



## THE JUDGE ADVOCATE GENERAL'S PRACTICE MEMORANDUM 8

### Legal Aid for Defendants in the Service Courts

#### Introduction

- 1.1 The Armed Forces Legal Aid Scheme 2011 (AFLAS 11) is the only legal aid scheme available within the Service Justice System. An outline of the scheme is provided in this Memorandum. Further information can be found in JSP 838. The digital [MOD Form 2263](#) (application for legal aid) is available to all personnel with a MODNET account; non-MOD personnel (ex-serving personnel) can apply using the [legal aid application forms](#) available on [GOV.UK](#). The process for applying for legal aid was reviewed and simplified at the end of 2023 and SSSs and Defendant's Assisting Officers (DAOs) should familiarize themselves with the new procedures. Although non-statutory, the scheme is based upon the same basic principles as the civilian criminal legal aid scheme in England and Wales and is administered by the Ministry of Defence.

#### Trials: Court Martial (including Referral Stage) and Service Civilian Courts

- 2.1 Every defendant who appears for trial in the Court Martial (including the initial referral to the Service Prosecuting Authority stage) or Service Civilian Court is entitled to apply for legal aid. They will be subject to a Means Test assessment and, provided they have not exceeded the financial eligibility threshold (FET), an offer of legal aid will be made for those proceedings. However, subject to the outcome of the Means Test, a defendant may be required to pay contributions towards their defence costs. This could be from income, from capital or both. The amount paid by a convicted offender will never exceed legal aid costs actually incurred.

#### Information to be Provided

- 3.1 Applicants are required to provide information about their income, capital assets and financial commitments so that an accurate means test can be carried out to determine what, if any, contribution will be required from their income and/or capital.

## **Means Test**

- 4.1 The means test assesses the applicant's ability to contribute towards their legal aid costs and will determine the amount required to pay (if any). The applicant's "disposable income" is calculated by subtracting various allowances from gross income. Annual disposable income above a threshold of £3,398, or capital and/or equity above a threshold of £30,000, implies contributions will be payable. Those applicants below both income and capital thresholds pay nothing.

## **Financial Eligibility Threshold (FET)**

- 5.1 Any applicant with disposable income in excess of £37,500 per annum will not receive an automatic offer of legal aid. Instead, the procedure at 8.1 below will be adopted.

## **Contribution Order (cases under the FET)**

- 6.1 A Contribution Order confirming an offer of legal aid is issued to each applicant who submits a completed legal aid application form and is under the Financial Eligibility Threshold (FET). It gives details of the contribution required (if any) and the payment options available. Applicants can either accept or decline the legal aid offer and must return the signed and witnessed Contribution Order to AFCLAA to complete the process. If the offer of legal aid is accepted, the defendant thereby accepts liability for the payment of contributions.

## **Hardship**

- 7.1 Applicants with financial commitments, aside from those outgoings already included in their application, should complete the relevant section within the digital application form. These are known as Grounds for Hardship. Applicants who are unable to access the digital application should complete the [MOD Form 2263C Hardship Review](#). Applicants will be required to provide documentary evidence in support of any Hardship declared in all circumstances. For example, an applicant may have far higher than usual household expenditure which the living allowance element of the means test does not truly reflect. This might include significantly high levels of personal debt, especially where formal repayment programs have been established to resolve these (i.e. IVA), or where a dependent has special needs, with additional costs relating to specialised care, diet or education. Costs of private education, other than Boarding School Fees which are deemed necessary for Service or operational reasons, and/or private healthcare are not included.
- 7.2 All Hardship included in any application for legal aid will be reviewed by AFCLAA staff. In some cases, AFCLAA may seek the opinion of the Judge Advocate General before making a final decision. An application can be submitted at any time whilst monthly contributions are being paid where the applicant's financial or personal circumstances have changed. AFCLAA will carry out a means test reassessment and amend contribution liability accordingly.

## **Cases where Disposable Income exceeds the FET**

- 8.1 Applicants with disposable income in excess of £37,500 per annum will be advised that their application has been refused but they can request a review of the decision to refuse legal aid on financial eligibility grounds. This will require the applicant to provide further details of any expenditure not already taken into account in the initial means test, and a written estimate from their legal representative detailing the likely private costs of their case, to support a review of their application. These details must be provided within 21 days of the date of the Refusal Certificate issued by AFCLAA.
- 8.2 The estimated private legal costs provided, and any previously unidentified expenditure declared as Hardship are then subtracted from the annual disposable income previously determined by the original means test, to provide a revised annual disposable income figure. If the revised annual disposable income figure takes the applicant below the £37,500 threshold, they then become eligible to receive legal aid. If eligible, at the annual disposable income assessed under the original means test, including any additional expenditure allowed following the eligibility review, will be used to determine the level of monthly income contributions. The estimate of private legal costs will not be included as, once the applicant has been granted legal aid, they would not be required to pay privately from their income therefore, these costs are no longer relevant; a Contribution Order will be issued in accordance with paragraph 9.1 below.
- 8.3 Applicants whose disposable income still exceeds the financial eligibility threshold after further review will not be eligible to receive legal aid. However, if they are acquitted or their case is otherwise discontinued, there is scope to recover some or all their private costs from AFCLAA (see 9.20 – 9.21 for details).

### **Contribution Order**

- 9.1 For applicants with annual disposable income above the threshold (see 4.1), income contributions are set at 90% of the monthly disposable income. The total contribution payable is 5 x the monthly disposable income and can either be paid in full or in regular monthly instalments spread over 8 months. To ensure no-one pays significantly more in contributions than their maximum likely legally aided costs, monthly contributions are capped according to the Class (type) of offence (as defined in The Criminal Legal Aid (Remuneration) Regulations 2013). Capital contributions, if required, are payable after the case is concluded and all legal bills are settled by AFCLAA.

### **Minimum Drawing Rate (MDR)**

- 10.1 Contributions paid directly from salary via JPA may be subject to the MDR regulations, which prevent compulsory deductions exceeding 50% of the monthly net salary (after deducting PAYE and NI contributions). Where applicable, the amount of monthly contributions payable is reduced, but the number of contributions payable increased. A revised Contribution Order is issued, for the minimum number of monthly payments necessary to satisfy both the MDR regulations and the maximum contribution.

## **Acquittal**

- 11.1 Following an acquittal on all charges, or if the case is discontinued at any stage, contribution payments already made by the defendant are refunded in full, with interest. Any future contributions will be stopped.

## **Excess Contributions (following conviction)**

- 12.1 Where income contributions paid exceed the actual costs incurred, the overpayment is refunded without interest.
- 12.2 Applicants aged 17 or under are exempt from making any income contributions. Applicants in receipt of certain welfare benefits (Universal Credit, Jobseekers Allowance, Guaranteed State Pension Credit or Employment & Support Allowance) are also exempt.

## **Overseas Travel Costs**

- 13.1 Where the applicant was stationed overseas as part of their duty, or Court Martial proceedings are held outside the UK, and provided legal aid has been granted, the additional costs of overseas travel and accommodation incurred for legal representation are, subject to a notional fee, covered by the legal aid order.
- 13.2 If a defendant declines an offer of legal aid and chooses to pay privately for legal representation, they will be liable for all fees under all circumstances. This includes costs for transport, flights and accommodation for their legal representative(s) should part or all of their case be heard overseas. These costs can be considerable.

## **Judicial Apportionment**

- 14.1 A convicted offender may, through their legal representative, apply to the Court Martial for an order that they should pay only a proportion of the costs, on the grounds that it would be manifestly unreasonable to pay the whole amount. This provision applies to those who have been convicted on one or more, but not all, of the offences for which they were charged. Applications must include the grounds and the proportion (as a percentage) of the costs which it is said would be reasonable. The trial judge (or a judge specified by the Judge Advocate General) considers the application and may seek further information from AFCLAA before making a final decision. Where an application is granted, the judge states the percentage of costs payable. If there was a co-accused who was convicted, they pay only their own share of the total costs (not the outstanding balance of the applicant's costs). There is no right of appeal against a refusal.

## **Service Civilian Courts (SCC)**

- 15.1 For SCC cases (unlike the Court Martial) it is not assumed that the Interests of Justice (IOJ) test is automatically met. Only applications which meet the IOJ test will be processed (including means testing), just as for Court Martial cases. Applications that do not satisfy the IOJ test will be refused by AFCLAA.

## **Summary Appeals (SAC) and Elections for Trial in the Court Martial**

16.1 Applications for legal aid in respect of summary appeals or CM by election are treated differently in that:

- i. the income-based means test includes an additional £500 allowance to cover any costs incurred if/when applicant obtains privately funded independent legal advice before deciding to elect or appeal, thereby increasing the threshold,
- ii. there is no capital or equity contribution liability,
- iii contributions are only payable following case conclusion, and dependent upon the outcome of the proceedings.

iv the amount of the contribution is fixed as follows:

- SAC appeal against finding dismissed - £500;
- SAC appeal against finding dismissed but sentence reduced - £250;
- SAC appeal against sentence dismissed - £250;
- SAC appeal lodged by Reviewing Authority – nil;
- Conviction in the Court Martial following election for trial - £1,000 or actual legal costs, whichever is the lower.

## **Non-Legally Aided Defendants**

17.1 If a defendant in the Court Martial who has instructed a legal representative privately (that is, without legal aid) is acquitted of all charges, they are not entitled to apply to the judge or AFCLAA for a recommendation that their costs be reimbursed. This applies to all cases where the defendant either declined to apply properly for legal aid or refused an offer of legal aid from AFCLAA, choosing to instruct a legal representative privately instead.

17.2 Applicants who were refused legal aid because they exceeded the financial eligibility threshold, but who were later acquitted, or where their case is discontinued, can apply to AFCLAA to reclaim some or all of their privately incurred legal costs. The maximum that can be reclaimed is equivalent to that which would have been paid if legal aid had been granted by AFCLAA. Applicants are only able to reclaim these costs where they have provided a written estimate from their legal representative and, after a review by AFCLAA, their annual disposable income still exceeds the financial eligibility threshold, after taking into account potential private legal costs of representation and have provided a Refusal Certificate to show the applicant's annual disposable income exceeded the financial eligibility threshold.

## **Transfer of Legal Aid**

- 18.1 Once legal aid has been granted, AFCLAA will only consider an application from a defendant to transfer legal aid to a different legal representative at public expense if it can be shown that there are substantial and compelling grounds to do so. Any application to transfer legal aid received after Plea and Trial Preparation Hearing will be referred to the designated trial judge who will provide AFCLAA with their recommended course of action.
- 18.2 Where the applicant is unable to provide suitable grounds for transfer at public expense, changes to legal representation will only be authorised if the applicant agrees to accept personal responsibility for all costs incurred by the originally instructed legal representative. This is in addition to any contribution liabilities the applicant has towards their legal aid costs and is irrespective of the outcome of proceedings.
- 18.3 Should the legal representative request to be removed or replaced, irrespective of the reasons for such a request, AFCLAA will transfer legal aid to another representative at no cost to the applicant.

### **When in doubt**

- 19.1 When in doubt, contact the helpful team at AFCLAA on:

General enquires: 01980 618915 or 01980 618008

Policy enquires: 01980 615973

Email: [mcs-afclaa-group@mod.gov.uk](mailto:mcs-afclaa-group@mod.gov.uk).

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