Please send completed responses to:
Email: civilreform@legalservices.gov.uk

If you need to **post** or **fax** your response, please contact Stephanie Curran (tel 0207 783 7536) for our NEW contact details

Civil Bid Rounds for 2010 Contracts Offline Response form

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 (see description below)
☐ Regional or Local Provider Representative Body
☐ Client Representative Body
☐ Member of the Public
☐ Central Government
☐ Local Government
☐ Other Government

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

☐ Member of Parliament

☐ Other (please specify)

ILPA is a professional association with some 1,000 members, who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-government organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration and asylum, through training, disseminating information and providing evidence-based research and opinion. ILPA is represented on numerous government and other stakeholder and advisory groups including the Legal Services Commission Civil Contracts Consultative Group and the specialist immigration groups under it.

This response addresses the consultation questions in the order they appear. Additional matters are incorporated in the most logically appropriate places with our responses to the consultation questions.

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**

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

B: Questions asked in the consultation paper

Section 1: Foreword

There were no questions asked in this section.

However there are significant assumptions inherent in the whole approach to procurement set out in this paper and so this seems an appropriate point to deal with some of these assumptions.

One such significant assumption is that it would be better for there to be fewer, bigger contracts as between the Commission and, therefore, a smaller number of providers. This is to be achieved by the introduction of a minimum number of new matter starts (100 asylum with 50 immigration). Providers will be required to meet this minimum (or 85% of bids for more than the minimum); this, it is proposed, will be a Key Performance Indicator ('KPI'). The expectation is that the sanction for not meeting the minimum matter starts (or not meeting 85% of matter starts allocated in excess of the minimum) will be termination of the provider's contract in that category of work.

At the Representative Body Meeting of 8th December 2008, Mr Chris Handford (for the Commission) in response to ILPA's query as to the basis for the 100 / 50 matter starts requirement, confirmed that there was 'no robust evidence base for it'.

Nevertheless the logical corollary of this approach is that the Commission must expect some smaller providers no longer to have contracts after 2010, as is in fact evident from the Initial Impact Assessment at Annex E. The Commission states that it wishes to give smaller providers 'the opportunity to increase capacity' (3.24) but does not consider or address the facts that a) the general economic climate, and in particular reduced availability of credit with which to finance expansion, makes expansion a very difficult and risky choice at present, particularly given the poor cash flow many immigration providers are struggling to cope with (which has been the subject of much investigation and discussion, and which at the time of submitting this response remains unresolved) and b) smaller providers will have to take a chance on expanding in advance of knowing whether they will secure a contract (i.e. in order to be competitively placed in the bid round which will start in July 2009). The alternative for such providers is simply not to enter the bid round at all. This creates unnecessary risks for suppliers and the Commission alike. The risk for suppliers stems from the fact that, as noted above, the current economic climate could not be less conducive to expansion (from an abundance of evidence available to support this contention see for example The Guardian's leader on 3rd January 2009: 'Banks defy Brown call to free up credit – Loans for business increasingly scarce and outlook bleak says report'). The Commission expects to award the contracts for April 2010 in December 2009, leaving barely12 weeks for those awarded contracts to scale-up as required in time to start delivering services under the contract from 1st April 2010. This is clearly an inadequate period of time for recruiting, training and acquiring premises, but for those

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

providers who are currently too small to deliver the minimum matter starts which the Commission proposes to require, the options appear to be to take a chance on expanding in the hope that a bid will be successful, or not to enter the bid round. The Commission unreasonably seeks to place all the risk in this process on providers. We anticipate that expansion will be particularly difficult for Not For Profit providers, who report having even greater difficulty accessing the credit market, and many of whom have been hit hard financially by the change from the old NFP contract.

It is incumbent on the Commission to make clear the specific estimated cost savings it anticipates from having fewer, bigger contracts. The prioritisation of and competitive advantage for larger providers in the forthcoming bid round is a clearly evident theme, sometimes explicit, sometimes implicit, throughout the consultation. The consultation proposals as they stand have the potential radically and irreversibly to change the landscape of Legal Aid provision. Once smaller and / or specialist providers (who undertake fewer, longer running cases) are lost they will not return. Before embarking on a process which could result in the loss to the sector of a significant number of quality, specialist providers, simply on the basis that they are not as 'big' as their competitors, the Commission should make plain the magnitude of savings it hopes to achieve with this approach, bearing in mind that the proposals set out in Delivery Transformation ('DT') are supposed to achieve significant administration savings without that being contingent on there being fewer, bigger contracts. In its consultation response on DT the Commission anticipates administrative savings of £7,000,000 per annum as a result of the DT measures it intends to implement.

We appreciate that in advance of knowing how many fewer contracts there will be it would be difficult for the Commission to provide precise data, but our point is that the Commission must have in mind a minimum savings figure across civil Legal Aid as a whole, and perhaps also minimum savings figures for each category. We would like to know what those figures are, so as to be able to assess whether they form part of a rational basis for these proposals.

If the aim of having fewer and bigger contracts is not to achieve significant (or any) savings, then the Commission should make plain what that aim is in fact designed to achieve.

The priority for the Commission should be to enable and preserve the existence of a provider base of the highest possible quality. The size of a provider has nothing to do with the quality of work they deliver; insisting on bids for an arbitrarily arrived at minimum number of new matter starts will do nothing at all to safeguard or nurture quality. For providers with existing caseloads, conducting a broad spectrum of work 150 as a minimum matter start size is too high. We do not propose an alternative minimum; there should be no minimum matter start size.

Alongside the minimum new matter start figures, the Commission also posits a maximum number of matter starts per Full Time Equivalent (FTE) per year in order to assess whether a bid is realistic. We note that there is no suggestion that the supplier would have to guarantee to employ at least that number of fee earners throughout the contract and therefore its usefulness in achieving its aim seems highly doubtful. For

immigration / asylum this figure is 100. Again there appears to be no real evidence base for this figure, which equates to starting more than 2 new matters per week (over a 47 week working year).

We would immediately point out that the failure to differentiate between asylum and immigration matter starts is irrational. The difference in the fixed fees set by the Commission in immigration and asylum reflects the fact that on average immigration cases take much less time than asylum cases (although there are of course immigration cases which are very complex and time consuming).

We note that amongst our members there is a wide divergence in the number of matter starts per fee earner currently undertaken and no consensus as to what a realistic maximum would be. What is realistic depends on very many variables many of which, in this volatile area of law, are difficult to predict in advance, such as deteriorating conditions in a country resulting in a large influx of refugees (remember the situation of Kosovar asylum seekers in 1999).

The quoted figure may be achievable by some providers only if they cherry pick the most straightforward cases or avoid litigation. It may create a risk of those providers misapplying the CLR merits test so that they can prioritize new matter starts over appeals and litigation in the higher Courts (compounding the risk of this behaviour which the 40% success rate KPI already creates) in order to retain the contracts they have been awarded. Such a 'pile them high and sell them cheap' approach would not be deterred. However, other existing providers, acting perfectly properly and providing a good quality service with experienced, expert staff, who rely on being able to undertake greater numbers of case starts would be hurt by such a move and will either find themselves unable to make a sustainable bid or being driven into taking on private work in replacement for the publicly funded cases that the Commission has deemed excessive. As we have repeatedly stated the Commission cannot afford to drive out good providers.

Whilst there is not a complete consensus of opinion amongst our membership on this point, overall we take the view that in relation to this matter the Commission should retain flexibility and desist from being overly prescriptive. We appreciate that there is a need to guard against unrealistic bids or bids based on assumptions of poor quality work or which can only be maintained through poor work. Whatever the size of a bid, the Commission's overriding imperative in awarding contracts should be to maintain, promote and safeguard quality standards. The Commission has access to data (however incomplete and subject to inaccuracies) on what matter starts are currently conducted by existing providers and will have peer review data for many of them. That would seem to be a proper starting point for an assessment of feasibility.

Section 2: Executive Summary

There were no questions contained within Section 2 of the consultation paper.

Section 3: Introduction

Again, whilst there are no questions in this part of the paper there are some significant assumptions which we wish to comment on. The introduction gives an overview of how the Commission sees the future shape of civil Legal Aid generally and provides a category-specific break-down. In relation to immigration and asylum the emphasis (3.13) is very clearly on taking an approach which a) prioritizes asylum over immigration and b) identifies Home Office processes and accommodation policy as the main driver for the kinds of services clients need and the necessary geographical location of those services.

In relation to the prioritisation of asylum over immigration please refer to our responses to questions 35 and 35a, below. For the time being we note that as a matter of principle prioritisation should be accorded to those at risk of serious harm, which on the face of it suggests that prioritisation of asylum is correct. However the Commission must not forget, and must retain capacity to fund services for non-asylum clients who are equally at risk of serious harm, such as victims of domestic violence, and domestic workers in private households who suffer abuse at the hands of their employers.

In relation to Home Office processes and accommodation policy being the main driver for the kinds of services clients need and where those services are needed, that is simply not the whole picture and we believe that planning the delivery of Legal Aid in asylum and immigration based on current Home Office processes and accommodation policy, which are liable to change (especially with the prospect of a change of Government on the not too distant horizon) should not be the main factor in planning the delivery of services. UKBA plans do not now, and never have provided the complete picture in relation to where and what kinds of Legal Aid services need to be accessible. The consultation proposals seem to be premised on the view that the New Asylum Model ('NAM') is the only show in town. That is simply not the case. There are now and there will continue to be a very significant number of asylum clients who are not within NAM and who are not dispersed outside London and the South East. Amongst these are: those who make fresh claims for asylum (members of this group will typically have been in the UK for longer periods of time and are more likely to have more community contacts and therefore potential for making their own arrangements for accommodation and support – however precarious - instead of subjecting themselves to the s.4 regime, including dispersal), those making applications for further leave to remain on grounds which include asylum or Article 3. Then there will be all the applications for indefinite leave to remain which will be coming up from August 2010 from those asylum seekers who were granted refugee status and 5 years leave to remain, following the policy change of August 2005 when immediate grants of indefinite leave to remain upon recognition of applicants as refugees were abolished. These clients, emerging as they do from pre-NAM days, are not going to be situated in Home Office dispersal areas. Activity on cases being dealt with by the Case Resolution Directorate is increasing, and again these cases have nothing to do with current Home Office asylum / dispersal processes in terms of where the clients are located and the kinds of services they need.

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

The proposals overall proceed on the basis of assuming that the 'Legal Aid cake' is the right size, and that all that remains is to divide up that cake in line with current UKBA plans. Both parts of this assumption are wrong. The 'Legal Aid cake' is not big enough, as increasingly evidenced by research undertaken by the voluntary sector about the numbers of applicants / appellants unable to find Legal Aid lawyers to take on their cases (see for example the Refugee Action document of May 2008: 'Long term impact of the 2004 Asylum Legal Aid Reforms on access to legal aid', which was included in the briefing papers for the September 2008 National Asylum Stakeholders' Forum). Our members frequently report being approached by clients who have been turned away by numerous other providers for lack of capacity. Dividing up a cake which is already too small, in a manner which will be fixed for the next 3 years, according to UKBA plans which are highly unlikely to be fixed / unchanging for the next 3 years is a recipe for increasing inadequate provision and unmet need.

If the reality is, as we believe, that the Commission does not really have an accurate model of where the demand is now and more crucially where it will be, it should resist the temptation to be overly prescriptive about where providers will need to locate themselves. Providers are unlikely to set up or move to areas of low demand. Providers situated in areas of high demand, who find that there is inadequate demand for their services (a very hypothetical scenario and certainly not one our members would recognize) may well choose to relocate or diversify.

We also wish from the outset to reiterate our firm opposition to the 40% success rate KPI which it is now proposed will become mandatory (see 8.22 of the consultation document) with 'proportionate' sanctions attaching to failure to meet this KPI.

As we have consistently explained:

1. The 40% success rate requirement is based on no sound reasoning, or statistical evidence or advice and is therefore arbitrary. Given the extent of the variables involved it is highly unlikely that a failure to meet the KPI could be said to correlate to poor quality representation. As such it cannot form a proper basis for triggering contract sanctions.
2. If providers are given to understand that their contracts will be in jeopardy for failure to meet this KPI there is a very real risk of cherry-picking straightforward cases and of clients being wrongly refused CLR rather than the stated aim of improving the quality of representation. This will lead to more unrepresented appellants with the risk that their rights will be denied to them (and it is consequently likely there will be more need to fund fresh claims).
3. Those with a contract for detained fast track work stand little prospect of being able to meet the 40% success rate requirement if correctly applying the merits test, even if the representation is of high quality, given the low overall success rates for cases which remain within the DFT.
4. If there must be a success rate KPI, children's cases should be left out of it. There are particular difficulties in children's cases, as the Commission has gone some way to recognizing, through guidance, that the CLR merits test should be applied liberally in children's cases.

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

There is a clear, absolute imperative that children should be able to access advice and representation of the highest standard, and providers should not be put at risk of being penalised for taking on children's cases.

5. We have also explained why the recording of a successful outcome using the LSC's current reporting arrangements is highly inaccurate. The complexity of the reporting codes tends towards supplier error/misunderstanding, and the LSC still cannot record when a case is successful after an appeal to the Court of Appeal. That is worrying enough when a contract discussion may arise from failure to meet the target, but is the more so when contract termination is the inevitable consequence.
6. There is no mention of the size of sample that is to be measured. Even if the minimum matter starts are maintained (and we consider they should not be) then providers may still be reporting small numbers of appeal outcomes in a given period (e.g. a new provider may have no appeals for several months after commencing a new contract). Reliance on statistical criteria in small samples is highly inaccurate (and has been rejected in the past by the LSC in this context) but no safeguard is mentioned here. This may specifically unfairly disadvantage new providers in the retention of a contract.

If the 40% success KPI is to remain (and we consider its adverse consequences sufficiently serious that it must not) then at most failure to meet it should trigger a quality audit, but there should be no question of any presumption in favour of terminating a provider's contract for failure to meet this KPI.

Finally, by way of introductory remarks, our response to this consultation is informed to a significant degree by our and our members' experience of the competitive bid tender, which closed on 19 August 2008, for advice services in Immigration Removal Centres. In that bid round the Commission has stated it received bids for 259 contracts from a total of 69 organisations. At the time of writing, (17 January 09 – i.e. 5 months later), those contract bids have still not been let as the appeals process is still ongoing. There is currently no announced start date for the contracts, although when the tenders were submitted the start date was to be 27 October 2008 and it was a strict condition of bids that organisations be able to commence the contract work on that date. No one will therefore be surprised if our members consider the possibility of a competitive bid round by the Commission for all services with trepidation and some cynicism as regards the Commission's ability to deliver what it sets out within the timescales it has stipulated. The risk that the Commission will not achieve this appears, from this consultation, to be borne entirely by prospective providers.

Section 4: Types of services we want to buy

Q1: Are there any areas of family work other than child abduction that should be procured separately?

☐ Yes
☐ No

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

☐ Don't Know

NO ILPA RESPONSE.

Q2: Are there any other areas within low volume categories that are so significantly distinct that it would be more appropriate to tender for this work separately from the rest of the category?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

Q3: Do you agree with the types of services we intend to procure in each category of law?
Please rate one or more of the following options.

	Family	Family mediation	Social welfare law	Mental health	Immigration and asylum	Low volume categories
Strongly agree	☐	☐	☐	☐	☐	☐
Agree	☐	☐	☐	☐	☐	☐
Agree with reservations	☐	☐	☐	☐	☐	☐
Neutral	☐	☐	☐	☐	☐	☐
Disagree	☐	☐	☐	☐	☒	☐
Strongly disagree	☐	☐	☐	☐	☐	☐

We have checked 'disagree' for the following reasons:

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

We understand that the Commission is considering letting only a very few contracts in immigration only / asylum only (possibly 6 – per Chris Handford – Representative Bodies' Meeting of 8th December 2008) and that the decision to let immigration only / asylum only will be demand-led (that is to say, such contracts will be let only in areas of the country where there is no demand or negligible demand for one or the other of asylum or immigration).

In publicly-funded work, clients are far better served by advisors who have adequate experience in both asylum and immigration to be able to identify those cases which present initially as potential asylum claims, but for which there may be immigration solutions with far better prospects of success, and those cases which initially present as immigration but where on taking further instructions it is clear that an asylum or human rights claim needs to be made.

Whilst in general it is better if providers can deal with both asylum and immigration cases, an inability to deal with both should not preclude a provider from entering the bid round. There is a stronger argument for letting immigration only contracts than asylum only contracts. Those providers whose primary focus is asylum work need to be able to deal with immigration aspects of their clients' cases (e.g. applications for post-flight spouses / children to settle in the UK with a client who has been granted refugee status). Providers with a primary or exclusive focus on immigration have emerged to serve the particular needs of settled BME communities. The loss of such providers (i.e. if they are unable to bid because they are situated in an area of high demand for both asylum and immigration – an area in which on the face of it the Commission would not let immigration only contracts) would therefore constitute the loss of a very important service to settled BME communities.

If not, how should services be structured to ensure more integrated advice?

No further comment.

Q4: Do you agree with the types of civil legal aid we will no longer procure?
Please rate one or more of the following options.

	Debt only	Welfare benefits only	Housing only	Family private: domestic abuse only	Family private: finance only	Domestic abuse and finance only	Family private: children and finance only	Mental health: detained clients only	Mental health: non-detained clients only	MHRT work only	Non-MHRT work only	Immigration Removal Centres only	Consumer (other than as stated)
Strongly agree	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☒	☐

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

Agree	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Agree with reservations	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Neutral	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Disagree	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
Strongly disagree	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

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

Q5: Is it reasonable that, in order to maintain integrated services, where contracts have been awarded on the basis of multiple categories (e.g. debt, housing and welfare benefits), work in all categories usually lapses where the minimum new matter start size per contract year has not been met?

☐ Yes
☒ No
☐ Don't Know

There should not any implicit or explicit presumption in favour of work in all categories lapsing in these circumstances. If there are to be minimum matter start sizes, then in circumstances where these are not met it should be incumbent on the Commission to investigate thoroughly what the problem is; to try together with the provider in question to identify workable solutions (such as exercising discretion to allow shortfall in one category to be made up in another category for that particular contract year) and to monitor the implementation of the proposed solution. Before terminating a provider's contract anywhere at any time, we believe the Commission needs to be certain that it can reallocate that provider's matter starts elsewhere within the same procurement area or access point, otherwise coverage will reduce.

We are aware that this question does not impact directly on immigration and asylum because for the time being the Commission is not requiring multi-category bids from asylum / immigration providers. Nevertheless there is a similar proposal that if a provider fails to meet (for example) all their asylum matter starts, then their contract for asylum and immigration work should be terminated.

It is crucially important, as we reiterate in our more detailed comments about the minimum matter start requirements (above and below), that access to quality Legal Aid providers should be safeguarded. For this reason it is extremely risky for there to be any presumption that termination of contract should flow from a failure to meet minimum matter start requirements, be that in relation to multi-category providers or immigration / asylum only providers. The risk is of losing quality suppliers and further reducing access / coverage. In the circumstances an automatic sanction such as contract termination is not appropriate, nor is a presumption in favour of contract termination.

The level of uncertainty which would be inherent under a contract in which, on the face of it, failing to meet a minimum matter start requirement by even just one case would trigger a presumption of termination of the contract is not conducive to a stable supplier base. Automatic sanctions are far more likely to have unintended adverse consequences than bringing in a reasoned, individual decision.

Q6: Are the minimum new matter start sizes required set at the right level in each category?
Please rate one or more of the following options.

	Family	Social welfare law	Mental health	Immigration and asylum	Low volume categories
All are right	☐	☐	☐	☐	☐
Most are right	☐	☐	☐	☐	☐
Don't know	☐	☐	☐		☐

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

Most are wrong	☐	☐	☐	☐	☐
All are wrong	☐	☐	☐	☐	☐

This question does not admit of a tick-box response.

We are opposed to there being a minimum matter start requirement, but if there are to be minimums then these must be evidence-based. As we have already noted, the Commission has admitted that there was no robust evidence base for the 100 asylum / 50 immigration minimum requirement (see also 4.28 of the consultation document – minimum matter start levels have been set 'prospectively').

The overall minimum (150) is significantly greater than that being required in any other category of work. The Commission may take the view that in social welfare law existing providers may have to start significantly more matters in a wider variety of categories than they do at present (because of the proposal no longer to contract for debt, housing and welfare benefits only), but that is not comparing like with like because in social welfare law consortia bids are to be permitted (assuming the Commission and the Solicitors' Regulation Authority can find workable solutions to the conduct problems identified – at 8.13 - as arising with the concept of consortia). At present there is no proposal to allow consortia bids in immigration / asylum.

Further, as the Commission is aware, asylum cases are typically the longest running cases (only care cases tend to last for longer) and so again, in order to meet the minimums, and to keep meeting the minimums over the 3 year period of the contract, the only option for smaller providers is to expand. We have explained above the problems with expansion.

At 4.27 it is reiterated that part of the rationale for seeking a minimum matter start requirement is that the Commission does not wish to commit resources to managing a large number of small contracts. Again, as per our comments above, we would like to know what magnitude of savings the Commission anticipates making by having fewer, bigger contracts, and if it is not a question of savings, then what is the rationale?

The Commission does not appear to have considered the following problems:

a) Providers will not be bidding on the basis of 'starting from scratch'. Existing providers will have existing case loads of varying sizes and this will impact on their ability to submit realistic bids for the minimum number of new matter starts.

b) Even setting aside for a moment the reality of existing case loads, there appears to be a presumption that it will be completely feasible to start 100 asylum matters in contract year one, and then to start another 100 asylum matters in contract year two. This may well be completely unfeasible in practice. It is by no means the case that the 100 asylum matters started in contract year 1 will have concluded by the end of that contract year. A significant number of initial asylum claims from year 1 (including NAM cases) may still be under appeal in year 2. The appeal aspect of the cases may even stretch on into year 3 if there are applications for reconsideration by either side and / or appeals to the Court of Appeal. In the case of fresh claims, there may not even be an initial decision during year 1, but that does not mean the cases can be ignored. Further representations may need to be made if there is any change in the country conditions, the relevant law and / or the client's circumstances. Judicial

review may need to be considered and instigated if the delay is casing exceptional hardship to the client.

c) The upshot of the foregoing points is that in order to meet the minimum matter start usage year on year, many providers will have to consider expansion. As we have already pointed out, the current economic climate could not be less favourable to expansion. As we have mentioned, access to credit with which to finance expansion is now extremely tightly restricted.

We understand and appreciate that the Commission has a duty to ensure access and coverage, but we believe that this can best be achieved by a flexible approach to matter start allocation, including being more receptive to providers wishing to increase their matter start allocation during the course of the contract year. We note that at 8.19 the Commission states its intention to clarify the procedures for providers being able to request up to an additional 20% of their matter start allocation in any contract year, but intends to reserve the right to refuse requests 'if there is adequate supply in the area or [they] want to run an open tender process for new work'. If, within access point X, provider A is 20% short of their target (and is not expecting to make up that number), whilst provider B wants to take on an additional 20% of their matter start allocation, then if those figures roughly equate, it would seem entirely logical to allow provider B their new matter starts and to allow provider A to continue with their contract. In this way, access and coverage can be ensured, and there is no good reason on the face of it to throw out the baby with the bathwater by terminating provider A's contract. In addition, as we have suggested, the Commission and provider A should then work together to identify viable solutions to maintain and enhance provider A's matter start delivery.

We acknowledge that the Commission proposes (see 4.29) to retain discretion not to terminate contracts where matters leading to the failure to meet the minimum were beyond the provider's control or where 'we still wish to purchase the services due to access issues'. Nevertheless we reiterate that if there must be a minimum matter start size then it would be wrong and very risky for there to be any kind of presumption that the appropriate sanction for not meeting that minimum should be termination of contract. It follows from this that if there must be a minimum matter start size then it should not be included as a KPI (given the proposal that KPIs are to become mandatory – see 8.22).

The Commission should maintain a sensible, flexible approach in cases where matter start minimums are not met. Of course providers can and should monitor their matter start use throughout the year, and the best approach would be that if a provider found that they were falling behind then they should be able to approach the Commission to try to identify and implement a workable solution. But providers will always come up against obstacles to being able to use all their matter starts, including unforeseeable events such as employee maternity leave or employee prolonged sick leave.

What needs at all costs to be avoided is any pressure which could lead to clients receiving a substandard service, that is to say inadequate time and care being devoted to an asylum case simply because the advisor knows that s/he has to start another 3 matters that same week.

If not, why – for example, is there a case for letting lower new matter start sizes in rural areas?

Yes but not just in rural areas. Specialists who do long running cases and therefore cannot start so many matters per year should be considered for lower matter start sizes, if there must be a minimum matter start size. Providers who undertake work in the Special Immigration Appeals Commission (SIAC) are dealing with extremely long-running cases, concerning fundamental issues of human rights. These cases are extremely time-consuming and clearly impact on those providers' ability to take on new matter starts. Those providers whose appeal cases become Country Guidance cases have to devote very significant time to the preparation of those appeals as do those providers who litigate in Country Guidance cases which become test cases for countries such as Iraq, Somalia, DRC and Zimbabwe. In general, providers who have the expertise, ability and willingness to pursue litigation in the higher Courts (the Administrative Court, the Court of Appeal and the House of Lords) will not be in a position to start as many new matters as those providers who do not have the same expertise, ability and willingness. Specialists who conduct vital higher Court litigation should not be penalised for so doing because they cannot deliver so many new matter starts.

In immigration and asylum, because of the current structure of the appeals system it is in any event essential to have the ability and willingness to conduct higher Court litigation. We repeat that this work is onerous and time-consuming if properly conducted. It is bound to impact on the number of new matters a provider can start. The Commission should bear in mind that the Home Office still appear to apply for reconsideration of clients' allowed appeals almost as a matter of course, so here it is clear that the behaviour of UKBA, over which providers have no control, also impacts on providers' ability to deliver new matter starts.

Overall our position in relation to minimum matter start levels is:

a) Given that part of the rationale for minimum matter start levels is that the Commission does not want to commit resources to managing a large number of small contracts, the Commission should as soon as possible and in any event before the post-consultation response, provide information about what it regards as constituting small, medium and large contracts and specify the magnitude of savings it envisages achieving through letting fewer, bigger contracts;

b) If there must be a minimum matter start size then the Commission should have regard to the highest minimums in other categories, as there is nothing in this consultation paper which appears to explain why immigration / asylum should be subject to a higher minimum, the Commission is aware that asylum cases are amongst the longest running of all the work it funds, and the Commission has admitted in this paper and in a Representative Bodies' Meeting that the 100 / 50 minimum figures have no robust evidential basis. A reasonable experience of immigration matters can be maintained on the basis of fewer than 50 new cases per year.

c) If there must be a minimum matter start size then there should be no presumption at all that failure to meet the minimum should normally attract the sanction of contract termination. Amongst the risks arising from such an approach would be the risk of discriminatory employment practices, as providers sought to safeguard against employee absence. If there must be a minimum matter start size then the Commission should evolve proactive procedures for investigation in cases where minimum matter starts are not met and should encourage providers to report anticipated problems with meeting their minimums at the earliest possible opportunity, such that solutions can be identified and implemented;

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

d) It follows from this that the minimum matter starts should not be a KPI.

Q7: Is the minimum supervisor to caseworker ratio set at the correct level?

Yes
☐ No
☐ Don't Know

This question does not admit of a tick box answer.

There is a good case for equating good supervision with good quality. A good ratio of supervisors to caseworkers does not of itself though mean that the supervision is of good quality. We are also concerned that there is no recognition of the difference which will exist between the supervision requirements of, say, a caseworker new to the field (perhaps only having just qualified at probationer or level 1) and an experienced caseworker who may meet all the legal knowledge requirements to be a supervisor but simply has no supervisory responsibility. We are therefore concerned that there is a lack of flexibility and recognition of different models of practice in the current proposals. Members have also commented that rates of remuneration for Legal Help and CLR work (particularly GFS work) that the Commission is simply not paying sufficient for the high quality and seniority of staff that the Commission are seeking to require, and which ILPA would say are required for publicly funded work.

Q7a: If not, are there, for example, some categories where processes are simpler and as such require less supervision?

	Family	Social welfare law	Mental health	Immigration and asylum	Low volume categories
Yes	☐	☐	☐	☐	☐
No	☐	☐	☐	☒	☐
Don't Know	☐	☐	☐	☐	☐

Q8: Are there any practical impacts on debt providers that will make the requirement to have an Approved Intermediary for Debt Relief Orders unachievable?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

Q9: Is Panel membership for advocates before the MHRT a reasonable requirement for Integrated Services A in high security hospitals?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

If not, what additional measures should we use to ensure appropriate expertise of MHRT work?

NO ILPA RESPONSE.

Q10: Do you agree that requiring immigration providers to have at least one Level 2 to every two Level 1 caseworkers employed will help ensure that providers are structured to represent clients through the appeal stages of their case?

☒ Strongly agree

☐ Agree

Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

The Commission should make provision to allow adequate time for providers to recruit additional Level 2 caseworkers if they would need to do so in order to maintain the correct ratio, i.e. a provider's contract should not lapse if one of their Level 2 caseworkers leaves their employment. The provider should be allowed adequate 'bridging time' to recruit another Level 2 caseworker.

We would add only that some of our members have commented that the fees that are paid by the Commission are so low that, without cross subsidisation by private work, such a model is difficult to justify financially.

Q11: Is the Integrated Services A requirement to undertake Legal Representation in community care, housing, mental health and immigration and asylum the most suitable way to ensure that clients can access all levels of advice?

X Yes
☐ No
☐ Don't Know

Our response is in relation to immigration / asylum only. We cannot comment on other categories of law.

If not, what would be a better approach?

Q12: Do you agree that specifying referral to family support services for family contracts is the best way of addressing the support needs of family clients?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

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

☐ Strongly disagree

NO ILPA RESPONSE.

Q13: Other than independent advocacy services, are there any other types of support service that the LSC can more closely specify that mental health providers should have links with?

☐ Yes
☐ No
☐ Don't Know

If so, what are these?

NO ILPA RESPONSE.

Section 5: Where services will be delivered

Q14: Given the limitations on competition for mental health services, is the LSC right to treat high security hospitals as separate procurement areas?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

Q15: Do you agree with the approach in immigration and asylum to identifying areas of high demand (access points) and letting matter starts on this basis?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

This question does not admit of a tick-box answer. It is certainly sensible to look at areas of the country where there has been, historically, a high demand for asylum / immigration services, and to ensure that there is adequate coverage and sufficient matter starts available in those areas to meet demand.

We note that although the Commission has set a requirement that within the Family category there is a minimum of 5 contracts to be let per access point, there is no requirement for a minimum number of contracts in any other category of law. This is a very dangerous omission. It cannot be assumed that the selection criteria will not produce a monopoly or near monopoly bid for any access zone. Whilst in some areas the level of demand may not be sufficient to support more than one supplier, where it does that is clearly to be preferred. A lack of competition will tend to facilitate quality standards falling. It also does not allow for the possibility of conflict of interest, which may occur for example between clients or between the client and the supplier (for

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

example the sole immigration supplier may act in a family matter for a husband whose wife needs advice on a domestic violence application for leave to remain based on his violence). Expertise will be lost (not all the experienced advisers will go to work at those suppliers which do get contracts). It also raises real risks to access if all or many of the other providers of that service in an area fail to win contracts. If the monopoly or near monopoly providers fails to meet their contract or fails as a going concern, supply will have been wiped out and will be difficult to replace.

The minimum number set per access point should be based on specific intelligence about that area and the level of demand there. We so not have the information required to suggest figures and that should be the subject of further consultation.

Q16: Do you agree that a different approach to setting access points for London in immigration and asylum is necessary?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

Whilst we agree that a particular approach may be required in London, we are unconvinced by the approach the Commission proposes. We have found the Commission's proposal difficult to follow. This is particular so because of the use of a new piece of jargon - access points – which is given a particular meaning which is then changed for London.

Our understanding is that the proposal is that all of London comes within a procurement area that also includes the South East of England. It is recognised in the consultation (5.23) that it would be impractical to try to arrange procurement based on individual Boroughs. The Commission instead proposes to split London in 4 quadrants (North, South, East and West) which will be called access points. The matter starts for the whole of London will be split between the 4 quadrants. In order to bid for a share of the matter starts in any quadrant ("access point"), a supplier will have to have a permanent presence in an access point somewhere within London/South East and a part-time or permanent presence in the quadrant bid for. However, there is no requirement on the supplier to restrict in any way where, within London/South East procurement area the clients they actually take on live. The only restriction is the proposed percentage restrictions on clients from outside London/South East (5.49). So, for example, a supplier with a permanent office in South London would be bidding for matter starts allocated to the South London "access point" but could actually take all their clients from East London.

If we have not understood the proposal as the Commission intends then a further explanation must be provided by the Commission and our comments are to be understood only in the light of our current understanding.

Whilst we appreciate the Commission's desire to ensure that there is a spread of contracts across the London/South East area, the division of London into these 4 quadrants is arbitrary and has not been justified. It may well result in unexpected consequences. In the category of immigration and asylum many suppliers will have

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

significant proportions of their clients coming from outside their immediate locality. Some of the reasons for this will be particular links of a supplier to a particular community which may include for reasons of language or expertise, or more mundane reasons such as ease of public transport access (much of which flows in and out of the centre of London).

We are concerned that the arbitrary division of London in this way may result in suppliers being unable to bid for matter starts which have been allocated for a quadrant other than the one in which they are sited, and which may have had all its matter starts allocated. This could result in further under provision within London. It could also favour a supplier in a quadrant where there is less competition even though they may be in a part of that quadrant which is less accessible than a supplier in the neighbouring quadrant.

Within London, for immigration and asylum, we do not consider that requiring suppliers to have part-time presence in order to access the matters of another access point will address this issue, and we consider it will not achieve any meaningful improvement in service for most clients. That will merely increase costs and uncertainty for suppliers. As asylum cases in particular are long and time consuming it is unlikely that a client taken on at a part-time access point will necessarily be able to have all their appointments at that part-time office throughout the lifetime of their case.

We consider that all London should be considered as 1 access point.

Although we consider that there is overall an under supply of immigration and asylum advice in London/South East, we note that providers have historically reacted to perceived unmet need by setting up their offices in such areas. This has not been perfect but has lead to a spread of providers across London and higher concentrations in areas where there is high demand. Provided the Commission does not weight bids from large suppliers, we anticipate that this spread will continue to be achieved across London.

We consider that the need for a distinct approach for London may also exist for other large conurbations such as Bristol/Cardiff.

Q17: Do you foresee any issues with the proposed definition of permanent and part time presence?

☐ Yes
☐ No
☐ Don't Know

We are not convinced that the idea of part-time presence (a concept we do not completely understand) has anything to offer, at least in terms of Immigration and Asylum, to dealing with the problems of access to advice. We consider that the main barrier to access is chronic undersupply. We are constantly aware of potential clients who have called large numbers of suppliers to find someone to take their case. We are frequently told by members that they are too busy to take on further cases. We have never heard a member complain that there were no clients available for them to take on. It is that problem that must be tackled first by the Commission. The proposals on access points and part-time presence are merely a way of trying to distribute an inadequate supply more widely afield. Simply selecting different clients to receive assistance by post-code without increasing the amount of assistance that

is available in total is mere window dressing which will bring about increased bureaucracy and expense to the providers affected.

Q18: Does the type of presence proposed in a procurement area for family and social welfare law advice achieve the right balance of ensuring client access to service whilst being practical for providers?
Please rate one or more of the following options.

	Family	Social welfare law
Yes	☐	☐
No	☐	☐
Don't Know	☐	☐

NO ILPA RESPONSE.

Q19: Where a mental health provider has no permanent presence in a procurement area does an insistence on fee earners being based in that area ensure good access for both detained clients and those in the community?

	Detained clients	Clients in the community
Yes	☐	☐
No	☐	☐
Don't Know	☐	☐

NO ILPA RESPONSE.

Q20: Is requiring a permanent presence in at least one immigration and asylum access point, and a permanent or part time presence in each access point bid for, the best way to ensure access across procurement areas (Home Office regions) whilst maintaining a level of flexibility for providers?

☐ Yes
No
☐ Don't Know

London:

There is simply no need to have access points in London. We accept that there should be a permanent presence within the procurement area, but that should suffice as it always has. This requirement has clear potential to push smaller, specialist providers out of the market simply because they cannot afford to invest in setting up a part-time presence in the three access points outside the one in which they have a permanent presence. This requirement has the potential to deprive clients of the services of well established, well respected providers with particular expertise apt to serve particular client communities and needs simply because those providers are not in a position to expand by establishing a part-time presence in all the access points in which they wish to bid for matter starts.

Outside London:

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

The Commission should take an approach which is not over prescriptive and is thoroughly grounded in intelligence about the requirements of the areas in question, in particular information about the situation of conurbations, how far apart they are, and what the extent of public transport provision between these conurbations is.

Q21: In the award of UASC work, do you agree that we should favour providers with the shortest travel time to the Home Office Interview in the specialist local authority for which they are bidding?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

Disagree

X Strongly disagree

If not, why not?

We will refer to Unaccompanied Asylum Seeking Children simply as 'children' because it is extremely important that consideration of how to provide services to this client group should be informed by the recognition that these clients are, first, foremost and beyond any other descriptive label, children.

Overall there needs to be considerably more thought and planning around the award of exclusive contracts for work with children.

From the outset we take this opportunity to urge the Commission to abolish the CLR merits test in children's cases. This would be consistent with the fact that in some cases, the mere fact that a child is a child could found a clear claim to refugee status, and would reflect recognition of that which UNHCR and UKBA both recognise, namely that children may very often be unable to understand and / or articulate the reasons for which they need international protection, and are therefore unable to give consistent instructions. As a minimum, the Commission should issue very clear guidance to providers about the particular issues around the grant or refusal of CLR in children's cases.

The proposal to favour providers with the shortest travel time to the Home Office interview venue in the Specialist Local Authority (SLA) in which they are bidding would constitute an entirely arbitrary basis for marking bids. Firstly, of course we still do not know when the SLAs are going to be finalised – we do not even know if this will be in time for the bidding in July 2009. At the Representative Bodies' Meeting of 8th December 2008, Chris Handford confirmed that the Commission had no information about what was happening with the SLAs. Secondly and more importantly it would be entirely wrong to prefer a provider who is no more than adequate over a provider with a strong track record in representing children just because the former provider is situated 20 minutes closer to the Home Office interview venue. Thirdly, it goes without saying that Home Office interview venues may be relocated over time, so whatever (presumably modest) savings may be achieved in the short-term by prioritizing providers with the shortest travel times, such savings could be lost in any event if the interview venue were to be moved. Our members already report experiences of NAM case owners considering changing interview venues and point out that UKBA at least currently have discretion to make

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

different arrangements on a case by case basis. If this remains the case there would clearly be scope for situations arising in which the provider with the contract would not always be the provider closest to the interview venue in any event.

We fully accept and endorse the view that it is preferable for children not to have to travel long distances either to see their legal representative or to the Home Office interview, but the distance the child will have to travel to the Home Office interview will depend entirely on where the child is accommodated in relation to the Home Office interview venue, so the idea of favouring providers with the shortest travel time to the Home Office interview venue would not seem at all to be predicated on any welfare concerns for the children.

Nowhere in the consultation document does the Commission indicate what it would consider to be a 'long distance' for a child to travel.

It is appropriate at this point to set out our additional concerns about the award of contracts for work with children.

As noted above, the Commission's intention is to award contracts for this work in the designated SLAs, but at present there is no information at all about when these may come into existence.

There is also no information about how long UKBA anticipates it will take for a child who is accepted as a minor to be transferred to a SLA. If children contracts are to be awarded only in SLAs then there must be concerns about how long it will be before the child is actually able to access legal advice.

Even when the designated SLAs are set up, they will not take in all child clients. They will not take in (at least at the outset) age disputed cases. Nor will they take in age disputed young people in detention, children reunited with family members or children in families who make an asylum claim in their own right. An age disputed client needs access to equally competent advice, and appropriate safeguards as set out in section 6, as does a client who is accepted by Social Services / UKBA from the outset as being a minor. The same goes for a child within a family who needs to make and asylum claim in his / her own right. It is far better in our view for an age disputed client who is subsequently accepted as being a minor to be able to retain the same legal advisors throughout his or her case. It would only serve to compound the client's difficulties if the price of it being established that s/he was in fact a minor were to be that s/he would have to transfer their case to another provider. The proposals do not take in children who have immigration as opposed to asylum cases. The providers with the expertise to represent child asylum seekers are likely to be the best representatives for child immigration clients too, because of their experience and skills in advising and representing in children's cases.

As will be readily appreciated from the foregoing, children in the asylum and immigration system will need accessible legal advice and representation far beyond designated SLAs, if and when these are established. For children making asylum claims this will certainly include ports, Asylum Screening Units, Immigration Removal Centres (we note in addition to the continued general problem of children in detention due to age-disputes, there is the recent practice by the UK Border Agency of directing lorry-drop cases to Oakington which has led to significant increases in the numbers of children detained there) and in other areas where screening is undertaken by the Local Immigration Team. For children with other immigration needs, it is clear that they may require legal advice and representation in local

authority areas other than those of designated SLAs. The consultation proceeds on the assumption that everything will be fine because the child and the provider will both be in the SLA, but the examples cited herein make clear that will not always be the case, or will not always be the case at the outset. If for example there is a port which ends up not being covered by a SLA, will providers holding children's contracts in other SLAs be permitted to provide outreach services at that port (i.e. to attend screening interviews, which can last for more than a day), thereby ensuring continuity of representation from the outset, even if the port in question is outside their procurement area? As the Commission is aware, significant issues can arise at screening (e.g. an allegation that there is a fingerprint match indicating a previous visa application by the child) in relation to which immediate, quality legal advice is imperative.

Further we note that, as now, some providers may wish to undertake a mix of legal aid and privately-funded work. This may be particularly important in a niche, specialist area such as children's work. Safeguarding the interests of children must mean ensuring that practitioners with the expertise and experience to deal with the complexities of law and provide the skills and sensitivity for advising and representing children are retained within the legal aid system. The focus in the consultation document on designated SLAs is flawed for the reasons given here, and would put the retention of these practitioners at risk since they cannot predict where the designated SLAs may be and in any event may be unwilling or unable to resituate their practice for various reasons, including their recognition that legal advice and representation, legal aid and privately funded, for children is required in non-designated SLA areas.

It is not clear from the consultation document whether matter starts under a 'UASC' contract (or indeed matter starts under an IRC contract) can be counted towards the minimum matter start requirement. We would be grateful if the Commission would provide clarification on this point.

Q22: Where a low volume category provider, other than in clinical negligence and personal injury, has no office in an area, what requirements should be placed on the provider in terms of facilities offered to clients and the marketing of their service?

NO ILPA RESPONSE.

Q22a: Is it appropriate to use video conferencing to provide face-to-face advice to clients where there is no local "access point"?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

Q23: In immigration and asylum should the restrictions around undertaking the majority of work for clients in the procurement area extend to restricting providers in Wales from accessing clients in the South West and vice versa considering that the Home Office operates only one region covering both areas?

☐ Yes

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

☒ No
☐ Don't Know

Our overall view is that there should not be a rigid cap on the percentage of cases that providers can take from outside their procurement area (see our response to question 2, below).

Wales and the South West are areas of high demand in immigration and asylum. The experience of our members strongly suggests that there needs to remain the flexibility for providers from Wales to take cases from the South West, and vice versa. There is a shortage of immigration / asylum providers generally in these areas, and so it is imperative, if clients are not to go unrepresented, that when providers in the South West simply have no more capacity, they should be able to refer clients on to providers in Wales, and vice versa.

Q24: Do you believe that mental health and immigration and asylum providers should be restricted to undertaking most of their work for clients from within the procurement area(s) bid for?

	Mental health	Immigration and asylum
Yes	☐	☐
No	☐	X
Don't Know	☐	☐

The comments below relate to immigration and asylum only, not mental health:

Overall we do not agree that providers should be restricted to undertaking most of their work for clients within their procurement area. The market for legal services should be based around quality, not location. The Commission should not create closed shops where a firm has a monopoly over the people who live in that area simply because they are in that area. Providers in London find that their clients come from all over London and the South East, and sometime further away (see our comments in response to question 28, below).

There is a significant issue here as regards prison work. The consultation paper stipulates that providers will be required to deliver 90% of their asylum and 70% of their immigration services to clients in the procurement area they have bid for (see 5.49 of the consultation document). Beyond that, the extent of outreach work they will be permitted to do is a matter they will have to negotiate with their account managers, only once they have been awarded a contract (see 5.30). The problem this presents for providers who do a significant amount of prison work is that they will not know at the time they bid whether they can count on still being permitted to do that work or not. Therefore they will have either to submit a bid based on their current work profile, which may turn out to be unrealistic because of the potential restrictions on outreach work, or they will have to disregard that part of their work profile when bidding, which may mean they cannot be sure of meeting the minimum new matter start requirements.

Whilst the current travel cap for prison work is something to which we remain completely opposed, if the cap is to remain it probably goes some way to ensuring providers are not travelling to opposite ends of the country to undertake prison work.

As Paul Newell acknowledged at the Representative Bodies' Meeting of 8th December 2008, careful thought will need to be given to this matter, especially given that information from the Prison Service about the intended future location of Foreign National Prisoners may not be wholly reliable – i.e. is often liable to change / revision at short notice. With this in mind, and with a view to ensuring that those in prison who are in need of immigration / asylum advice (without which they may be deprived of their liberty for very excessive periods of time beyond the end of any sentence) we believe that there should be no cap on taking matter starts from outside your own procurement area. However if there must be such a cap, then in order to ensure access for those in prison, either the percentage of services a provider can deliver outside his / her procurement area should be increased and / or it should be specified that such percentages will apply to non-detained work only.

Another significant issue here is that of providers who are located near the border of a procurement area. At 5.52 there is some recognition of this issue, but it is then reiterated that still only 10% of asylum and 30% of immigration matter starts can be used for clients outside the procurement area. For providers located right on a boundary, that could present a very significant problem.

The Commission should retain and sensibly exercise discretion to permit providers located near a procurement area boundary to request, for that reason, being able to use a higher percentage of their matter starts for clients outside their procurement area.

Q25: Do you agree with our proposed approach to setting certificated matter starts in family?

☐ Strongly agree
☐ Agree
☐ Agree with reservations
☐ Neutral
☐ Disagree
☐ Strongly disagree

NO ILPA RESPONSE.

Q26: Bearing in mind the limits on the legal aid budget, is the initial 30% ceiling the most suitable way to calculate HPCDS budget for 2010 onwards?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

Q27: Do you agree that in mental health, immigration and asylum and low volume categories we should move towards distributing new matter starts more closely to where clients are located?
Please rate one or more of the following options.

	Mental	Immigration	Low

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

	health	and asylum	volume categories
Strongly agree	☐	☐	☐
Agree	☐	☐	☐
Agree with reservations	☐	☐	☐
Neutral	☐	☐	☐
Disagree	☐		☐
Strongly disagree	☐	☐	☐

This question does not admit of a tick-box answer and it assumes as a starting point that clients are a lot more static than in fact they are. Clients in dispersal accommodation get moved around when the Home Office decides that its contract with a particular accommodation provider has become too expensive, or when the original accommodation provider gets taken over by another company. Clients who are not in dispersal accommodation often move around a lot during the lifetime of a case because they tend to be reliant on the charity of friends and family. The movement of non-asylum clients who are completely outside the Home Office accommodation regime is entirely unpredictable and dependent on very subjective factors. The movement of clients who are in prison simply cannot be predicted at all because whatever plans the Prison Service may from time to time announce, short-term and emergency pressures on prison places can lead to those plans being cast aside at short notice.

Clearly no-one wants clients (those at liberty) to have to travel long distances to appointments, but if a provider is approached by a client who has genuinely been unable to find local representation then there should not be rigid bars on the provider taking on that client either because of the limits on taking on clients from outside the procurement area or because of an overly prescriptive approach to the allocation of matter starts.

Q28: Do you agree with the proposed approach of holding back 10% of asylum new matter starts within London and the South East to facilitate the changing dispersal patterns?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

X Strongly disagree

We refer to our comments at page 5, above, about the fact that there will continue to be demand for asylum services outside the NAM framework – e.g. fresh claims, applications (from August 2010) for indefinite leave to remain for those granted 5 years leave to remain as refugees, non-asylum Article 3 applications etc. We do not therefore consider the fact that London and the South East are not Home Office dispersal areas to be as significant as the Commission appears to in terms of planning matter start distribution and allocation. The number of new asylum

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

applications overall is falling, whilst the activity on cases in the Case Resolution Directorate is increasing. We do not believe that demand for asylum services in London and the South East in particular is in such significant decline as to warrant holding back 10% of asylum matter starts. The Commission states at 5.77 of the consultation paper that in 2006/07, '30% of asylum new matter starts used by providers in the South East (including London) were for clients located outside the region'. This statistic, without more, simply does not evidence a drop in demand in London and the South East. It may well be evidence of lack of coverage and / or capacity in asylum provision outside London and the South East, and if so the Commission would no doubt wish to see provision expand to fill those gaps, but withholding asylum matter starts from London and the South East will not in and of itself bring about this expansion of provision outside London and the South East, and in the meantime it is incumbent on the Commission to ensure that clients do not go unrepresented as a result of withholding matter starts in areas where the coverage and capacity exists. The Commission itself accepts that the provider base will 'need time to adjust' (see 5.78), and also admits that 'We also do not have the most up to date information required to accurately confirm our projections of changing demand' (5.78).

It may well be sensible for the Commission to hold matter starts in reserve to allocate to providers who use up their matter starts before the end of a contract year if they can demonstrate a demand for their services, but the holding back of matter starts should not be based on geography. Quality and capacity should dictate where extra matter starts should be given. It is not possible to run a business, particularly a large organization, if providers suddenly find themselves without matter starts despite the fact that there is obvious demand for those services, and employees paid to deliver them.

Section 6: How we will procure services

Q29: Do you agree that asylum rotas should be open only to providers who have been awarded work in the access point where the rota operates?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☒ Disagree

☐ Strongly disagree

If not, how can we ensure that asylum clients do not have to travel long distances based on the rota?

The Commission should define what is considers to be a 'long distance'.

If asylum rota participation is limited to those who have been awarded work in the access point where the rota operates, this may result in a capacity problem, depending on how many providers have the requisite minimum part-time office presence in that access point. Conversely those providers may end up being unable to meet minimum matter start requirements (or to use the matter starts they have bid

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

for – if the proposal for a minimum is dropped) because the Commission is not able to guarantee minimum volumes of work from rotas.

Rota participation should therefore be open to providers within the procurement area where the rota operates, but there should be no bar to clients seeking representation from providers outside the procurement area in which the rota operates (in line with our views that providers should not have a cap imposed on the number of matter starts they can deliver for clients outside their procurement area, and that the Commission should not be proposing in effect the creation of closed shops by insisting on such a cap).

On the subject of rotas, we refer to the detail in Annex B relating to the proposed Immigration and Asylum Specification (mainstream services) for Integrated Services B. Point 4 in that specification sets out the following requirement:

'Participate in any rota scheme(s) to provide services to:

- Asylum applicants who have been dispersed to the area by the Home Office; and
- Clients who are in prison and require immigration advice

If such a rota(s) operates in the access point bid for'.

We consider that this requirement is too widely drawn. It is impossible for providers to commit to structuring / restructuring their businesses to meet these demands in advance of knowing if and when such demands are likely to be made of them, the extent to which they may need to expand to meet such demands and, crucially, whether at the material time they will be financially in a position to expand so as to be able to submit a realistic bid. Again, the Commission will not be in a position to guarantee minimum volumes of work from rotas, which augurs extremely poorly for the ability of providers to structure / re-structure their businesses to meet the requirement to participate in rotas.

If this requirement is to be maintained then at the very least the Commission should give a realistic indication of when it expects to set up more rotas in dispersal areas and rotas to deliver services in prisons, whether (and if so, how) the Commission believes it will be able to guarantee minimum volumes of work from such rotas, and (if so) what these minimum volumes will be.

The Commission refers to having anecdotal evidence that those in prison are finding it difficult to access immigration advice. We believe this is an unsurprising and entirely predictable result of the travel cap (introduced on 1st October 2007). We have no doubt that many providers have been forced to conclude that attending clients in prison is simply uneconomic. The introduction of rotas may not prove to be a panacea in this respect because prisoners and those who remain in prison, in sole immigration detention, following the conclusion of their sentence are liable to be moved from one establishment to another at any time, and this is a matter over which neither the Commission nor providers have any control. Thus the position should simply be that if a provider takes on a prison case, whether from a rota or otherwise, the provider should always be permitted to claim the full time of travel from the office to the prison and back.

Q30: Do you believe that a single adviser should be required to attend on the client throughout the life of the case, and that the best way to achieve this is requiring a single adviser to own UASC cases from start to finish?

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

☐ Strongly agree

☐ Agree

☒ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

We do believe that the best interests of the child would be served by having a single legal advisor from start to finish. Undoubtedly this would be what quality providers have always aimed for as a matter of best practice. Clearly there needs to be sufficient flexibility to cater for the unforeseen, such as the advisor in question being off work sick at a time when instructions / further instructions need to be taken from the child, and it is not possible to wait for the advisor to return to work.

We would only wish to add and emphasize that children should always be made well aware that if s/he at any point has a problem or feels uncomfortable with the allocated advisor, and if that problem is not something that can easily be resolved with the allocated advisor, then s/he can speak to another designated advisor about the matter with a view to conduct of the case being taken over by another advisor if necessary. The requirement for a single advisor from start to finish should not be invoked by providers as a justification for being inflexible or unresponsive to the child's concerns in such circumstances.

We also wish to comment on the additional requirement above 6.21 in the consultation paper (repeated at Annex B) that providers should offer specialist advice relating to public law children matters or offer an appropriate local referral to a quality assured contracted public law children provider (our emphasis).

In our view these alternative requirements are correct as they stand and should not be qualified by the indication at 6.22 that providers who can offer the public law children services in addition to the asylum advice may be preferred. There is no justification for such a preference other than the advantage for the child of having all matters dealt with under one roof. That advantage needs to be weighed against the disadvantage of squeezing out providers who have a good track record on asylum and immigration work for children just because they do not do public law children work. Providers who undertake a significant volume of asylum and immigration work for children will often have built up informal but successful referral arrangements with local public law children providers whose work they know and trust. The greater advantage to the client is the retention of quality providers. In the circumstances there should be no preference given to those who can also offer public law children services.

Q31: Do you agree that performing UASC work should be limited to advisers accredited to at least Level 2 of the Immigration and Asylum Accreditation Scheme?

☐ Strongly agree

☒ Agree

☐ Agree with reservations

☐ Neutral

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

☐ Disagree

☐ Strongly disagree

Certainly we would agree that Level 2 accreditation is an appropriate requirement for conducting work with children, given the particular vulnerability of this client group. The only qualification we would make is that those dealing with ancillary work, not involving direct contact with the child (e.g. country research, setting up appointments) should not be required to be Level 2 accredited or CRB checked (see comments re question 32a).

However as a mark of competence to undertake work for this particularly vulnerable client group, Level 2 accreditation must be regarded as very much a minimum. Please see further our response to question 34a.

Q32: Do you agree with the mandatory requirement that all advisers who provide advice to UASC have obtained disclosure checks from the Criminal Records Bureau as a pre-requisite?

☐ Strongly agree

☒ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

Q32a: If so, should this be at the enhanced level?

☒ Yes
☐ No
☐ Don't Know

We agree that it is entirely appropriate for CRB checks to be carried out on all advisors who provide advice to children.

It is not clear from the consultation paper, but we assume that providers would need to obtain the necessary disclosure checks in advance of submitting their bid. It would be helpful to know if we are wrong about this. In any event the Commission should be aware that our enquiries of the CRB revealed that the current aim is to process 90% of enhanced checks within 4 – 6 weeks. So providers will need to be given plenty of warning, i.e. significantly more than 4 – 6 weeks, in advance of the date by which the Commission will require confirmation of the CRB checks, as it must be anticipated that CRB's timescales for providing a response may increase with a sudden influx of demand, and CRB has also confirmed it is only able to accord priority to an application if the check is required for reasons relating to adoption.

The Commission should also indicate how often it would expect the check to be repeated. Whilst some employers (e.g. in NGOs) stipulate once every three years, other employers we understand stipulate once every two years. The information on the CRB website makes very clear that from CRB's point of view there is no pre-determined period of validity for a CRB check.

We also suggest that the Commission should be aware and take account of the new 'Independent Safeguarding Authority': http://www.isa-gov.org.uk/ which works in partnership with the CRB to prevent unsuitable people from working with children (and vulnerable adults) to provide an additional check and layer of protection which the Commission may consider appropriate for those wishing to provide advice to children.

Finally we suggest that providers should be permitted to designate individuals within their organisation who will not carry out work with children, and on that basis should not be obliged to provide a CRB check.

Q33: Should there be an ongoing requirement by providers to ensure others who engage directly with UASC clients continue to pass Criminal Records Bureau checks?

☐ Yes
☒ No
☐ Don't Know

Interpreters:

With regard to interpreters we fear that such a requirement would significantly restrict the number of available interpreters. The phenomenally low rates of pay for interpreters doing legal aid work already make this a very unattractive area of work for linguists and as a result providers are already in a situation in which finding quality interpreters, particularly for languages which are not widely spoken, can be challenging. Imposing this requirement risks shrinking that pool further still, and the best interests of the children simply cannot be served without the services of a competent interpreter. Nevertheless, potential child protection issues cannot and must not be ignored, so we suggest that an appropriate and workable solution would be simply to stipulate that in the case of interpreters who do not have a clear CRB check, they should never under any circumstance have unsupervised access to the child clients. In practice this means that they should never be left alone with the child, so if during an appointment the legal advisor has to leave the room, s/he must take responsibility for ensuring that the interpreter and UASC are not left alone together. We imagine that in most cases this could easily be achieved by asking the child and the interpreter to wait with a receptionist or another member of staff whilst the fee earner is out of the room.

We further propose that the Commission should be proactive in terms of advancing child protection and should commit resources to training all those (providers and their interpreters) who undertake publicly funded work with children in working in a child sensitive manner. The CRB check is really only a minimum in safeguarding the welfare of children.

Experts:

Again, we think that requiring CRB checks on experts who may have direct contact with children is probably not necessary if instead the clear stipulation were to be that any (non-NHS / non-CBR checked) expert who needs to have direct contact with a child should not be left alone with that child under any circumstances.

It is relatively rare that an expert would need to have direct contact with a child. The consultation specifies that those working within or under the aegis of the NHS would

be exempted from any requirement to undergo a CRB check. These are the experts who are in practice most likely to have direct contact with child clients. In terms of country experts, it is probably only in cases where an issue of language and / or clan analysis arises that an expert may need to meet the child, although these assessments are conducted by telephone in many cases. If a child does need to speak directly to a country expert, whether face-to-face or on the phone, the legal representative (and if necessary an interpreter) should always be present too (i.e. either at a face to face meeting, or in the same room as the child speaking on the phone to the expert). Any attendance, travel or waiting time arising from the need for the representative to be present with the child should be chargeable and remunerated in full.

Q34: Do you agree that a minimum of three years of experience of acting as a supervisor in the immigration category is the right measure of a higher level of supervision for UASC clients?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

Does not admit of a tick-box answer – see text under question 34a.

Q34a: Should supervision experience specifically relating to this client group be taken into account?

☒ Yes
☐ No
☐ Don't Know

We understand the Commission's concern to ensure that those undertaking work with children are fully and appropriately supervised, but the balance the Commission has sought to strike is not quite right. Our proposal is that those supervising solicitors and caseworkers who undertake work with children should a) be SQM supervisors and b) have 3 years experience of work with children.

The emphasis should be on proven experience as a supervisor having conduct of cases involving children. It is quite possible that during 3 years as a supervisor a solicitor may not have done any work with children at all. The extent of a solicitor or caseworker's experience of children's cases is something which may be more difficult to quantify for the purpose of marking bids, but it would not be impossible. For example there could be a question along the lines of (to be answered for each supervisor who meets the SQM supervisor requirement): 'Over the course of the past 3 years, how many UASC matters have you started and seen through to completion: a) 10 – 20; b) 20 – 30; c) 30 – 40; d) 40+'?

As this is a new are of separate contracting there needs to be wider discussion of how best to promote and safeguard quality.

Q35: Do you agree that in immigration and asylum, asylum should remain our priority and the marking of bids reflect this?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

Q35a: Is this the correct approach for the South East also, which is not a Home Office asylum dispersal area?

☐ Yes
☐ No
☐ Don't Know

These questions do not admit of tick-box answers. In London and the South East, and in the rest of England and Wales, the Commission should prioritize those cases where the client is at risk of serious harm. Often those clients will be asylum seekers, but in non-asylum matters clients can equally be at risk of serious harm. We have given examples of such cases above (domestic violence and abuse of domestic workers in private households).

The Commission also needs to retain sufficient flexibility and discretion to permit long established and well respected immigration specialists to continue to provide for the needs of the settled BME communities they have evolved to serve. As noted above, we do not believe that there should be a minimum matter start requirement. If there is to be a minimum matter start requirement providers should not be required to deliver fixed numbers of asylum and immigration matter starts, but should be allowed complete flexibility so that they are able to serve the needs of their local communities and others who approach them for their expertise. If the Commission insists on minimum matter start levels, and if the Commission is not minded to accept the idea of complete flexibility about case mix, then we would propose that providers with a good record of quality work in immigration should be permitted to argue a case for their minimum requirement in each category to be reversed, such that if the eventual 'norm' in terms of minimums were to be 100 asylum with 50 immigration, they should be permitted to argue a case for bidding for 50 asylum with 100 immigration.

It is quite correct to underscore the importance of guaranteeing funding for asylum cases, but the Commission should keep in mind that immigration work often concerns protecting the critically important right to the preservation of family unity. As such, funding must be secured for the provision of quality legal advice in immigration too.

Q36: Do you agree that the LSC needs to guard against bids to deliver services that will not have the capacity to do the work bid for?

☐ Strongly agree

☒ Agree

☐ Agree with reservations

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

☐ Neutral

☐ Disagree

☐ Strongly disagree

Q36a: Do you think applying a maximum number of matter starts bid per FTE will assist in that?

☐ Yes
☐ No
☐ Don't Know

Please refer to our detailed comments at the conclusion of the 'Foreword' section (pages 5 & 6, above).

We agree there is a need to ensure that bids are realistic so as to avoid a situation in which it appears there will be sufficient capacity / coverage to meet demand and then that turns out not to be the case at all.

Also bidding needs to proceed on a realistic footing otherwise it will be a waste of time for some providers.

Nevertheless, as per our comments in the 'Foreword' section, whilst there is not a complete consensus of opinion amongst our membership on this point, overall we take the view that in relation to this matter the Commission should retain flexibility and desist from being overly prescriptive. Whatever the size of a bid, the Commission's overriding imperative in awarding contracts should be to maintain, promote and safeguard quality standards.

Q37: Do you agree with our proposed approach to allocating new matter starts for mental health services?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

If not, what alternative approaches would be preferable?

NO ILPA RESPONSE.

Q38: Do you think the proposed selection criteria for each category are the best way to differentiate between bids?

	Family	Social welfare law	Mental health	Immigration and asylum	Low volume categories
Yes	☐	☐	☐	☐	☐
No	☐	☐	☐	☒	☐

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

Don't Know	☐	☐	☐	☐	☐

Immigration and asylum (mainstream):

We agree that it is appropriate as a tie-breaker that preference should be given to those who can demonstrate a higher supervisor to fee earner ratio, subject to our comments in question 7, above.

We do not agree that having (or having a credible plan for) a permanent presence in more than one access point in the procurement area bid for should be a tie-breaker. Again this accords unfair and arbitrary priority to larger firms, potentially at the expense of smaller but better quality providers. The Commission's reasoning for making this a tie-breaker is that clients move around procurement areas and that if this happens it would be beneficial for them to stay with the 'same' provider, rather than having to travel a longer distance to stay with the original provider. This reasoning does not stand up to much scrutiny. Take for example provider A, which has a permanent presence in (for example) Shepherd's Bush and Clapham. The client lives in Plumstead and starts out instructing Provider A's Clapham branch. The client then gets moved, or has to move, to Acton. He could continue to attend the Clapham branch of Provider A, but he may wish to find more local representation. He could continue to be represented by firm A, as he could attend their Shepherd's Bush offices. But he won't be seeing the same advisor. A new advisor, based in the Shepherd's Bush office, will take over the case and will need to take the time to familiarise themselves with the file in exactly the same way as would be the case if the client in fact transferred his case to provider B, in Hammersmith, when he moved. The fact that the Shepherd's Bush office just has the same name over the door as the office in Clapham would be of little tangible benefit to the client. There is unlikely to be a time saving on the transfer of the physical file, which would probably go from Clapham to Shepherd's Bush by DX, just as it would go from Clapham to Hammersmith by DX. It may be that the original advisor at the Clapham branch would be more readily accessible to the new provider in Shepherd's Bush (i.e. in the same firm) than s/he would be to the new provider in Hammersmith, but in fact that ought not to be the case. The original advisor should be reasonably readily contactable by any new advisor taking over the case, irrespective of where the new advisor works, if there are questions about the case to which a careful reading of the file does not provide a response. Thus there is minimal advantage to the client from the fact that Provider A has a presence in more than one of the access points in the procurement area, and as a tie-breaker criterion, this is fairly meaningless. If the aim of the Commission is simply to ensure a new matter start is not used in these circumstances, then that should be made explicit.

Please see our comments under 'alternative tie-breaker criterion', below.

Immigration and asylum (Immigration Removal Centres - IRC):

As to the proposal that preference should be given to providers with the lower anticipated maximum travel times (not costs) to the IRC, please see our comments in relation to question 21, above. As with the proposal to prefer, for work with children, providers with the shortest travel time to the Home Office interview venue, the proposal to prefer for IRC work providers with lower anticipated travel times to the IRC would constitute an arbitrary tie-breaker criterion and again one which risks prioritising a provider with an adequate record of IRC work over a provider with an excellent record of IRC work. The Commission may take the view that when it comes to tie-breaker criteria, it is different because in theory, by the tie-breaker stage, it

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

should be choosing between 'good and good'. However this view depends on all the other selection criteria being apt to distinguish between good and merely adequate, which we do not consider they are. It is worth bearing in mind at this point that the minimum peer review rating for entry into the bid round is 3, so already there will be providers with a peer review rating of 3 ('threshold competent') competing for contracts with providers who have a peer review rating of 1 ('excellent'), and it is by no means the case that the proposed selection criteria are apt to prioritize those with higher historical peer review ratings.

Please see our comments under 'alternative tie-breaker criterion', below.

Immigration and asylum (Detained fast track):

We do not agree that greater capacity should be a tie-breaker. Again this accords unfair and arbitrary priority to larger firms, potentially at the expense of smaller but better quality providers. The reason given for making this a tie-breaker, that is that it 'Enables clients to get prompt access' cannot be logically correct: there is no apparent relationship between the provider's claimed capacity to cover a certain number of slots, and the promptness with which clients will be able to access effective advice. Given (1) the admitted uncertainties with regard to demand, and (2) the inherent difficulty of the substantive immigration case of the typical detained client, claims by providers to have the capacity to cover a comparatively large number of detained cases should be treated with caution, particularly if the claimed capacity would constitute a large proportion of their total immigration caseload. A better predictor of enabling 'clients to get prompt access to advice' would be the ethos of the provider, as demonstrated generally in their bid.

Please see our comments under 'alternative tie-breaker criterion', below.

Immigration and asylum ('UASC'):

The idea of using 'number of clients able to deal with within the SLA' would again accord arbitrary and unfair competitive advantage to larger providers, potentially at the expense of smaller but better quality providers. We describe the competitive advantage as arbitrary because the number of clients a provider can deal with within an SLA gives no indication whatsoever of the quality of that provider's work (save to the extent that bids asserting capacity to deal with very large volumes of this work, particularly where that would make up a large proportion of the total asylum caseload should be treated with great caution) so no benefit to clients can be assumed from conferring competitive advantage on larger providers in this way.

Again neither providers nor the Commission have any information about when the SLAs will actually come into existence and this is another reason for which the proposed tie-breaker criterion is inappropriate.

We would also observe that in the absence of any information at all about the magnitude of savings the Commission hopes to achieve by having fewer, bigger contracts, it is not even clear that this is a tie-breaker which would assist the Commission in its search for efficiency savings.

Please see our comments under 'alternative tie-breaker criterion', below.

Alternative tie-breaker criterion:

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

If the threshold for entry into the bid round is to remain a minimum peer review rating of 3, i.e. if those providers assessed as 'threshold competent' are to be permitted to bid, then a far more meaningful tie-breaker criterion would be to give preference to providers with historically the consistently highest peer review ratings. This tie-breaker could be applied for mainstream immigration and asylum, IRC, DFT and work with children ('UASC'). This would be entirely appropriate and completely in line with what the Commission should be seeking to achieve, namely to drive up standards of representation, and not to sacrifice quality on the alter of cost-cutting.

Q39: Do you agree with the proposed selection criteria for distinguishing between mediation bids?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☐ Disagree

☐ Strongly disagree

Q39a: If not, would another measure, such as the number of outreach locations or the ratio of mediators to cases, work better?

☐ Yes
☐ No
☐ Don't Know

NO ILPA RESPONSE.

Section 7: Changes to the scope of funding

Q40: Do you agree with the proposal to remove experts' cancellation and administration fees from the scope of legal aid funding in all civil cases and to cap rates for experts' travel and waiting time?

	Cancellation fees	Administration fees	Travel and waiting fees
Strongly agree	☐	☐	☐
Agree	☐	☐	☐
Agree with reservations	☐	☐	☐
Neutral	☐	☐	☐
Disagree	☐	☐	☐
Strongly disagree	☒	☒	☒

Please use this space if you wish to give any further information or explanation

The current restriction on disbursements in the civil specification is:-
"You may incur disbursements where:

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

(a) it is in the best interests of the Client to do so;
(b) it is reasonable for you to incur the disbursement for the purpose of providing Controlled Work to the Client;
(c) the amount of the disbursement is reasonable; and
(d) incurring the disbursement is not prohibited by this section or the applicable part of Sections 10 to 16 of this Specification"

We consider that this is a sufficient safeguard for the fund and sets an appropriate balance between the interests of the fund and those of the expert.
In the field of immigration and especially that of asylum the choice of who is suitable to be an expert is often limited, and perhaps more so than might be the case in other categories of law. There may be only 1 or 2 people in the UK qualified to speak authoritatively on an issue relating to the circumstances in an asylum seeker's country of origin relevant to their particular claim. It is often that medical or psychiatric evidence is required from the client's own treating doctor rather than an assessment from one who may have a reasonable proportion of their practice made up of providing medico-legal reports. Some of them are reluctant to provide reports and evidence in any event, and must be persuaded by the adviser. For many it is a distraction or interruption to their normal work. For some they are put off by the thought of putting their professional expertise before a highly sceptical Home Office and/or Asylum and Immigration Tribunal (witness the defamatory comments made and later withdrawn by the AIT against a regular report writer Dr Alan George in 2008). At the most basic level advisers need there to be no further disincentives for such experts being involved in cases.

We do not object to the objective of seeking to reduce costs that are "wasted" and would welcome further guidance or model terms from the LSC to assist in negotiations with experts to ensure that good value is achieved. We would have no objection to that saying that cancellation fees or administration fees should not generally be paid and that generally travel will be paid at no more than half the preparation rate. However we consider that excluding the costs proposed and capping travel is too inflexible and will damage the interests of clients and their cases and ultimately therefore also those of the Commission.

In respect of cancellation fees we expect that these are relatively rarely incurred in any event within the immigration and asylum category. We agree that many experts cancelled sufficiently far in advance may have other work that they can do but that will not inevitably mean they don't suffer a financial loss through the cancellation. If they do not receive recompense for that then they will not be willing to accept instructions for legally aided clients at all or in certain circumstances. We do not believe the assumption that they can fill time with other work, which is a more reasonable assumption for most solicitors and barristers, can be applied equally to all experts. The following examples are based on experiences reported by our members of situations they have encountered or which have been set out to them by experts that they do or have instructed:

Example 1. A former Medical Foundation experienced physician retired from practice generally is in great demand for medical assessments and takes a fixed number of appointments each month. If an appointment is cancelled at 1 day or less notice or the subject fails to attend the appointment for any reason, that appointment cannot be reallocated. He has no other "work" to do instead. It is reasonable that he has a late cancellation charge.

Example 2. A doctor rents a consultation room at his hospital for an assessment appointment. The client is taken ill on the day of the assessment and does not attend. The doctor attends and waits for the client for 30 minutes before giving up on the appointment. She must pay for the room and will have spent time preparing for the assessment (reading instructions and supporting documents). She therefore expects to receive reasonable recompense for the time and expense. The same situation might arise where a client is dispersed at short notice and they have not been able to notify their representative.

Example 3. A country expert's normal job is as a consultant to governments, NGO's etc most often involving travelling to the country concerned. Out of several experts the AIT have considered over recent years his evidence is greatly preferred and he carries significant weight with the Tribunal. He agrees that he will make himself available to attend a country guidance appeal hearing to give evidence in person, even though he may lose out significantly if a longer contract were to be offered that should cover that date, and having to ensure that other contracts he takes are outside that period. The hearing is called off the day before or on the day (which might be because the Secretary of State withdraws the decision at the last minute to avoid a hearing). His contract with any other organisation includes cancellation payments. He has no worked lined up which he can do in place of the lost hearing and had already turned down or delayed other work to take that booking. If he is not able to charge a reasonable cancellation fee having lost out financially he decides not agree to appear in person again.

Example 4. A country expert is a lecturer by a university. That position gives him part of his credibility and reliability in the eyes of the AIT – that he has a name and reputation to protect. The University has a charging policy for any external work done by academic staff that will involve either work in the name of the University or in its time. That charging policy is not consistent with the Commission's proposal that travel and wait be capped or that there are no cancellation fees (the lecturer must book time out of the university and beyond a certain limit that booking out cannot be cancelled). The expert can therefore only be instructed during his own vacation time and cannot write reports on the University headed paper. His ability to assist is therefore severely curtailed.

By removing "cancellation fees" from scope the following is likely to occur:-

1. Wrangles over what is a cancellation? Will a "no show" amount to a cancellation? Is it a cancellation if the expert attends the court but the hearing is adjourned after their arrival?
2. Increased wrangling over whose "fault" a cancellation is as experts seek nevertheless to claim against the Court/Tribunal, advisers or other parties for their financial loss.
3. Relabeling fees to avoid the ban. This could include charging by the day or half day so that any "work" done in that period means the full charge is payable. Or requiring large fees for accepting instructions rather than time spent with the client or in court. This is the difficulty that arises from the Commission setting out to regulate/exclude only one minor aspect of experts' fees whilst the rest being open for negotiation.
4. In circumstances where inter partes costs (or costs lost through maladministration by the tribunal perhaps) can be claimed on behalf of the assisted person the other party will not be required to pay anything either to the expert for their cancelled services, even though the need for the expert being required and perhaps the reason for them being cancelled may be the fault of the other party.

5. The risk of arrangements being cancelled would get built in to the general cost of the expert providing a service so that fees would go up generally for all cases rather than being incurred specifically in the case where the expert incurred the lost income. This then hides the issue of the true cost of cancellations making it less likely that problems would be identified and would receive attention. For example if country experts know that on average 1 in 5 appeal hearings get cancelled at the last minute by the AIT they will build that into their general fees. However the Commission will know only the fee that is being charged for a hearing that goes ahead and will have no information that the costs are going up because of late cancellation of hearings by the AIT.

However, if the Commission were to issue guidance, that could for example:-

i. Set the principle that fees were not generally paid where there was a cancellation in circumstances where the expert should be able to carry out other work;
ii. Ensure that terms for cancellations should be clearly agreed and be payable only where clearly reasonable rather than as a matter of course for any expert;
iii. Ensure that there is differentiation between arrangements cancelled far in advance and those cancelled at short or no notice.
iv. Ensure that the arrangements for paying for experts are reasonable for all involved in all the particular circumstances of that case.

The consultation refers to improvements in listing and the use of video conferencing as if these were reasons why cancellation fees should not be paid. Those matters will hopefully reduce the need for cancellations to occur and that there would therefore be fewer occasions on which a cancellation fee might be payable. The level of cancelation fees paid is therefore likely to be a diminishing problem for the Commission so the need to introduce a divisive rule to "deal with" the problem is diminishing.

We would invite the Commission to support a proposal that where, within the AIT or at the application stage, costs are wasted at the fault of the Home Office, that they should be required to meet those costs. This could include cancellation fees of experts and other wasted costs. We have informed the Commission (over many years) of the systemic problems within the Home Office that contribute to such wasted costs (eg poor administration meaning significant incidence of failure to get appellants' bundles to Presenting Officers for the hearing, and only allocating files very shortly before the hearing, and failure to comply with directions).

Similarly if "administration" costs are excluded from scope the most likely immediate response will be that those costs are merely added into the expert's fee.

Also it is not clear what are "administration" costs. Does this include travel expenses, subsistence, typing services, room hire, couriers, and interpreters? By removing "administration costs" from scope it opens scope for wrangling over definitions rather than looking at whether the charges made for the service provided are reasonable. For example if a doctor must arrange a courier to ensure medical records are available at an assessment it is reasonable that those costs are charged to the case in which they occur, rather than fees generally being put up to reflect more administrative costs absorbed by the expert. We see no principled reason why the Commission should not want itemised invoices for experts' services. The only difficulty we can see with these fees being charged is when they are not specified and agreed in advance, making it difficult to compare quotes between different

experts for the same work. This can be easily tackled with either guidance from the Commission or by model terms of business.

With travel and waiting costs again we feel a rigid cap is likely to produce problems whereas the general aim can be largely achieved by guidance/model terms of business. The Asylum and Immigration Tribunal is the most likely venue for hearings at which experts will attend within our category of law. The Tribunal is generally very unsophisticated in its listing arrangements. This means that expert witnesses are likely to all be required to attend the hearing centre at 10 am and to wait within the tribunal building until they are called, even if that is late that afternoon. A rigid rule that they cannot claim beyond half their normal rate may in some circumstances lead an expert to either increase their standard attendance rate to compensate, to charge by the half or full day instead of hourly (which may be their normal charging basis anyway), or to refuse to attend. There may be few occasions where we would want to agree that charging more than half was reasonable for travel and wait. However, if the expert is the only person who can give the necessary evidence, then a rigid cap means there is no flexibility available to agree that the expert's greater fee can be charged. As stated the expert may be one of only a very small number of people qualified to comment (as in the case of country experts) or may be the expert required perhaps because they have produced evidence earlier in the case or are already otherwise involved in the case for other reasons and their evidence will be irreplaceable. There will be other circumstances where there is a wider choice of expert and where a combination of model terms of business and competition between experts will mean that the terms suggested will be able to be imposed on the expert.

We can see no objection to limiting mileage rates to those for solicitor travel (assuming that those costs are upgraded to reflect the real cost of travel and are not allowed to lag behind real costs).

Q41: Do you agree that change of name work should be made available only by telephone?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☒ Disagree

☐ Strongly disagree

Please use this space if you wish to give any further information or explanation

This is not a matter on which we are particularly concerned except where the need for name change advice and assistance arises in the course of an ongoing immigration or asylum matter. Although not common there are circumstances in which our clients need name change documentation for use with the UKBA or otherwise connected with their case, examples would include;-

- An asylum seeker and his family after lodging their asylum applications and fearing reprisals, seek to protect themselves by adopting new names. They require name change deeds which then need to be lodged with the Home Office with a detailed explanation of the need for the documents;

- A client's name is translated from Sinhalese script to Roman script and is used by the UKBA on their records. It is not a good translation and does not correctly reflect his name but the UKBA will not simply amend it and require a change of name deed or will issue a status document in the version they already have.
- A victim of trafficking who wishes to avoid tracing by her traffickers by changing her name or a victim of domestic violence to avoid the family member responsible.

We would therefore see that where there is a clear need for the change of name in the course of ongoing advice it would be nonsensical for an adviser to have to tell their client to ring the Community Legal Advice telephone service to be put through to a commercial provider for a paid service. Some of clients most needing this assistance would have no way (through lack of language skills and funds to pay for the service) to obtain it, or who require the action to be taken quickly and failure of either could result in damage to their substantive case.

We accept that there may be circumstances in which is it not reasonable for the LSC to pay for assistance with a change of name. However, if a restriction is to be introduced we would suggest that it should still be possible for a funded service to be provided where the supplier certifies that there is good reason for the client to change their name and that it was reasonable for them to seek the assistance under legal help rather than commercially (which would include considerations of the client being unable to access or pay for commercial services having regard for the costs – some asylum seekers will have no prospect of paying £35 and of speaking to an adviser on the telephone). The downside that we see to this for providers and the Commission is at what point legal help would be provided given that instruction will need to have been taken to establish whether they justify assistance. We anticipate however that in most cases it will be easily apparent in the first contact instructions as to whether the case is sufficient to justify the assistance. We would say that if justified that should be able to count as a new miscellaneous matter start.

As an absolute minimum if matters comprising solely the name change are excluded we would say that it must remain as remunerable work within another ongoing funded matter for client where the need for the change is directly connected with that matter. So for our examples above the immigration adviser could prepare and advise on the change of name deed and charge the time within the immigration matter. That is far from ideal as it ought following the normal rules to be a separate matter and fixed fees will not have taken into account the possible need for this work on an immigration case. It may also be that the immigration adviser is not equipped to advise on the change of name. It would though be better than either the immigration adviser either sending the person off to try to obtain a service that they could have provided themselves or providing the assistance pro bono because it is necessary to the continued conduct of the immigration case.

Section 8: Other contract changes

Q42: Section 8 sets out our key proposals for changes to the Standard Terms for the Civil Contract 2010 [and the Crime Contract 2010]. Do you think we should make any other changes to the current Unified Contract (Crime and Civil) Standard Terms?

☐ Yes – major revisions
☐ Yes – minor revisions

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

☐ No
☐ Don't Know

Please use this space if you wish to give any further information or explanation
No ILPA response.

Q43: Do you agree with the consortia arrangements we propose?

☐ Strongly agree

☐ Agree

☐ Agree with reservations

☐ Neutral

☒ Disagree

☐ Strongly disagree

Are there any other categories of law, e.g. family or immigration, where we should allow consortia?

We are concerned that there are fundamental problems with the Commissions proposals concerning consortia. We are aware that The Law Society has raised and continues to raise many such concerns with the Commission. We consider they are well placed to identify such concerns.

In general we believe it is likely to be preferable for providers to be able to make their own arrangements for the performance of their contracts provided quality is maintained by those arrangements.

Q44: Do you agree that these proposals allowing providers to apply for extra new matter starts without going through a bid round gives a reasonable amount of flexibility for providers while maintaining the principle of open competition for new work?

☐ Strongly agree

☐ Agree

☐ Agree with reservations *This question does not admit of a tick box answer*

☐ Neutral

☐ Disagree

☐ Strongly disagree

We agree that there should be a transparent process for providers seeking additional new matter starts during any year. We see that being to the benefit of potential clients and suppliers. We raise some concerns that must be taken into account in setting up or running such a system. We consider that there is generally an inadequate supply of service in immigration and asylum in most regions. We know from our members that potential clients frequently have difficulty securing a publicly funded service.

Our first concern is the inadequate methods the Commission has for assessing adequaecy of supply. The Commission has been wrong to equate unused matter

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

starts within some providers as evidence that there is adequate or over supply. There are many reasons why a supplier will be using NMS's slower than expected and a lack of potential clients is, in our experience of immiraton and asylum, generally the least likely to be the case. Interuptions in staffing levels (for example through matenity leave, or staff turnover or because cash flow problems prevent an expansion in work) or uncontrollable activity on existing files (for example the legacy may suddenly bring a number of cases to life unpredictably or a perverse decision from the Home Office or AIT meaning a case which should have resolved becomes suddenly contentious). We are therefore concerned that the system for NMS's to be allocated must include a realistic and honest assessment of unmet demand.
At the same time demand for the services of a particular provider may indicate that the services of that provider are rated by clients more highly, and that choice should be able to be reflected in the allocation of further matter starts. ILPA does not accept the Commission's assumption that immigration and asylum clients can be considered to have little basis for decerning between providers. There is in fact a very mixed picture. Some community groups have become very discerning as to which providers are well serving their members. Others may be unwisely aligned with providers that they trust through ignorance of the higher quality their members could be receiving elsewhere.

At the same time our members also have some concerns that the ability to allocate NMS's more easily during the year may result in the Commission allocating too few NMS's at the start of the year, on the basis that the shortfall can be corrected later. This may mean that some providers contracts will be set unrealistically low and that many will be either unable or unwilling to be expected to expand part way through the year possibly followed by being expected to shrink again at the start of the following year again.

Q45: Do you agree that contractual KPIs focusing on delivery of quality of work, value for money and access to clients are appropriate?
This issue does not admit of a tick box answer.

	Quality of work	Value for money	Access to clients
Strongly agree	☐	☐	☐
Agree	☐	☐	☐
Agree with reservations	☐	☐	☐
Neutral	☐	☐	☐
Disagree	☐	☐	☐
Strongly disagree	☐	☐	☐

Our experience of the Commission's choice and measurement of KPI's does not give us any confidence that the application of contractual KPI's will be of any benefit to clients or even to the Commission and certainly not to suppliers. The question as phrased is a meaningless "motherhood and apple pie" question. Were the LSC to genuinely be able to measure quality through a KPI rather than merely measuring what is measurable we would support the rigorous imposition of such a criteria. But there is no easy way to measure quality. The closest measure developed is through peer review which is necessarily time consuming and requires highly skilled practitioners. Most of the KPI's that the LSC have settled on have been poor proxies for limited aspects of quality only, and some have potentially been perverse measures.

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

Our most detailed engagement with the Commission in respect of any of the KPI's has been in connection with the 40% appeal success rate (see response to Introduction above). Despite the Commission clearly having no statistically valid basis for applying the KPI, despite the unanswerable arguments that the KPI acts as a disincentive to granting CLR in borderline and unclear merits cases and despite accepting that the KPI does not measure quality, the Commission in this consultation reverts to a position where it "remains committed to this existing measure".

We have good reason to doubt the Commission's ability to collect accurate data upon which to base measurement of KPI's. The ongoing problems with the SMS online system, the complexity and therefore inbuilt tendency to inaccuracy in the matter outcome reporting, means our members have no faith in the ability of the Commission to obtain accurate data on which to analyse KPI's. We refer to the very extensive guidance and FAQ's issued relating to immigration and asylum coding as evidence of the difficulty for suppliers in coding accurately and yet still we come across instances where suppliers have been working to different understanding (eg. at an LSC workshop on 6 January 09 it emerged some provider have been told to code for postcode as at the end of a case and some as at the start).
If contract sanctions are imposed as a result the Commission can expect the suppliers affected to appeal or litigate over the basis of the Commission's decision. The uncertainty contract sanctions will generate in the contracts will further dissuade some providers from investing to try to increase their reliance on LSC funded work.
We consequently have no confidence in the Commission's ability to set and monitor KPI's to the extent necessary for those to amount to terms of the contract.

Q46: Would fixed payments based at fixed stages of a certificated case give providers better certainty of cashflow?

☐ Yes
☐ No *This is not an appropriate question.*
☐ Don't Know

Q46a: Would a simpler process like this reduce providers' overall administrative costs on a case?

☐ Yes
☐ No *This is not an appropriate question.*
☐ Don't Know

Q46b: Would there be any disadvantages?

☒ Yes – major disadvantages
☐ Yes – minor disadvantages
☐ No
☐ Don't Know

Please use this space if you wish to give any further information or explanation in response to Q 46, 46a and 46b.

You are asking the wrong questions in 46 and 46a. Certainty of cash flow is not particularly an aim in itself. Certainty can be achieved by having no POA system. What provider's need is to be able to "bill" work regularly as it is done so that they are not carrying large amounts of Work in Progress (WIP) nor being overpaid (such that

they have a hidden "debt" to the LSC). Given that the timing of particular stages in a case is often beyond the control of the supplier (eg the long delays at the Admin Court) greater uncertainty is likely to result from the proposal. We do not see any problem or particularly large burden on either the Commission or suppliers being able to submit claims for POA of profit costs at more regular intervals say monthly or at each £500 of profit costs whichever is sooner. The Commission has the protection that POA's will not be made in excess of the certificate limit. We believe that limiting the payments in effect from those currently available will adversely affect the financial viability of certificated work by decreasing cash flow (at a time when credit is very restricted and maintaining cash flow is vital if providers are to continue to operate). The Commission could impose a reporting requirement on suppliers such that the making of a final order or agreement with the opponent has to be reported such that the Commission can then more accurately identify those cases on which there has been delay in the submission of the final report if that is the problem which the Commission has identified and wishes to tackle.

Q47: What categories of law would be appropriate for a revised payment on account system?
(Please select one or more of the following).

☐ Family
☐ Social welfare law
☐ Mental health
☐ Immigration and asylum
☐ Low volume categories
☐ None *We cannot answer this question as it is inappropriately phrased*

Please use this space if you wish to give any further information or explanation
We can only speak in respect of Immigration and Asylum.

There is no meaningful "average" certificated case in immigration and so any proposal based on paying for average amounts will result in payments often being very out of alignment with the work done (both over and under payments) and will therefore raise real potential for cashflow problems. An immigration certificated case could be anything from a JR lodged behind a test case on which nothing may happen for months or years whilst the test case is litigated, to a test case which becomes a very high cost case and proceeds through the courts to the House of Lords. One size does not fit all. Any system of paying averages will almost certainly hit smaller suppliers hardest as the variability of their work will be a more significant factor to them.

Q48: Should we limit the standard payments on account to 75% of average costs, in order to incentivise providers to submit final bills?

☐ Yes
☒ No
☐ Don't Know

Q48a: If we are to pay more, say 100%, what alternative ways can we incentivise bill submission?

The Commission already has in place systems for identifying cases which appear to be inactive which could be built upon. The figure of 75% is arbitrary and penalises or provides disincentives to suppliers taking difficult expensive cases, or incurring all the

reasonable costs necessary in the case. We see no justification for a financial penalty on some providers when all that is required is a slightly more proactive approach from the Commission to deal with the identified problem. The Commission could set a reporting requirement so that the Commission knows when the substantive part of the case has been concluded so that they can set realistic time scale by which a bill can be expected to be submitted to the Commission, enabling the inactive case mechanism to be tailored more precisely to the circumstances in the case.

Q49: Do you have any other suggestions for how we could better align payments to work accrued on civil certificated cases?

We see no reason to limit the number or timing of claims on certificated cases. If profit costs have increased by say £500 (roughly 6 hours of work) we see no reason why the supplier should not claim further POA's regardless of how recently another claim has been submitted. Or a limit of 1 claim per month regardless of the amount (or subject to a de minimis amount) could be set. Private clients would expect to be billed in line with those arrangements. Given the move to bring in "delivery transformation" and more on line interaction with the Commission particularly billing there would presumably be significantly less administrative burden on the Commission than with the current arrangements so there would be no purpose set in restricting the number or frequency of claims.

Initial Impact Assessment

Q50 Do you consider that the impacts on experts are justifiable in ensuring sustainable access to legal services for clients?

☐ Yes
☒ No
☐ Don't Know

Please use this space if you wish to give any further information or explanation
We have explained above that in our category of law we believe that essential and irreplaceable experts will be lost to the process and clients will suffer as a result. The main expected benefits for the Commission can be achieved by making guidance and suggested model contracts. The introduction of a bright line exclusion from funding removes the Commission's ability to do what is appropriate and right in an individual case (in circumstances where failure may mean a case is lost and a refugee wrongly being sent back where their life and liberty are at risk). We note that the AIT has concerns about the quality of evidence that is placed before it in Country Guidance cases. Any step that adversely affects the availability of quality advice has not been justified. No data is provided on the extent to which this is a significant problem.

Q51: Do you have any comments on any prospective impacts of these proposals on clients or providers?

We refer the Commission to our response to the Carter Review[1] and to our other responses to consultations[2] in which we have made clear our views on the long term

[1]ILPA response to the Legal Services Commission/Department of Constitutional Affairs Consultation Paper *Legal Aid: a sustainable future*

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

risk to the quality of representation and the sustainability of the supplier base form the changes initiated following from that review. We repeat that there is no 'market' where there is only one effective purchaser. This is the case with legal aid and so market forces will not ensure quality or provision. We remain concerned that where the LSC bases its planning on market assumptions there will be adverse impact on an already inadequate supply. The LSC must be concerned to preserve all the high quality suppliers it already has if clients requiring essential assistance are not to suffer. The service to clients has already suffered from the departures of suppliers from legal aid provision that have taken place over recent years. The LSC must make quality central to it's plans. Until it does so it will not be securing value for money and will not be providing a service in which clients will be able to hold the Home Office to for the proper delivery of immigration and asylum decisions.

We do not agree that all applicants wanting to deliver immigration and asylum work should be able to meet the minimum matter starts as proposed. The Commission's own figures show large number of existing providers do not meet the current minimum. Of the suppliers who could not meet the minimum case starts (without significant expansion or change in work profile) a number are amongst the most highly respected and carry out some of the most difficult work to a high quality (eg firms carrying out Special Immigration Appeals Commission cases or many UASC cases may only be able to take on a very small number of cases each year). There can be no suggestion that the small number of cases indicates either that the fee earners are not getting sufficient experience of immigration or asylum work or of the legal aid funding regimes or that they are not providing good value to the Commission. If these smaller providers are driven out or forced to stop doing the highly specialised work then clients will be adversely affected. That is both the clients which they would otherwise have represented and the wider client group who benefit from standards being raised and of boundaries pushed back by these suppliers.

Q52: Do you have any comments on any prospective impacts on clients or providers resulting from the introduction of a tolerance bar in actions against the police etc, education and public law?

No comments

Q53: Do you have any comments on any prospective impacts on providers resulting from the introduction of a limit on the amount of payments on account that organisations may have?

For the reasons given above we consider that the proposed change will adversely affect the cash flow of providers and mean that more of them may find it financially impossible to do publicly funded work or to maintain a high level of such work.

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[2] ILPA response to the **Constitutional** Affairs Committee Inquiry into the implementation of the Carter Review October 2006**;** ILPA response to the Legal Services Commission Consultation on Legal Aid Regulations July 2007; ILPA Memorandum to the Joint Committee on Human Rights following the publication of the Government's response to the Committee's Tenth Report of session 2006-07, *The Treatment of Asylum Seekers,* September 2007.

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

Q54: Do you think there will be an impact on clients and providers on the basis of sexual orientation or religion or belief?

	Sexual orientation	Religion	Belief
Large positive impact	☐	☐	☐
Small positive impact	☐	☐	☐
No impact	☐	☐	☐
Don't Know	☐	☒	☒
Small negative impact	☐	☐	☐
Large negative impact	☒	☐	☐

Please use this space if you wish to give any further information or explanation

We are aware that the UK Lesbian and Gay Immigration Group (UKLGIG) have built up a rota of lesbian and gay-sympathetic lawyers who are willing to take on legal aid cases and who have expertise in those cases. If firms are limited to largely helping only those clients living within their procurement area this will have a negative impact on the ability of UKGLIG to refer clients to those solicitors who they believe are best equipped to do the job. We cannot quantify the extent of the impact and doubt that the LSC can. We know that there are many less formal referral arrangements within particular communities including those from refugee producing countries and that there may therefore be equivalent negative impacts on groups of particular beliefs or religions which again will be un-quantified.

We have had sight of UKLGIG's response to the Commission on this matter. We urge the Commission to take very seriously the concerns they have expressed around the issue of restricting access (eg. through strict caps on taking clients from outside a procurement area) to appropriately experienced and sensitive solicitors in whom lesbian and gay asylum seeks feel able to place their trust.

Q55: Do you have any comments on the prospective impacts of these proposals on clients and providers on the basis of ethnicity, gender, age or disability?

We have raised the specific concerns that the proposals raise for practitioners in the immigration field. These practitioners include many black and ethnic minority providers just as the client base for immigration, by the very nature of the work, is very diverse. We have explained our concerns previously[3] (these proposals being based on the Carter Review and we amongst many others have raised serious fundamental concerns with the principles adopted in that review).

As to the client base, the gravity of the matters raised by asylum, immigration and nationality cases is not in dispute: persecution death and torture, separation from family members including partners and children, and fundamental choices about where and how to live one's life, including opportunities to pursue the work and

[3] Most recently in our response to *Managing Legal Aid Cases in Partnership - Delivery Transformation* July 2008.

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

studies. Immigration, asylum and nationality law and policy is extremely complex and seemingly ever-changing. It is very difficult for people with complex cases to negotiate this legal minefield without high quality legal advice. Many of those under immigration control will be relatively new to the UK and some will have few contacts in the UK and limited English language skills. Lack of knowledge about what ordinary systems are in the UK adds to the risk that these people do not identify when they have been treated wrongly, or, if they do, do not know what means of redress are open to them. People whose immigration status is in doubt may be afraid of complaining for fear it will prejudice their application. People are thus vulnerable to being treated in ways that are not in accordance with the law by government departments and are also vulnerable to being misled, or worse exploited, by those who give them poor quality advice. People unfamiliar with UK costs, and with what is involved in the decision-making process, may find it difficult to assess whether fees proposed to them for private legal representation are reasonable. For all these reasons, a shortfall in legal aid provision can have devastating effects.

Asylum, immigration and nationality are specialist matters and providers do build up specialist expertise. There are real advantages in, for example, a person with disputed Eritrean/Ethiopian nationality going to a provider who specialises in these cases. Restrictions that will limit the areas from which providers can take cases will place these clients at a particular disadvantage.

Most asylum cases qualify for legal aid. People claiming asylum are not allowed to work nor to have recourse to public funds, save those set up by the Home Office (formerly the NASS system). The same is true for people who have no leave to be in the UK. The group thus includes some of the poorest people in the UK, with the least control over what income they do have (for example because they receive support in the form of vouchers that only be spent in specific outlets). Opportunities to research the availability of legal advice are thus limited and travel to legal advisors also. Drive times are unlikely to be relevant to many in this group who will have to use public transport.

Published material details the concentration of black and minority ethnic lawyers in small legal aid practices and parliamentary debates have also highlighted this[4]. Those same parliamentary debates have seen Ministers make reference to the LSC's 'provider diversity reference group', including the Black Solicitors' Network and the Society of Asian Lawyers and to other consultations. Ministers highlighted the importance of regulatory impact assessment.

We have addressed elsewhere in this response the effect of the minimum number of matter starts on smaller practices. The problem is compounded for suppliers in immigration because of the length of life of many of the cases. If a provider opens 100 matter starts in year one, 60 of these, or more, may still be live in year two. If the provider has to open another 100 matter starts in year two, this increases the maximum caseload s/he is carrying. The effect of the proposals on small firms is greater in this area of work than in other areas.

[4] See Black Letter Law, 2007, available from the Black Lawyers' Directory. See also Hansard House of Commons Report 9 May 2007 : Col 123WHff

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

The Select Committee on Constitutional Affairs (now the Justice Committee), in its report on the implementation of the Carter review of legal aid[5], examined the risks of race discrimination. It made the following recommendations:

> 'Recommendation 38. BME suppliers provide an essential link between BME communities and the legal world. They can contribute significantly to community cohesion and access to justice for BME clients. The current reforms proposals may have a disproportionate impact on BME clients who form the client base of most BME-controlled legal aid providers. This may limit access to justice for members of ethnic minorities.[6] (Paragraph 222)
>
> …
> Recommendation 40. We are concerned that some of the reform proposals may contravene the prohibition of indirect racial discrimination under the Race Relations Act 1976 as subsequently amended. Some of the reform proposals, notably the introduction of minimum contract sizes, leave us in doubt as to whether they are a necessary and proportionate means to achieve the intended objective, which is the legal test.'[7]

The Committee also highlighted the importance of robust assessments based on comprehensive and reliable statistical data[8]. The consultation before us does not contain sufficient detail, or sufficient data, to allow full assessments to be made, or to allow us to comment fully on those assessments.

The Select Committee said:

> "We are concerned that some of the reform proposals may contravene the prohibition of indirect racial discrimination under the Race Relations Act 1976 as subsequently amended. Some of the reform proposals, notably the introduction of minimum contract sizes, leave us in doubt as to whether they are a necessary and proportionate means to achieve the intended objective, which is the legal test."[9]

The Minister, Vera Baird MP, stated in parliament

> '…some aspects of our reforms may have an adverse impact on some BME firms as they are currently configured. I recognise that some BME solicitors want to work for themselves and that some BME clients come to such solicitors because of the cultural resemblance. That is inevitably the case. The core point is that proportionately more firms in some parts of the country are run by BME solicitors than by white solicitors.
>
> Undoubtedly many young black firms run by black entrepreneurs of the kind whom we want to encourage are small, because they are new and have not had the time to grow and develop.'[10]

[5] HC 223, 1 May 2007
[6] Paragraph 222
[7] Paragraph 229
[8] Paragraph 223.
[9] Paragraph 229
[10] *Hansard* House of Commons Report 9 May 2007 : Col 129WH

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

We recall that the definition of indirect discrimination was changed on 22 December 2008 by The Race Relations Act 1976 (Amendment) Regulations 2008 (SI 2008/3008), This amends s 1(1A) of the Race Relations Act 1976 to insert the words 'or would put'. The amendment was made subsequent to the European Commission's Reasoned opinion Infringement No 2005/2363 of 27 June 2007 which found that the UK had failed accurately to transpose the indirect discrimination provisions of the European Race Directive (Directive 2000/43/EC. The Commission took issue with the original UK transposition because it appeared to suggest that a person needed to suffer actual disadvantage. In the words of the impact assessment prepared for SI 2008/3008 'the amendment ensures that the legislation covers both individuals who are put at a disadvantage by a discriminatory provision, criterion or practice and also those who would be put at a disadvantage'.

ILPA has repeatedly emphasised that it is not a straightforward matter for a practice to grow; growth must be managed. There are risks associated with rapid growth, for black and minority ethnic firms as for others. Added to the risk is not the real problem of whether growth is possible in the current economic climate. The Minister's comments on the risks of discrimination because of the current configuration of firms are not matters that can be changed in a short time, even if the firms were desirous of changing them.

In the debate from which we cited above the Minister mooted[11] the possibility of lower-value, smaller contracts for newer firms to enable them to establish themselves in the market and a tier of contracts for small firms. The Minister also suggested phased 'rolling out' of competition across the country, which may fit with piloting, the importance of which we have repeatedly emphasised above. This would also allow for adequate monitoring of discriminatory effect and for corrective action to be taken at the earlier possible stage.

We note that the changes to procurement arrangements are happening at a time when many other changes are also proposed (Delivery Transformation and likely changes to the fees structures or payments) and note that the impact of all these issues combined is difficult to predict and that has not yet been carried out.

Q56: Do you have any comments on any prospective impacts of these proposals on small firms?

As stated above we anticipate that many small firms will not be willing and/or able to meet the minimum matter starts in immigration and asylum. All the negative impacts identified in every section will impact on small firms as well as larger, but the may be more vulnerable to some aspects. For example small firms are more likely to be at risk of failing the 40 % success KPI for the simple statistical reason that there is to be expected greater variation in outcome rates when the sample size is smaller (eg it make take only a very small number of adverse outcomes in cases concentrated together in time to push a good firm providing good representation below the threshold).

Q57: Do you consider there to be any adverse impacts on clients or providers in rural communities in the proposals outlined in the consultation paper?

☐ Yes – large impact
☐ Yes – small impact *This issue does not admit of a tick box answer.*

[11] *Ibid.*

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

☐ No impact
☐ Don't Know

Is there anything more that you suggest the LSC does to take account of this group?

We have limited information about the needs of immigration and asylum clients and their providers in rural communities. However, many prisons and detention centres are in rural areas and their presence requires a specific approach, rather than being considered as being a facet of rural advice provision. We are concerned that some of the LSC's modelling may have failed to identify clients that are in different areas because they are in prison or detention centre.

For genuine rural communities we see nothing in the consultation that gives them any additional assistance. We consider that there is a real risk, arising from the mistaken reliance on Home Office plans for modelling need over the 3 years to 2013 (see above) , that as that model is based on large conurbations only the needs of smaller population centres will have been missed out of the planning. We note specifically that there are no plans to facilitate access by supporting the travel of clients in rural areas to suppliers

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.

We do not agree with the requirement in paragraph 5.30 of the Impact Assessment nor the assumption behind it. The document states that it is justifiable that all providers "*must make themselves available to new asylum seekers initially accommodated in their locality... This is in effect the same as requiring contracted providers not to turn away asylum clients without good reason."* These 2 requirements are not equivalent and will not be seen as such. We consider that this new requirement places an obligation on providers to accept instructions from new asylum seekers regardless of their capacity to properly undertake the work (and hence their professional obligations under the Solicitors Conduct Rules). This may result in either work not being properly conducted or in other clients having their cases dropped to make room for the new client (including potentially asylum clients at a later stage in the application process or appeal process). Any obligation on providers must be clearly compatible with professional obligations.

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

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confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Commission.

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).

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