MANAGING LEGAL AID CASES IN PARTNERSHIP – DELIVERY TRANSFORMATION

Response from the Immigration Law Practitioners' Association

Introduction

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 consultation paper contains some positive proposals, but raises some matters of very significant concern. As detailed throughout this response once informed consensus about the final form of the proposals has been achieved, there will be a clear need for the new ways of working to be piloted. As the Commission acknowledges in this consultation paper, in the wake of the 'LSC Online' fiasco, suppliers have concerns about proposals for the expansion of electronic working. Neither the Commission nor suppliers can afford another disaster on the scale of 'LSC Online'. The case for piloting is clear.

By 'piloting' we mean that for an agreed period of time, the new system will be operating but will not be the only system in existence, i.e. the present system and the new system would run side-by-side. It may well be unnecessary for every supplier to participate in the pilot, but the new system will need to be tried and tested over an extended period (for example 12 months) by a number of suppliers of different sizes, undertaking a range of work (including in some cases detained and other 'outreach' work) in different geographical locations and including both solicitor and not for profit organisations. Any suppliers agreeing to participate in the pilot should be indemnified by the Commission against any financial loss arising directly or indirectly from participation in the pilot. Only after a successful pilot, and once it is proved that clear and comprehensive contingency plans, including disaster recovery plans, have been designed to deal with system failure at any level, could a new system be rolled out nationally and the present system set aside.

We request information about which, if any, independent IT consultants have drawn up or are collaborating in drawing up these proposals. The proposals appear to assume that IT systems will be capable of doing everything it is proposed they should do. ILPA would be reassured by independent expert confirmation that this is so. It is of course unlikely that suppliers would have confidence in the IT consultants involved in the original design of or advising on 'LSC Online'

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This response addresses the consultation questions in the order they appear, as summarised at page 37 of the consultation document. Additional matters are incorporated in the most logically appropriate places with our responses to the consultation questions. Some questions have been grouped together where was convenient and logical to do so.

Electronic Working Arrangements

Question 1:

Which of the minimum requirements do you think you will be able to meet in time for the implementation of Delivery Transformation in April 2010? What obstacles do you envisage in meeting these requirements?

Any response to this question will be supplier-specific. The Commission has undertaken its own IT survey of suppliers. We regret that the results of that survey are not available for this consultation and urge the Commission to publish the results as soon as possible. ILPA considers it likely that the majority of suppliers who are its members will have the minimum IT requirements listed at 3.1 of the consultation paper but this is an impression only.

The greater concern at this stage relates to the functionality of the Commission's own IT. At 3.7 of the consultation paper the Commission states

> 'if the position arose that we were unable to receive electronic submissions, we would ensure that we had contingency arrangement in place'.

We wish to see full details of the proposed contingency arrangements. Our principal concern, simply put, is that if increased electronic working means decreased staff levels at the Commission, then if something goes wrong there will be fewer people available to step into the breach whilst things are being put right again.

Chapter 3 ('Electronic Working Arrangements') as a whole proceeds on the basis of assuming that the concept of an 'online client management system' is unproblematic. No such assumption should be made. Our main concerns about an 'online client management system' relate to confidentiality, security, accuracy and retention of client data, as well as that additional time spent by providers setting clients up on the online management system will not be remunerated. We elaborate further on these issues below.

Question 2:

If the LSC has the ability to accept key supporting documentation electronically, would you use this facility?

Again any response to this question will be supplier-specific. The answer may depend simply on whether a supplier has scan / e-mail facilities, as stipulated in the minimum IT requirements at 3.1 (see our response to question one). As noted above ILPA's impression is that the majority of suppliers will have such facilities (if the IT survey is adequate it will confirm or refute this impression) albeit not necessarily of the highest or most recent specification. Providers predominantly carrying out legal aid work are those least likely to have funds available to invest in IT upgrades. However, if the electronic submission of key supporting documentation were to become mandatory it is likely that many suppliers would have to invest in more or faster scanners to cope with the increased usage by fee earners and administrative staff alike.

The issue of confidentiality arises again here. The kind of supporting documentation to be submitted by e-mail will necessarily contain personal and financial information which need to be kept completely secure. Email is not generally considered to be a secure method of data transfer. How will the security of such data and its transfer be maximized and guaranteed? Will there be a requirement for sophisticated encryption systems and software to support this? The opinion of independent IT experts on this issue would be of assistance.

Question 3:

Are there any additional activities the LSC can consider to improve the electronic working proposals?

As per our introductory comments, any new systems must be thoroughly piloted before being rolled out nationally.

Client Database (Civil categories of law only)

Question 4:

Do you believe that a client database is appropriate and would provide value as described in the proposal? Do you envisage any additional issues that would impede its introduction?

Question 5:

Is it appropriate to extend the use of the client database to providers and at what stages of the application could a client database add value? What are the barriers that could hinder the use of the database?

Question 6:

What controls do you consider to be most appropriate for protecting against inappropriate access? Are there any other data issues that you feel would need to be considered?

As noted in the introduction above, ILPA has significant concerns about the concept and practicalities of the proposal for a client database.

Concept:

The Commission has not made the case for a client database, at least not in the form outlined in this consultation paper.

The starting points for the collection and storage of personal data in a database are the eight principles of the Data Protection Act. Given the inherent problems of confidentiality and security and the sensitivity of the data the Commission proposes to hold, ILPA considers that the database should only proceed where an overwhelming case for the need for the database has been made. We do not consider that case has been made.

The Commission states that a client database would provide it with the ability to look at a client's legal aid history when dealing with new applications or enquiries. Whilst measures

designed to prevent wrongful access to legal aid are to be welcomed, ILPA suggests that there are other methods of fraud prevention and detection which do not entail the significant risks to client confidentiality described below. If the Commission is simply interested in identifying those individuals who have the misfortune frequently to require publicly funded legal assistance, then we wish to know for what purpose the Commission is interested in identifying such individuals.

The Commission identifies (at paragraph 4.4) 6 potential benefits of a database as described. Considering those in turn:-

1. "Assistance with the identification of existing clients".

To what end and for whom?

2. "Overview of client history, including current and previous applications".

   See our points above. For the adviser most clients (assuming that they are honest about this and we have no reason to think that the vast majority of assisted clients are not) can supply sufficient detail of their legal aid history for the supplier's needs. For what we have no reason to think is other than a tiny minority who may hide their history with the intention of breaching Commission rules on access to assistance (e.g. by obtaining advice from a second supplier without sufficient reason on the same matter within six months) we suggest that the number of such instances is too small to justify the expense and time involved in this extended database. We regret that the consultation does not include the Commission's estimate of the scale of this problem from information it already collects (at the CMRF billing stage, from the database of immigration grants of funding extensions and from report to Regional Directors from suppliers for example) nor an analysis based on this evidence of the scale of this problem. This information also permits the Commission to deal with such clients, albeit retroactively.

3. "Identification of vexatious clients and those subject to prohibitory directions".

   What is the size of this cohort? We have no reason to believe that it is other than extremely small and insufficient to justify the database (see our response to point 2 above).

4. "Identification of contributions already being paid under an existing certificate"

This, as we understand it, can be achieved on the current funding certificate database.

5. "Use as a tool to manage and mitigate risk (e.g. case splitting, creation of multiple records for the same client)".

ILPA has repeatedly expressed concern about the Commission's approach to suppliers amounting to treating them all as if they are not to be trusted and are all potentially trying to rip off the system, most recently, and with others, at the immigration specialist representative's group under the Civil Contracts Consultative Group in June 2008. This despite the numerous "safeguards" and controls put in place over many years.

If the Commission is concerned about case splitting there are other less time- consuming and less costly ways of doing that than making all suppliers put all clients onto a database,

which can at best only indicate that a suppliers has opened two cases for the same client in the same or related categories. Further investigation would be needed if incorrect case splitting were to be identified. Again, we have no reason to suppose that this would identify other than a very small minority of cases.

We do not understand the reference to "creation of multiple case records". We note that the experience of any organisation holding large details of large numbers of data subjects (e.g. UK Border Agency, NHS hospitals) is that databases are liable to become riddled with erroneous duplicate entries or erroneous wrongful merging of 2 people's data. There is nothing in the consultation about how the Commission recognises or has planned to deal with that problem. This is a serious omission in the consultation paper.

6. "Mechanisms for better understanding civil legal aid spend and client need".

This confuses data with information and understanding. There is no justification given for why holding of data at this level of detail is necessary for the Commission to understand factors affecting the civil legal aid spend. There is not even any identification of the information that the Commission wants to obtain and thinks it does not already have from other sources. This database will tell the Commission nothing about unmet need or gaps in provision.

Members with extensive experience of patient record systems within the hospital sector have recounted that problems of ensuring the validity of the database. Problems include ensuring that a subject has only one record and their data and that of no one else is assigned to that record. These problems are highly significant and require extensive formal protocols and arrangements for dealing with data validity problems. The problems increase the more people have access to input or update data. Even with trained specialist registration clerks having full access to the database so that subsidiary data such as hospital admission records and address and GP histories can be used to ensure a correct match and with the subject in person in front of them, our understanding is that the experience of the health sector is that errors persist and require a dedicated protocol to address them. There is no indication that the Commission has considered how to address this or sought any advice from other public sectors and this is a serious omission in the consultation paper.

Access to the database from outside the Commission.

What is being proposed appears to be effectively a semi-public, if not completely open access database containing information about clients which, as a matter of principle and professional conduct, should not be available for others to access. There is of course personal and financial information about legally-aided clients that the supplier representing them and the Commission is entitled to know. But we can see no reason why this information should be stored in a database to which other suppliers have access.

It is very clear why a database enabling semi-public access to personal information about clients should be a matter of the gravest concern for those representing asylum seekers and individuals seeking other forms of human rights protection. The confidentiality of personal data as basic as a *client's name and address* is of paramount importance for political exiles; people who have been trafficked; unaccompanied minors, those fleeing forced marriages or domestic violence; those fleeing non-state agents of persecution such as criminal gangs; those who have been granted refugee status but wish to apply for overseas family members

to join them; those under witness protection in the UK; those alleged to have committed serious criminal offences abroad or within the UK; those suspected of having committed war crimes or crimes against humanity, and those alleged to pose a threat to national security.

The consequences of anyone entitled to access the database passing on that data could have disastrous consequences. For example, semi-public access to the addresses of unaccompanied minors raises very serious child protection problems.

At 4.2, the Commission states that plans to include a client's National Insurance number as his / her unique identifier were abandoned as 'concerns have been raised around the security of this'. If the database is not sufficiently secure to store National Insurance numbers, then it cannot be sufficiently secure to store the names and addresses of asylum seekers, those claiming other forms of human rights protection and the other groups detailed above.

At 4.9 the Commission states that in any case where the client or the Commission deemed there were 'significant confidentiality issues' or simply 'where the client was not happy for their details to be available in this way' the case would be referred to the Commission. This is not enough. If there is to be a client database for civil categories of law then as a minimum all clients claiming asylum and other forms of human rights protection, all children and members of the groups detailed above should be automatically exempted from the requirement to have their personal information stored on such a database or accessible outside the Commission.

It may well be that practitioners in other areas of law would have their own categories of client to add to the above list of automatic exemptions. It is conceivable that the list might become so long as to render the idea of a client database quite pointless. Such an arrangement would lead to the creation of multiple records for those clients.

In some cases the need for confidentiality may not exist or be apparent at the time a record is created but may only become so later after the client has ceased being in receipt of funded services. There could be no expectation that someone in that position would remember or understand that their data is on an LSC database and should now be classified as of higher confidentiality.

The risk exists. As to the extent of the risk, much will depend on the provision of full detail as to how the rigorous control systems referred to at 4.8 will work. The Commission seeks our views, but again it appears to ILPA that much more information is needed from independent IT experts. The Commission posits as part of risk management contracts sanctions for inappropriate access, but as ever contract sanctions are necessarily *ex post facto* and are unlikely to make any significant contribution to negating the risks resulting from inappropriate access.

If, despite all the concerns raised above, the decision is taken to create a client database, the Commission should make clear that it will *always* be inappropriate for a provider to access information about any person who has not approached that provider with a request for advice and assistance unless for a specific good reason that person gives express and informed consent for the provider to access the data held about them.

As to the specific responses of the Commission to the risk of inappropriate access at paragraph 4.8:

1. Having a limited indicator rather than greater detail may cause less data leakage but raises concerns about suspicions then being raised in the supplier over the information given by the client, damaging the client/adviser relationship at the outset, and of client's being wrongly turned away from advice that they are entitled to receive;

2. Requiring client permission is a given, but how will that be verified and by whom and when (again *ex post facto* would appear to be the only possible answer). The consent must of course be informed if it is to be meaningful and lawful. Who will be in a position to advise the client on whether to give that consent? The consent could be vitiated in that consent could be given in those circumstances under the duress of being the only route by which to get needed legal advice.

3. Restricting access to the minimum necessary is a given, but increases the likelihood that errors identifying subjects will happen. As a minimum no access should to be given to data that does not relate to an existing client of the supplier.

4. Monitoring and exception reports are *ex post facto* and of minimal value where someone is determined to have unauthorised access. They are also of no value against unauthorised access through hacking.

5. Restricting access in sensitive cases - see above.

6. Contract sanctions - see above.

Data retention is a concern. At 4.3 of the consultation paper it is posited that data would only be retained for so long as necessary. The questions arising here are:

- How long is 'as long as necessary'?
- Who decides how long is 'as long as necessary'?
- Who would be responsible for deleting data from the database?
- What guarantee would the client have that his / her data would eventually be deleted?

These questions are not answered in the consultation paper and this is a serious omission.

If the advantage of the database is supposed to be the instant availability of a client's personal details and legal aid history, then that advantage would be lost if the data were deleted from the system at the end of the client's case. Given that no-one can predict when that same client may need publicly funded legal advice again, the only way to ensure that the claimed advantage is not lost would be to retain the data indefinitely. This would be disproportionate and unacceptable. Any compromise cut off point between those two extremes – e.g. data to be deleted if no new matter started for that client within 18 months of his / her first matter closing - would necessarily be arbitrary. Presumably responsibility for deleting data at any agreed cut off point would rest with the Commission, but are the time and costs involved in this task really worth the claimed benefits, taking into consideration the very serious issues of confidentiality referred to above?

ILPA also draws attention to, particularly within the immigration law category, a significant number of clients being abroad. The consultation document is silent on how to deal with data protection issues for such clients and this is a serious omission.

Practical:

If there is to be a client database we can see no reason why a supplier should not be remunerated for the time it would take to set the client up on the database, unless of course the client turns out to be ineligible for legal aid.

The Commission estimates that setting the client up on the database would take one additional unit of time. We are sceptical of this given that a significant amount of information is required, that legal advisers are not trained as data entry clerks, that accuracy is important and that there will be situations (see below) when the system is not available to the adviser and the information therefore has to be recorded by hand and then again later on the system. Even if this estimate is correct, the financial loss to suppliers would still be significant, and for ILPA's members the loss would be higher than that anticipated at 6.2.20 of the Impact Assessment at Annex A of the consultation paper. That calculation was made on the basis of 1 unit at the current family legal help rate - £5.05, whereas from 1st July 2008 1 unit for legal help matters in immigration and asylum will be £5.85. For businesses running on tiny profit margins, or simply struggling to break even, that is a significant differential.

On what basis would suppliers pay interpreters for time spent setting the client up on the database, as they will have to do, if suppliers could not claim for their own time for that task?

In terms of the stages at which a client database may add value, ILPA believes that at "best" a supplier would have instant access to a client's basic personal details if that client had ever received publicly funded legal advice in the past (although as stated above we consider this undesirable).. But in every case it would be necessary to check whether the personal details were still correct (e.g. any change of name because of marriage or divorce, or for other reasons? any change of address?) so in practice the time saved would be minimal.

Application Process (Civil categories of law only)

Question 7:

Do you think there are any additional categories of cases that should be referred to the LSC? If so, please could you list what you think these are?

Means assessments that involve application of discretion may need to continue to be referred. For example clients with income which has varied significantly over the previous three months and where taking an average of the three is not an adequate measure of the ongoing income expectations (for example where a client has had significant overtime in one month but that is no longer available to them). ILPA is concerned that the LSC may take a different view on the discretion to that of the supplier leading funding to be withdrawn and to sanctions against the supplier.

In immigration / asylum cases there will be a significant number of mandatory referrals, namely in the 'overseas applicant' and 'negative disposable income' categories.

In relation to the 'overseas applicant' category the Commission will no doubt be aware that a significant number of those applying for visas at overseas posts have lost their statutory rights of appeal against the refusal of their entry clearance applications [see s. 4 Immigration

Asylum and Nationality Act 2006]. The only remedy for an unlawful decision by an Entry Clearance Officer for those who no longer have a right of appeal is Judicial Review.

As to the 'negative disposable income' category the Commission will of course be aware that a large proportion of asylum / human rights applicants fall into this category. Clients in immigration detention often fall into this category. ILPA would welcome confirmation that the Commission accepts that clients who fall into the 'negative disposable income' category are very unlikely to have any documentary proof of this. Some may have correspondence from the UK Border Agency NASS terminating s.4 or s.95 (both references to the relevant sections of the Immigration and Asylum Act 1999) support, but many will not. Those who survive by the charity of friends or community support groups are unlikely to have any documentary proof of their impecunious state. This point is also relevant to the means assessment of non-passported clients addressed under question 8, below.

Question 8:

Do you agree with the proposals on the handling of means testing? What changes to the process would you suggest?

Question 9:

Are there any additional activities the LSC could consider doing to achieve a more efficient and timely process with regards to applications?

We reiterate our objections set out above to the giving of access to the database.

There are further concerns about the proposals, both for passported and non-passported clients.

Passported clients

The main concern is the proposal that to verify that clients who seem to be eligible for passporting on the basis of being in receipt of certain benefits are indeed in receipt of such benefits, suppliers would need to carry out a 'validation check' by accessing the Department of Work and Pension's (DWP) database.

There is a need for clarification of whether the validation check on the DWP database would be mandatory in every case, or whether if the client could provide recent documentary evidence of receipt of a passporting benefit, such evidence would suffice. Paragraph 5.3.4 of the consultation paper seems to suggest that reference to DWP's database would be mandatory and that it would only be in cases where DWP's database could not give a conclusive result that the client would be required to produce supplementary evidence. However 6.2.32 of the Impact Assessment could be read the other way – i.e. that the DWP validation check is simply another option which can be used where a client does not have documentary proof of receipt of benefits.

If the validation check is to be mandatory, the Commission must publish full detail of a clear and comprehensive contingency plan in the event of significant system failure at the DWP. The consequences for our members will vary according to the proportion of certificated work they undertake but we should regard anything in excess of three working days as significant, especially for cases in which devolved powers are exercised (see further below).

There is considerable potential for things to go wrong with this process. Weighed against the potential for things to go wrong, the envisaged saving of £48,600 (Impact Assessment – 6.2.33) is a relatively small one. As per our introduction, thorough piloting of this process would be necessary if the Commission decides to go ahead with it. Efficiency savings would depend largely on DWP's database being up-to-date and functioning well. This is clearly not a matter over which the Commission, suppliers or clients have any control. The Commission acknowledges for example that data updates take seven days to get onto the DWP's system (other sources have stated that this may be nearer to 14 days). This would create a potential difficulty in a devolved powers case, where the client presents in need of urgent advice / representation on the same day as being awarded Income Support. If it would take seven days for confirmation of the benefits to be available on DWP's database, then the financial information required by the Commission could not be made available within five days of exercising devolved powers, as is required. This may be a fairly unusual scenario, but it is one that bears consideration nevertheless.

We are also concerned about the general accuracy of the validation check given the opportunities for data entered by the supplier to differ from that contained on the DWP system. This is a separate concern from that of timeliness. Inaccuracy may come from data input errors by the DWP or supplier, from the client providing different information (e.g. having changed their name or names used from that recorded by the DWP). These would tend to result in false negative results as an exact match was not made but with no opportunity for the differences to be identified and resolved. This could result in unnecessary re-checks and full means assessments.

Finally, ILPA is unconvinced that the proportion of asylum / immigration clients who are eligible for passporting is anywhere near as high as the 40% figure the Commission cites for civil representation as a whole (see 5.3.7). Asylum seekers and those claiming other forms of human rights protection are of course not entitled to receive mainstream welfare benefits. If time saving is a claimed advantage here, it will not be a significant advantage for many of ILPA's members.

Non-passported clients

As noted above, there will be a significant number of referrals to the Commission based on the 'negative disposable income' category of mandatory referrals. ILPA would welcome confirmation that the Commission appreciates that those amongst our members' clients who fall into this category will often have no documentary proof of their impecunious state.

At 5.4.5 of the consultation paper the Commission states that clients, and partners who have been included in the means assessment, would be required to sign a declaration to certify that the information is correct and can be checked with other 'relevant organisations'. There is a need for an exhaustive list of which organisations may be considered relevant. At present the CLSMEANS1 form makes reference to organisations 'such as' DWP and HMRC. Is it envisaged that the information provided by non-passported clients would need to be checked with any other organisations than DWP and HMRC? If so, which organisations?

We also require clarification of the requirement at 5.4.6 that suppliers should 'corroborate the evidence provided' by non-passported clients. This appears to be a significant additional requirement on suppliers beyond the verification of means they carry out at the moment.

There is no requirement for the capital of the applicant to be verified beyond the client's statement. It is not clear what corroboration would be required.

At 5.5.1 the Commission states that changes to financial eligibility data would automatically be fed into the online means assessment tool. A commitment is needed from the Commission that it will publicise such changes in advance of their being fed into the online means assessment tool.

Again the Commission should publish full details of clear and comprehensive contingency plans to be put into place in the event of the online means assessment tool failing. These plans should start by outlining how, and how quickly, the Commission would be alerted to any problems with the online means assessment tool. It would need to be crystal clear for every supplier to whom they should report apparent system failure in the first instance, and what processes would apply whilst the system failure was being rectified.

Reassessments

Clarification is needed of the proposal at 5.7.1 that a reassessment of means on a certificated case should be undertaken if 'a significant amount of time has elapsed since the initial assessment and the determination is made that a reassessment should be undertaken, based on the risk of the case'. The same paragraph goes on to state that 'Risk criteria will be determined by rules to be introduced by the LSC to ensure that clients remain eligible for funding'.

Specifically clarification is required as to:

- What constitutes a 'significant amount of time'?
- Who would be responsible for making the determination that a reassessment should be undertaken? The proposal is set out at 5.7.1 in the passive sense, so it is not clear whether the Commission or the supplier would determine that a reassessment should be undertaken.
- The rules on risk criteria.

The Commission might consider introducing a 'red flag' system such that if a supplier assesses a non-passported client as eligible on means by using the on-line tool, the information held by the Commission about that client's legal aid history might be capable of producing a red flag prompt at the same time as confirming eligibility, such that the supplier would know they must conduct a reassessment of means in six months time if the certificate is still live. ILPA emphasises however that such a system would not be a substitute for the Commission publishing its rules on risk criteria, especially if those rules are to be fed into an automated system incapable of exercising discretion, and that it should be open to suppliers to query / challenge a red flag prompt when the supplier can see no apparent reason for it by reference to the published rules on risk criteria.

ILPA also asks for confirmation that suppliers would be remunerated for conducting mandatory means reassessments.

Question 10:

Do you agree with the proposals on the merits element of the application and amendment process?

Broadly speaking, if the proposals at 5.10 of the consultation paper are designed to assist suppliers who would make good and proper use of the greater devolution of powers to assess merits of a case at the initial stage and when amendments to scope are required, whilst continuing to control those who would not use such powers responsibly, then ILPA welcomes the proposals.

ILPA asks for information about the criteria that will be fed into the system to determine in which cases the supplier can grant and in which cases the supplier should refer.

Certificate Discharge (Civil categories of law only)

Question 11:

Do you think the circumstances where the provider would have the power to discharge certificates are reasonable? Are there any circumstances you would add or remove?

The circumstances outlined are in ILPA's view reasonable and there are no circumstances ILPA would add or remove.

Client Contributions (Civil categories of law only)

Question 12:

We believe that changes to the contribution process are essential, in order to be clearer, more transparent and equitable. This will also be a key element of simplifying other processes. Do you agree with our approach on this change? What changes would you suggest?

ILPA has no objection in principle to the proposals set out in chapter 7 of the consultation document. However, if these proposals could only be implemented if a client database such as described in Chapter 4 were to be set up, then ILPA refers to our concerns set out at as responses to Questions 4, 5 and 6. Given the strong case for, as a minimum, certain categories of clients automatically to be exempted from the requirement to have their data stored or at least accessible outside the Commission on the client database, the Commission would need to consider and advise on how the process of allocating contributions would work for clients not set up on the database.

The consultation does not include the detail of the calculations carried out by the Commission to demonstrate the claimed effect on clients. This is a significant omission and those calculations should be provided.

The proposed changes with regard to client contributions would need to be properly and thoroughly piloted in advance of being rolled out nationally.

Electronic Billing (Applicable to both civil and crime categories)

Question 13:

What benefits or disbenefits do you perceive can be achieved from electronic billing?

It is disappointing that the Commission indicates at 8.4 that it is likely 'more information would be required with this submission than on the existing electronic billing system for controlled work'. The aim should be to make things more simple. The Commission should be looking to reduce the amount of information it currently requires on a standard bill (as well as looking to reduce the number of occasions on which the file is required to be submitted). At present the controlled work 'bulk upload' facility does not work and suppliers remain to be convinced that the Commission can deliver on this in controlled work let alone in certificated work as now proposed. Thus any efficiency savings anticipated on the basis of suppliers using bulk upload are theoretical only, and this needs to be addressed.

ILPA is also concerned that when the controlled work billing system was redesigned for November 2007 there were a number of last minute and apparently illogical changes to the CMRF (for example to the requirements for reporting travel time). The Commission explained that these had been forced upon it because they had arisen too late in the day and software suppliers declared that they were too late to be incorporated any other way. Thus providers were left trying to use a system parts of which had been designed as a result of the combination of those two factors with the Commission's insistence that the system start in time for the November CMRF reports. Our members expect the Commission to confirm that such factors will not again result in bad systems being foisted upon them.

Whatever electronic billing system is ultimately sought to be procured, the Commission should be aware that the software supplier market is consolidating and products are being phased out and legal aid business is not attractive to the few remaining suppliers. The requirements imposed on suppliers by the Commission's schemes are very onerous and frequently changing and we, their customers, have little spare cash to invest in systems. There is a danger that if the new billing software is sought to be procured by individual suppliers, one or two commercial software suppliers could hold the whole electronic billing system to ransom or that none would be willing to invest in the full functionality (or their customers could not afford the price tag). The solution appears to be that the LSC should take responsibility for procuring the software (giving software suppliers plenty of notice of what is required), should make the software available to suppliers at minimal cost and should itself bear the costs of any subsequent changes to the software. In relation to the latter point, frequent changes to the software should be avoided in any event in order to minimise costs and maximise the smooth running of the system.

Question 14:

Do you agree with our approach to electronic working for advocates, including payment using BACS? What changes would you suggest?

Members who are advocates have raised no objections to the approach and some have positively welcomed the proposal subject to the caveat that they require the same levels of consideration and piloting that we have proposed as an over arching requirement of the whole proposal.

Risk

Question 15:

Do you think the controls under consideration are sufficient to manage risks associated with these proposals? What additional controls would you suggest?

The stated aim , at 9.3,

> 'gradually [to] move away from a system of direct routine case interventions to a system of indirect monitoring followed up by risk-based intervention with penalties for serious transgressions'

Is welcomed. For a long time there have been concerns that the Commission does not properly use the tools already at its disposal for managing risk and ensuring quality, and that the tendency has been to engage in micromanaging without regard to levels of risk. . This ignores the risk management suppliers have in place as required previously by Law Society / Office of the Immigration Services Commissioner (OISC) and now by the Solicitors Regulation Authority / OISC, and for the supplier's own protection. These serve inevitably to also manage risk for the Commission.

As to the list of risk management activities the Commission is considering (9.3 a – e), there is a need for acknowledgement from the Commission that destitute clients often do not have documentary evidence of their destitute state and thus suppliers representing a high proportion of destitute clients would have more difficulty in complying with requirements to retain evidence of means on file, and to submit such evidence with the final bill (see 9.3 a and b).

Suppliers who represent a high proportion of destitute clients should not be assessed as 'high risk' and therefore subject to more closer monitoring and more frequent interventions, simply on the basis that their clients are often unable to produce any evidence of destitution (see 9.3 d). The Commission's view on this is needed.

At 9.3 d reference is again made to use of the proposed client database as part of risk management. See the concerns set out in our responses to questions 4, 5 and 6 above. The Commission has not demonstrated at all why it considers that this database facilitates "better understanding of spending patterns" beyond the extensive information that it already holds on all claims on all its various databases nor how the database would do so. The database may provide more data but that does not necessarily mean better understanding. The level of data being sought to be held is unnecessary for the information purposes of the Commission. Nor has the Commission demonstrated how this contributes to "understanding risk". The Commission has been collecting and collating increasing amounts of data over recent years, for example Key Performance Indicators and on billing and transfers. It has conspicuously failed to show that it is managing risk or addressing quality concerns as a result. The Commission would do better to addressing those matters than merely seek a more complete but no more informative data set.

We do not understand exactly what the Commission expects as proof of client identity checks. There is no such contract requirement at the moment. Apart from money laundering checks (rarely relevant in funded services) and ensuring that representatives are not being used as a tool for fraud, we know of no such requirement on providers. The Commission should also expressly that clients seeking asylum and other forms of human rights protection very often do not have any valid identity documents (see 9.3 e).

Supporting Providers Through the Transition

Question 16:

Do you agree that our transition proposals are appropriate? If not, what changes would you suggest?

The timetable is unrealistically short and optimistic and makes little, and certainly insufficient, allowance for piloting. This is especially important when it comes at the same time as suppliers will be preparing for a new contracting regime and as extensive legislative changes again in the field of immigration. We anticipate that many members will feel be overburdened.

Question 17:

Are there any other areas of support that you think would be beneficial?

ILPA's main concerns relate to the costs and logistics of training suppliers to use the new systems.

No amount of training will put suppliers in a position to make good use of a new system unless that system works. This goes to our earlier comments about the need for comprehensive piloting. It would be wasteful and pointless for the Commission to start training suppliers until it was as confident as it could be that the systems will work well.

The Commission is not mandating the use of particular Electronic Case Management Systems fitting certain criteria (Option 3). Therefore training will need to be tailored according to the systems each supplier has in place. This is another reason for which it would make sense for the Commission to procure and distribute electronic billing software, which would make training, at least on billing, more straightforward.

We do not consider that training could successfully be delivered as envisaged, with suppliers attending raining events, if at each training event there would be a roomful of suppliers all using different electronic case management systems.

The Commission has estimated the costs of training providers as £2,000,000 (i.e. in lost fee earning time). This we consider to be a gross miscalculation. Again, the existing family legal help rate has been used to make this calculation, whereas from 1st July 2008 the legal help rate for asylum and immigration will be 80 pence per unit higher than this. Further, the Commission considers it will be able to discharge its training obligations on the basis of two fee earners per firm attending four hours of training, but, as appears to be acknowledged at 6.2.50 in the Impact Assessments, those fee earners will then have to provide training to every other fee earner in their firm. Thus the number of fee earning hours lost to training will be far greater than that indicated above and in the calculation at 14.1.2. This additional financial burden will come at a time by which suppliers will be feeling the full force of graduated fixed fees driving down their profits such that they can ill afford additional costs of this kind. Suppliers should be fully compensated for their reasonable claims for fee earning time lost because of the training process, even if such compensation had to be calculated at a single hourly rate for all suppliers which represents as near as possible to an average hourly rate for legal help work.

The minimum technology requirements are just that – an absolute minimum. At that level any benefits to suppliers of on-line billing are negligible. It would only be by the use of a

robust and reliable system downloading data from their own systems that suppliers would see any real benefits. Support and training must extend to that functionality not just to the minimum.

As to the list at 10.4 of the elements of the 'comprehensive support package' for suppliers that the LSC intends developing, further details about the content of 'technical support' and 'process support' (bullet points 1 & 2) are required. Would these be in the form of telephone access to competent IT support and to staff at the Commission who have been thoroughly trained in understanding and addressing the problems which the new systems may throw up? A proper period of piloting would allow for the identification of such problems.

Any telephone advice services would need to be functional and adequate to the volume of calls. Members frequently experience significant delays in getting through to the National Immigration and Asylum Team, on whose number there is still an automated menu, which insists on taking the caller through about 8 options in terms of which department the caller may speak to, does not permit the caller to interrupt the menu by selecting for example option two after option two has been offered, and even when the caller tries to make their selection again at the end of the menu, sometimes simply takes the caller back to the beginning of the menu again. Members need concrete assurances, that they will not be subjected to such a time-wasting system for technical and process support in connection with the proposed new systems.

Question 18:

Do you agree with the assessment of impact outlined in Annexes 1 and 2? Do you have any evidence of impacts that we have not yet considered?

Please refer to our responses to questions 21 – 28, below.

Question 19:

Do you think the approach we have proposed makes for good policy on improving efficiency and experience for clients, providers and the LSC?

No. We refer to our real concerns set out above. We consider that problems of confidentiality and security of data have been sidelined in a desire to make relatively small savings in administrative costs for the Commission and that risk and work is being transferred disproportionately from the Commission to suppliers.

Question 20:

Do you have any additional comments that are not covered in the questions asked in the consultation?

We have made additional comments in what we consider to be logically appropriate places throughout this consultation response. We wish merely to reiterate that the Commission should not sacrifice proper system design and piloting to political imperatives to achieve

certain things by otherwise arbitrary dates. To do so would be a great disservice to clients and suppliers alike.

Questions set out in the Impact Assessment

Question 21:

Would the proposals detailed in the consultation paper have an impact on your use of IT as an organisation? Would you have to invest in further IT?

The response to this question will be supplier-specific. The responses to the LSC's IT survey may go some way to answering this question, although the number, range and detail of responses will be significant. At the first meeting of the Civil Contracts Consultative Group we expressed concern that representatives of the LSC were too sanguine that suppliers would discover, and take the time to complete, the LSC's survey. Suppliers are copying with an enormous amount of material and work from the LSC, without consideration of consultations such as this one, and may simply not have time for detailed surveys. Publishing a questionnaire on a website is no substitute for conducting research and we have doubts that the results of the IT survey will be comprehensive. It may in any event be premature to ask suppliers to answer these questions until it is known, for example, whether the LSC will agree to procure electronic billing software on behalf of suppliers and make it available to suppliers at minimal cost, as suggested above, or whether individual suppliers will be left to procure such software for themselves.

Separate difficulties will arise where clients are detained and in cases of other clients who are unable to attend suppliers' offices for their initial appointment. This point seems to be acknowledged at 6.2.15 in the Impact Assessment, but no solutions are proffered.

The Commission must take into account that laptops and mobile phones cannot be taken into the visits areas of prisons, even if the client in prison is detained under immigration act powers. Thus at initial appointments with clients in prisons, there would be no way of setting clients up on any client database. Means assessments would have to be conducted on paper forms, and then the information would have to be fed into the online means assessment tool (or, in a small number of cases, the DWP database) on return to the office, thereby duplicating work.

Laptops and mobile phones are permitted on visits to clients in immigration detention centres (although problems with this are reported by members from time to time). Laptops may not be plugged into power supplies but can only run on batteries (due to electrical safety regulations) and there is no access to the internet provided by the centres. In theory suppliers could access the internet (and therefore the Commission's website via a combination of laptop and mobile web link, but this would not be part of the minimum requirements set out by the Commission in the consultation document. The Home Office has been asked to allow lap-tops to be plugged in and for internet access to be made available but has declined to do this. The Commission must either secure agreement from the Home Office on these matters, and monitor its implementation, including ensuring all Home Office and subcontractor employees at Immigration Detention Centres comply with the requirement to allow suppliers to take in laptops and mobile phones, and make provision for internet access, or must proceed on the basis that the same problems as identified

above for those in prisons will arise for those in Immigration Detention Centres and reconsider the proposals accordingly

Less common but none the less significant are occasions on which suppliers have to see clients in hospital for their initial appointments. Mobile phones and laptops with wireless internet connections are not permitted on many hospital wards or even in designated visit areas in hospitals, and, the same problems as identified above for those in prisons arise. This is an area in which the Commission needs to do further research and discuss further with other departments.

Similar problems arise in cases of home visits.

Home and hospital visits raises problems of discrimination on the grounds of disability.

Practitioners in other areas (e.g. mental health) will describe similar difficulties, as they did at the first meeting of the Civil Contracts Consultative Group. This is an area that must be addressed and the proposed solutions subjected to thorough piloting.

Finally, the Commission states at 6.2.14 that suppliers in civil categories needing to meet the IT spec of the civil contract has been taken to mean that no further investment will be needed to meet the electronic working requirements. However for those firms undertaking a high volume of outreach work (e.g. in Immigration Detention Centres) it can readily be foreseen that they will need to invest at least in more laptop computers and mobile phones with wireless mobile internet connection.

Question 22:

What do you consider the impact of the client database to be on your business for both options?

Please refer to our responses to questions 4, 5 and 6 above. We reiterate that suppliers be remunerated for the time involved in setting clients up on a database.

Question 23:

Do you consider the proposals for billing in the consultation to have an impact on the costs draftsmen sector? Will any parts of the sector need to invest to meet the IT requirements?

This question is not in our specialist area of expertise and requires consultation with costsdraftspersons. Costs draftspersons are not a regulated sector, raising again, and in an acute form, the concerns about access to a client database identified above.

Question 24:

Do you consider the proposals for billing in the consultation to have an impact on advocates? Will any investment in IT be needed?

We have not identified any specific effects. More detail is required on information technology to answer the question about investment, and consultation with barristers clerks and practice managers should also be carried out.

Question 25:

Do you think there is any direct or indirect discrimination against BME providers in the proposals outlined in option 1? Is there anything more you suggest the LSC does to take account of BME providers or clients?

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 and the Commission should interrogate its data to determine those areas of law in which black and minority ethnic providers are most represented and the particular effects of its proposals in those practising in those areas of law.

Published material details the concentration of black and minority ethnic lawyers in small legal aid practices and parliamentary debates have also highlighted this[1]. 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.

The Select Committee on Constitutional Affairs (now the Justice Committee), in its report on the implementation of the Carter review of legal aid[2], 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.[3] (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.'[4]

[1] See Black Letter Law, 2007, available from the Black Lawyers' Directory. See also Hansard House of Commons Report 9 May 2007 : Col 123WHff
[2] HC 223, 1 May 2007
[3] Paragraph 222
[4] Paragraph 229

The Committee also highlighted the importance of robust assessments based on comprehensive and reliable statistical data[5]. 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."[6]

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.'[7]

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. 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. The technological and training demands of these proposals, together with the risks associated with systems failures, create new costs and risks for firms, including black and minority ethnic firms.

We commend to you the evidence submitted to the Select Committee on Constitutional Affairs by the Society of Asian lawyers, published as part of the Committee's report. They made reference to proposals for grants and loans to assist firms, including in increasing efficiency. We have raised matters in this submission, such as the proposal that the LSC procure and provide at no or low cost to suppliers the necessary software, and that it ensure that training extends to those tasks needed to ensure optimum use of the proposed systems, rather than simply addressing the basics, as important for the reasons set out in the Society of Asian Lawyers submission.

In the debate from which we cited above the Minister mooted[8] 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 implications of the matters of IT infrastructure and demands on training detailed above will need to be considered as part of

[5] Paragraph 223.
[6] Paragraph 229
[7] *Hansard* House of Commons Report 9 May 2007 : Col 129WH
[8] *Ibid*.

this. 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.

The Minister indicated that the LSC has made compulsory the provision of data by legal aid firms on the ethnicity of their staff. This needs to be interrogated looking at the particular areas of law in which firms are practising, so that the effect of specific difficulties we have highlighted in the immigration field can be examined.

Question 26:

Do you think there is any direct or indirect discrimination against people with disabilities in the proposals outlined in option 1? Is there anything more you suggest the LSC does to take account of providers or clients with disabilities?

As the Commission acknowledges at 9.3.7 of the Impact Assessment, the wider move to electronic working may have an impact on disability equality, most obviously on the visually impaired. ILPA believes that the Commission should make a clear commitment to bearing the costs of any additional IT investment required to enable the visually impaired and all those with other disabilities who may be further disadvantaged by the proposals at option 1 (i.e. relative to any disadvantage identified in the proposals which will impact on every supplier) to access and operate the proposed new systems.

We have identified problems concerning access of disabled clients to funded services if there are additional burdens on suppliers caused by lack of access to the internet at the site of their first appointment, or delays or barriers caused to them in receiving services as a result.

Question 27:

Do you consider there to be any direct or indirect discrimination against persons of either gender in the proposals outlined in option 1? Is there anything more you suggest the LSC does to take account of possible gender discrimination?

We have commented above on particular difficulties for those taking on particular types of cases (those involving detention, home visits, meetings away from the office etc) and for firms of particular size and composition and the LSC will need to examine data on gender of suppliers to identify the potential for indirect discrimination if one gender is disproportionately represented in these types of work or firms. .

Question 28:

Do you consider there to be any direct or indirect discrimination against persons in rural communities in the proposals outlined in option 1? Is there anything more you suggest the LSC does to take account of this group?

We have commented above on the costs and burdens for smaller firms of the proposed changes. The LSC needs to interrogate its data to examine the relative size of firms in rural and urban areas. IT support and training costs may be greater where more travel is required of either IT companies or members of the firm because of a remote location.

Sophie Barrett-Brown
Chair
ILPA
30 June 2008