworker will note that Libra needs to be checked and updated at a later point. There is no requirement for Charge Sheets to be supplied to the LAA.

Defence practitioners are still notified of the funding decision via the eForm or by correspondence, with assurances that the Representation Order will follow in due course. The physical Order will be sent to the practitioner once the case has been revisited, following validation by the Court.

2.2.2 HMCTS

Court staff should endeavour to create a Libra record on the basis of charging information as soon as possible to facilitate speedy LAA processing and to enable a Representation Order to be made.

The LAA’s MAAT system record for a case needs to be linked to the corresponding Libra case in order to pull through the information to produce the Representation Order and for the funding decision to be transmitted back to HMCTS. Once the existence of the case is “validated” in the Libra system it can be located and a Representation Order issued.

2.3 Applications: What Happens Once a Decision Has Been Made?

2.3.1 LAA

If the application was made using eForms, the practitioner will receive an automatic alert from the system to notify them whether or not legal aid has been granted. In all cases, the Representation Order (paper version) should be received by post in the days following a decision, but there is no need for the practitioner to wait for this before acting for the client.

The following table shows volumes of each type of decision reached during the last two years for applications related to Crown Court Proceedings. Only 0.2% of applicants (210) were refused legal aid during 2014/15:

Decision	Apr13 - Mar14	Apr14-Mar15
Granted - Passed Means Test	58,173	57,088
Granted - Failed Means Test	7,847	8,028
Granted - Passported	37,675	33,929
Ineligible	29	210
Total	103,724	99,255

Where the LAA reaches a decision while the case remains in the Magistrates’ Court, Libra will be updated (once the case is validated) to show that legal aid has been granted and the details of the defence representative. Magistrates’ Court, Crown Court, and CPS staff all have access to the relevant Right to Representation screens in Libra to enable them to identify the defence representative. If a decision is made after the case has moved into the Crown Court’s jurisdiction the LAA should send an e-mail notification to the relevant Crown Court site.

2.3.2 Defence

CrimPR 3.3 places a duty on the parties to actively assist the Court in case progression, notably through ensuring early contact between the prosecutor and the defendant.

Although there are inter-agency mechanisms in place for sharing information on Defence identity, practitioners are encouraged to make contact with both the Court and the CPS as soon as the Representation Order is received, or notification of grant received from eForms.

3. Future Developments & Improvements

This section summarises the key observations/concerns raised by CJS agencies and defence practitioners based on their experiences in BCM Early Adopter Areas so far, and outlines the efforts being made to address them:

The Crown Court and the CPS need to see the Representation Order

The Crown Court should receive all necessary legal aid/defence details (e.g. for DCS invitations) either as part of the information (notably 'CCDDT' and the Better Case Management Questionnaire) received from the sending Magistrates' court or via e-mail notification from the LAA (in the event the legal aid decision is made after the case has concluded in the Magistrates' court).

However, prompted by feedback received from individual Crown Court sites and during the course of the cross-agency work referred to later in this section, the LAA has investigated the feasibility of e-mailing a full copy of the Representation Order to the relevant Crown Court site in lieu of an e-mail notification containing just the most salient details. It does not appear that this change of approach would adversely affect LAA processing times (to the overall detriment of BCM). Provided it can be established that an amended process will not have undesirable operational consequences for Crown Court staff, we can swiftly begin sending Representation Orders as a matter of course where the legal aid decision post-dates sending.

Historically, clients wishing to change their representative were required to submit an application to the LAA, who would then forward it, accompanied by a copy of the Representation Order, to the Court for submission to the Judge. A new process will soon be implemented whereby the defendant applies directly to the Court, using a form which captures details of both the existing and the new representative. HMCTS will confirm judicial assent to (or refusal of) the request to the LAA, who will then supply a revised Representation Order to the new representative. There should in future be no requirement for the Court to source a copy of the Representation Order. Communications will be issued to confirm the implementation date of this approach.

The 'Notification of Grant' alert sent to the practitioner by eForms does not supply sufficient detail to enable him/her to apply for Prior Authorities and can create problems when instructing advocates

The LAA ran a pilot during 2015 whereby practitioners received an electronic Representation Order via secure mail as soon as a grant decision was reached. Unfortunately this pilot had limited success, and there are no current plans to extend it. The LAA is considering alternatives to postal transmission of the Order, involving eForms and the LAA portal. In the meantime practitioners are asked to highlight specific instances where there is delay in issuing the Order, either with the appropriate LIT or directly with the LAA.

Both the Crown Court and the CPS would benefit from earlier notification of who is representing the defendant, for DCS invitations and general early engagement. Can information sharing on the identity of the defence be improved?

The LAA is working with HMCTS and CPS colleagues at BCM national Working Group level to improve the efficiency of transfer of these details. We have been identifying variations in approach within and amongst agencies, and potential improvements in light of the roll-out of DCS. A memorandum, agreed by the three agencies and distributed to operational staff, will ensure expectations are clear and consistency is maintained.

It should be noted that the LAA cannot divulge details of the defendant's (anticipated) legal representation until the grant of legal aid has taken place.

4. Further Information

The LAA has produced a Better Case Management Q & A, to address queries raised about legal aid and BCM, and more general queries raised by the defence, which can be accessed here:

<https://www.gov.uk/government/publications/crown-court-fee-guidance>

Compilation of the Q & A results from sustained and successful collaboration with CJS agencies and Defence representatives at both national and local level. The LAA will continue to pursue a consultative approach in developing procedures which most effectively support the aims of BCM.

5. Better Case Management - Legal Aid Applications and Notifications Process (Cross-Party)

Process for cases in which application is made at Magistrates' Court			
Defence	Legal Aid Agency	HMCTS	CPS
<p>Defence representative should:</p> <ol style="list-style-type: none"> 1. Apply for legal aid (preferably via eForms). 2. Provide the LAA with all required information. 3. Notify court and CPS of contact details of representative responsible for the case. 	<p>Legal Aid Agency caseworker will:</p> <ol style="list-style-type: none"> 1. Check to see if form is fully completed, if not LAA will try to contact legal representative to seek missing information before rejecting. 2. Check legal aid application against Magistrates' court case record on Libra. 3. Assess the application, once all required information is received. <ul style="list-style-type: none"> • Processing should take no longer than 2-4 days from date of original receipt of application depending on complexity. 4. Create a case reference record in MAAT to record decision of legal aid application (granted or refused). <ul style="list-style-type: none"> • MAAT/Libra link will update case record on Libra with legal aid details and produce Representation Orders, provided the case has 	<p>Magistrates Court will:</p> <ol style="list-style-type: none"> 1. Create case record on Libra. 2. Validate the case record on Libra so that legal aid details can be sent by the LAA to Magistrates' Court via MAAT/LIBRA link, and to allow production of Representation Order. 3. Once case has been sent to Crown Court, update Libra file and send defence details (CCDDDET, BCM Questionnaire) to Crown Court. 4. Inform CPS that the case has been sent to the Crown Court. 	<p>CPS will:</p> <ol style="list-style-type: none"> 1. Engage with the defence representative prior to or at the allocation/sending hearing (where possible)

	<p>been validated by HMCTS.</p> <ol style="list-style-type: none"> 5. Notify defence practitioner of the funding decision via eForm or by correspondence. 6. Post Representation Order to the defence practitioner. 		
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Process for cases in which application is made at Crown Court

Defence	Legal Aid Agency	HMCTS	CPS
<p>Defence representative should:</p> <ol style="list-style-type: none"> 1. Ensure any outstanding legal aid issues are addressed, i.e. provide evidence of means. 2. Notify court and CPS of contact details of representative responsible for the case. 3. Grant access to case file on DCS to defence advocate. 4. Engage with the CPS prior to the PTPH. 	<p>Legal Aid Agency caseworker will:</p> <ol style="list-style-type: none"> 1. Assess client’s application and decide whether and at what level contributions are payable. 2. Send Crown Court Representation Order by email (TBC). 3. In urgent cases, when requested by the Crown Court, expedite processing of the legal aid application. 	<p>Crown Court will:</p> <ol style="list-style-type: none"> 1. Create CREST record. 2. Create digital case file and invite defence litigator to access the file (if identity known at that time). 3. In non-DCS cases, notify CPS of defence identity administratively. 4. In urgent cases ask LAA to expedite processing in line with Part 9, Section 12 of HMCTS Crown Court Manual. 	<p>CPS will:</p> <ol style="list-style-type: none"> 1. Upload prosecution case material onto DCS. 2. Invite the defence litigator to access the case file, should the prosecutor discover their identity prior to the Court. 3. Engage with the defence prior to the PTPH.