A: Information about you

Please provide us with the following information so we can log your response and send you acknowledgement of our receipt of your response.

Your name: Immigration Law Practitioners' Association

Your postal address: 40 /42 Charterhouse Street, London

Your postcode: EC1M 6JN

Your email address: info@ilpa.org.uk

Your areas of interest:
If you specify your areas of interest below it will help us to target future consultations to you. **To select one or more of the options, double click on the appropriate box and select 'checked' as the default value.**

- ☒ Funding Code / Contract
- ☒ Amendments
- ☒ Quality
- ☐ Magistrates' Court Work
- ☐ Prison Law
- ☐ Actions Against the Police
- ☐ Community Care
- ☐ Debt
- ☐ Employment
- ☐ Family – Private Law
- ☐ Housing
- ☐ Mental Health
- ☐ Public Law
- ☐ Organisational Transformation
- ☐ Crown Court Work
- ☐ Police Station Work
- ☐ Very High Cost Crime Cases (VHCCCs)
- ☐ Clinical Negligence
- ☐ Consumer
- ☐ Education
- ☐ Family – Mediation
- ☐ Family – Public Law
- ☒ Immigration and Asylum
- ☐ Personal Injury
- ☐ Welfare Benefits

To select a box, double click on the appropriate box and select 'checked' as the default value.

Would you like us to automatically notify you of future consultations of interest?

☒ Yes
☐ No

The Legal Services Commission might like to contact you about other legal aid matters. Would you be happy for us to do this?

☒ Yes
☐ No

I am responding to this consultation as:
(Please select one option from the following list)

☐ Individual Legal Aid Practitioner – solicitor, adviser or mediator (not on behalf of my organisation)
☐ Solicitor, on behalf of my firm
☐ Not-for-Profit Provider, on behalf of my organisation
☐ Family Mediation Service (for profit or Not-for-Profit)
☐ Non-Legal Aid Contracted Provider
☐ Individual Barrister
☐ Barrister on behalf of chambers
☒ National Representative Body
☐ Regional or Local Provider Representative Body
☐ Client Representative Body
☐ Member of the Public
☐ Central Government
☐ Local Government
☐ Other Government
☐ Member of Parliament
☐ Other (please specify)

If you are responding on behalf of an organisation that holds an LSC contract, *please enter your LSC account number*

If you are a barrister, *please enter your LSC bar number*

ILPA's response to this consultation is limited to Section C (as Questions 1 – 5b inclusive are concerned with proposed changes to the fee schemes in the family and personal injury categories). At Section C, we set out our comments on the Civil Fee Schemes Review (Phase 1) as pertaining to immigration / asylum.

To select a box, double click on the appropriate box and select 'checked' as the default value.

B: Questions asked in the consultation paper

Please note there are 5 questions in this consultation.

Question 1: Do you agree that there should be a separate fee for preparation for advocacy? No ILPA response

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree

Question 2: Which option for funding the preparation fee do you prefer? No ILPA response

Option 1 – Increase the exceptional case threshold	Option 2 – Reduce the Care Proceedings Graduated Fee Scheme Level 3 fee

Question 3: How else do you think the preparation fee could be funded? No ILPA response

Please write your comments here:

Question 4a Do you agree with the proposed tolerance fee and tolerance exceptional fee for PI? No ILPA response

PI Tolerance Fee

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree

PI Tolerance exceptional Fee

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree

Question 4b If not what would you suggest? No ILPA response

Please write your comments here:

To select a box, double click on the appropriate box and select 'checked' as the default value.

Question 5a Do you agree with the proposed amendment to the fixed fee and exceptional fixed fee for PI? No ILPA response

Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree

Question 5b If not what else would you suggest? No ILPA response

Please write your comments here:

C: Additional questions

General comments

Do you have any additional comments that are not covered in the questions asked in the consultation? If so, please enter any additional comments in the space below.

Our comments are set out under two main headings:

1. The problems with the Fee Scheme Review;
2. The problems with the fee schemes for immigration and asylum.

1. Problems with the Fee Scheme Review ('the Review'):

a) Inadequate data:

As the Commission itself appears to concede, its analysis of how the changes to the fee schemes introduced in October 2007 have impacted upon suppliers in the immigration / asylum category is at present of limited value. The various periods of time, following the introduction of the fee schemes, which are under analysis in various different sections of the Review are unlikely to give a reliable indicator of how the fee schemes are working (or not) because of:

(i) The particular transitional arrangements (set out at 11.2 of the current immigration specification) which apply in immigration / asylum. These transitional arrangements mean that a considerable proportion of matters started in this category on or after 1st October 2007 continue to be paid at hourly rates, as do categories of cases such as unaccompanied children's cases and cases in the detained fast track.

(ii) The fact that immigration / asylum (particularly asylum) tend to be amongst

To select a box, double click on the appropriate box and select 'checked' as the default value.

the longest running cases (for reasons generally beyond the control of suppliers) of any cases in the civil category. The Commission's own research indicates that in asylum, 43% of cases exceed 14 months in length.

Matters started post 1st October 2007 which continue to be paid at hourly rates have been removed from the statistical analysis in the Review so as not to distort the outcomes, but that has presumably left the Commission with a relatively small sample of cases. Thus the data under analysis in this review is extremely limited in terms of its ability to feed into a proper, comprehensive assessment of the impact of the October 2007 fee schemes on the stability and sustainability of the supplier base and this is evident throughout the Review. To this extent, the Review may not provide an adequate basis for assessing the true potential impact of the fee schemes on supplier diversity in the immigration / asylum category, albeit that the analysis presented in section 7 appears to indicate that thus far there has been no impact on supplier diversity.

b) Increased usage of New Matter Starts ('NMS'):

The Review indicates that in immigration / asylum, as in all other civil categories, there has been an increase in NMS usage in the period October 2007 – September 2008. At best this information tells us nothing at all of any significance about the impact of the October 2007 fee schemes on suppliers. At worst, it may be indicative of a tendency towards cherry picking 'straightforward' cases, in the hope on the part of suppliers of getting paid for the case at a higher effective hourly rate. This risk is acknowledged in the Review. The Commission has a responsibility to find out whether this is what is actually happening. This imperative has been highlighted by the Minister himself on various occasions; see for example his speech to the Legal Aid Practitioners' Group annual conference (October 2008):

"We therefore need to be thinking about how we get more out of the significant commitment of resources that has been made to Legal Aid, both from the point of view of the taxpayer rightly expecting that we seek value for their money, and in ensuring those most in need receive legal help".

We would like to know when and how the Commission proposes to find out whether a tendency towards cherry picking has emerged, and if so, how the Commission proposes to address this.

It is the responsibility of the Commission to ensure that those clients with complex cases, clients who are often amongst the most vulnerable, such as those who may be suffering psychological / psychiatric disorders as a result of having been subjected to human rights abuses, do not go without representation because of suppliers' fears that taking on such clients' cases is not economically viable.

c) Fixed Fees paid exceeding actual profit costs:

The Review indicates that in immigration / asylum, as in all other civil categories, across all LSC regions, in the 14 month period from 1st October 2007, the fixed fees paid have exceeded the actual profit costs incurred in the majority of cases. In immigration / asylum the figures are said to be as follows:

Asylum:

Fixed fee higher than profit costs in 87.85% of cases.

Profit costs higher than fixed fee in 12.15% of cases.

Immigration:

Fixed fee higher than profit costs in 80.44% of cases.
Profit costs higher than fixed fees in 19.56% of cases.

We note firstly that the profit costs referred to above are 'average' but no analysis is given of the statistical distribution of claims other than the average. It is therefore necessarily the case that for asylum, some suppliers' actual profits costs in the post- Phase 1 period will have been very much higher than the £500.75 given as the average (in table 18 at 8.22), but not high enough to meet the exceptionality threshold. For immigration, some suppliers actual profit costs will have been very much higher than the £292.01 given as the average (in the same table), but not high enough to meet the exceptionality threshold. Reports from members (not a statistical survey) indicate that there may be a significant number of suppliers losing out on average across their caseloads (as well as instances of losing out on individual cases).

We are concerned that there may not be as many 'winners' under fixed fees as the figures would appear to suggest at first sight. Even if one were to assume for the sake of argument that the above figures broadly represent reality, such that in the period under review most suppliers have been 'winners' under the fixed fee scheme, we refer to our comments under (a), above. As the Commission itself acknowledges, the period under analysis was bound to capture a higher proportion of cases in which the fixed fee would exceed the profits costs simply because the cases which are quickest to conclude are also the ones which are most likely to come within the fixed fee. Again, we refer to the fact that 43% of asylum cases take more than 14 months to conclude. Again, the risk of a tendency towards cherry picking apparently straightforward cases cannot be ignored. Again, with cases which continued under hourly rates removed from the analysis – together with all cases from Refugee and Migrant Justice (formerly Refugee Legal Centre) and the Immigration Advisory Service - the sample on which these percentages are based may be too small to provide any useful data.

The Commission acknowledges that the gap between the fixed fees paid and the actual profit costs is likely to reduce over time. We would go further; over time it is more likely than not that the actual profit costs will exceed the fixed fee in the vast majority of asylum cases, and the majority of cases in immigration. There is a real risk that the 'exceptional threshold' of three times the fixed fee will prove to be set still too high, with the majority of cases falling between the fixed fee and the exceptionality threshold.

It is therefore of concern to note the Commission's conclusion at 8.25 of the Review that its analysis in the immigration category:

"…does not at this stage present evidence to suggest that the fees have been set at a level that will not prove sustainable to the provider base".

It hardly needs adding, given the acknowledged limitations on what the Review can tell us about the impact of the October 2007 fee schemes on the immigration / asylum category specifically, that the Commission's analysis does not at this stage present evidence to suggest that the fees have been set at a level that will prove sustainable to the provider base.

Further, as the Commission acknowledges, the fact that the fixed fee paid

exceeded 'average' profit costs in the period under review tells us nothing at all about the quality of the work undertaken, nor about the outcomes for the clients. Thus, broadly speaking, the Review tells us very little about whether the Commission is fulfilling its obligation to safeguard access to justice, another matter highlighted by Lord Bach (in his speech referred to above) as fundamental:

"Legal aid is a fundamental element underpinning the justice system. It enables access to justice for the vulnerable and those who cannot afford to pay for legal advice and representation".

d) Case mix

We note the findings at section 9 of the Review as to the impact of the fee schemes on the case mix undertaken by suppliers. It is a matter of concern that there has been a 5.09% increase in asylum and immigration (other) matters reported as concluding under outcome code 'IX' – 'client advised and no further action necessary'. In fact when one looks to the tables at Appendix 6 (page 73) the figure is 5.09% increase for asylum cases and 8.08% for immigration (other) cases. The Commission asserts the increased use of this code during the period 1st October 2007 – 31st March 2008, compared with the period 1st April 2007 – 30th September 2007, is 'largely explained' by clearer guidance having been provided to suppliers on how to report instances of advice given under the detention duty advice surgery scheme and police station telephone advice scheme. We would like to be informed of the evidential basis for this hypothesis, and for the Commission's overall conclusion that it does not 'feel' that there has been a negative impact on suppliers' case mix. Our concern is that the increased use of this outcome code might well be indicative of a tendency towards cherry picking of straightforward cases.

What is also notable from the tables at Appendix 6 is an increase in both asylum (2.40%) and immigration (2.15%) of matters concluding under code 'IU' – 'matter stopped on advisor's recommendation', and the stage claim code 'IE' – 'Legal Help completed, CLR not applied for' for both asylum (11.70%) and immigration (9.07%). Again there is a risk that these figures may be indicative of a tendency towards cherry picking straightforward cases, and again the Commission has a responsibility to find out if this is the case.

2. The problems with the fee schemes for immigration and asylum

Although the Commission has made clear that the purpose of the Review is not to revisit the principle of fixed fees, we take this opportunity to reiterate our firm belief that suppliers and the Counsel they instruct ought always to be paid for the actual number of hours they spend working on a case, subject to the work carried out being necessary in the client's best interests and justified in terms of the Funding Code Criteria. This is what should happen, in order to ensure the long-term sustainability of the supplier base, and access to justice for clients, rather than suppliers and the Counsel they instruct being paid an arbitrarily arrived at fixed fee, unless the value of their work exceeds that fixed fee by 3 times. Costs can and have been perfectly well be controlled in hourly rates cases through the careful consideration of funding extension applications and through appropriate costs audits. In addition to the issue of principle, hourly rates cases are far more straightforward to report and claim for. The advent of the October 2007 fee schemes, in immigration / asylum at least, has brought with it an incredibly complex and cumbersome system for reporting and claiming, a system which has been circumscribed by the

changes which software suppliers have been able or willing to make.

Failing the reintroduction of payment on an hourly rates basis across the board, the Commission should give serious consideration to reducing the exceptional threshold to twice the fixed fee. This would be a fairer scheme especially as there is no basis advanced for setting the threshold at the higher level. We expect that this would significantly reduce the number of cases in which individual suppliers are severely penalised because the value of the work falls between the fixed fee and the exceptional threshold, and as such would go some way towards ensuring the long term sustainability of the supplier base.

Further, we reiterate points raised in our April 2007 response to the Commission's consultation on the then draft Unified Contract, including:-

i) The London weighting should be added to the graduated fees. It makes no sense to have a 'national' fixed fee, given that it is entirely non-contentious that overheads in London are greater than anywhere else in England and Wales. We utterly reject your contention when this was introduced that there is an oversupply in London. Our members' clear experience is that potential clients in London often face huge difficulties finding a supplier with both the capacity and willingness to take on their case particularly where the case is likely to be complex. While we applaud giving out of London suppliers a remuneration "increase" the reduction in remuneration to London suppliers is detrimental to the sustainability of a quality supplier base in London.

ii) Bring back the ability for suppliers to open NASS only NMS for NASS work in excess of 30 minutes. It remains the case that there are many instances in which a client's NASS problem can and should be capable of resolution by the asylum supplier without the need for referral to a community care or welfare benefits specialist. Often the case is determined by arguments about the asylum seeker status of the client, in which case the asylum supplier is the most appropriate specialist to assist. It is by far in best interests of client for asylum suppliers to be able to carry out this work, as the problem is very likely to be resolved more quickly than if a referral has to be made. Although suppliers without contracts in the relevant categories can undertake this work within any tolerance allocation, the number of tolerance matter starts is very low and the payments based on lower hourly rates. There is simply no justification for not paying suppliers properly for work which is an integral part of providing a good service to asylum clients. If the Commission does not want to reintroduce the option of suppliers starting NASS-only matters, then it should permit suppliers to conduct as much NASS work as necessary on the asylum application file, and all that work should be remunerated (i.e. whether on an hourly rates case, or by counting towards the exceptionality threshold on a fixed fee case).

iii) CLR – we continue to maintain that it is unfair for travel and waiting time being included in the advocacy 'additional payment' rather than being separately remunerated.

iv) Restore the provision for 3 hours costs (including Counsel's fees) to consider the merits of a s.103A application (for Review and Reconsideration).

v) Do away with 3 hour travel cap for all prisons.

In addition we ask the Commission to reconsider as a matter of urgency the limitation of £100 on advice prior to a client attending the Asylum Screening

Unit if they do not instruct the supplier after claiming. This is simply inadequate, especially if one is dealing with an applicant who has been in the UK for many years and then finds that there are grounds for a 'sur place' claim, as will have been the case, for example, with many Zimbabwean people, following the Country Guidance given by the Asylum and Immigration Tribunal in RN (Returnees) Zimbabwe CG [2008] UKAIT 83. Equally if one is dealing with an applicant who has been in the UK for many years and who, however strong a claim she may have, is at real risk of having that claim certified as clearly unfounded, and / or of being detained and fast-tracked upon presentation at the Asylum Screening Unit, then very detailed instructions need to be taken so that the supplier will be ready to deal with issues relating to credibility as well as the substance of the claim. Fewer than 2 hours work simply is not adequate in such cases. The fixed fee should be increased, or pre-Asylum Screening Unit advice should be paid at hourly rates.

We are dismayed to see that the limit in the current draft specification for the 2010 contract has been extended to clients who ultimately decide not to claim asylum.

These limitations pose a direct conflict of interest between the best interests of the client and the requirements of best practice on the one hand, and the financial interests of the supplier on the other. They are also counter to the idea of "front loading" asylum advice.

A further matter of concern is the bureaucracy involved in making 'Exceptional Case' (EC) claims, and the length of time which it takes for suppliers to be paid for EC claims, especially if the case proceeds to appeal. This can mean a large amount of time being invested in a case for which only fixed fees may be paid for many months whilst the case and then the claiming process proceed. The form and information required (in different formats from the CMRF report) is an unnecessary burden on suppliers.

FOI disclaimer

If you want the information you provide to be treated as confidential, please be aware that under the Freedom of Information Act (FOIA) there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatically confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Commission.

Please write your comments here:

E-consultation feedback

Please could you tell us your reasons for not responding to this consultation online, (this is so that we can develop the system further to improve it for future use).

Please write your comments here:

Thank you for your response.

Please email your response to: civilreform@legalservices.gov.uk

Or post to:
Michelle Leung
Legal Services Commission
4 Abbey Orchard Street
London
SW1P 2BS
DX 328 London

To select a box, double click on the appropriate box and select 'checked' as the default value.