ILPA response to consultation on the draft detention advice specification

Introduction

1. ILPA continues to be concerned that exclusive contracting for the provision of advice to those detained in IRCs may lead to the provision of a worse rather than a better service to those in detention. This will be the case if the service is not properly funded so that detainees find they are receiving a poor service (eg limited access to advice, delays in getting initial advice, overworked and under paid providers) with no possibility of instructing another provider under legal aid.

2. A service provided by top quality providers, paid a decent enhanced rate of pay, with enough advisors to meet the needs of all detainees quickly and comprehensively is something that ILPA could support – but we are not satisfied that this is what will be provided under the exclusive contract terms as currently drafted.

3. With those introductory remarks in mind we now comment on the paragraphs of the draft specification.

Comments on Draft Specification

4. Foreword: Any amendments to the specification should be consulted upon. The LSC should not be able to amend the specification without first consulting practitioners and those suppliers who have entered into the Contract.

5. Aim: We are concerned about the inclusion of an aim to achieve the best possible value for money. We believe it should be made clear that the *overriding* priority of the LSC is the first two aims - the emphasis should be on providing detainees with the best quality representation, and the LSC should be willing to pay the price of securing this – this should be a priority over trying to achieve "continually – improving value for money".

6. re 4.3 : It should be made clear that time spent making appropriate referrals for matters requiring legal advice outside of the immigration category will be remunerated at the hourly rate.

7. re 5.2: The LSC should consult with practitioner bodies and suppliers before introducing revised criteria.

8. re 6.2: There is no indication as to what the performance standards will be. We believe that the performance standards for detained work should :

    8.1. Exclude success rates on appeal in fast track cases. This is because of the speed and nature of a fast track case, most suppliers properly applying the merits test should be unclear as to the prospects of success, rather than reaching firm conclusions that the prospects of success are below 50% or above 50%. A case may have over 50% prospects of succeeding on a Rule 30 application to take it out of fast track in the interests of justice, but less than 50% on the substantive appeal. A performance indicator requiring a particular success rate in fast track appeals is thus inappropriate.

8.2. Exclude a performance indicator for success on bail applications. Applying for bail is a right and representatives should assist detainees in exercising that right. The burden is on the Home Office to justify the detention. Detention should only be used as a last resort. Detainees have varied immigration histories full details of which are often not apparent until the bail hearing itself. Whether the detainee gets bail or not is of itself no indication of the performance of the representative. All detainees should have at least one bail application – and this should be funded without a merits test (with only subsequent applications subject to one) and the outcome should not form part of a performance indicator.

9. re 7.1.1 : We believe a representative should be remunerated for the time taken to establish at the outset whether a detainee has a representative. If it transpires that they already do have a representative they should be able to claim against their Contract for the time spent identifying this. It is not uncommon for detainees to inform a potential representative that they have no representative only for the representative to find out once they have travelled to the Detention Centre that in fact the detainee has had a representative who still considers themselves to be instructed.

10. re 7.1.3 : ILPA believes there should be no merits test for appeals that are covered by the Fast Track procedure rules. Alternatively it should be made clear that the merits test in the funding code, as applied to fast track cases, should be interpreted to mean that given the nature of fast track it is likely to be the case that a representative will be unclear or borderline as to the merits save from those rare cases where the case is *clearly unfounded.*

11. re 7.1.3-5 : In each of these paragraphs there is reference to Rule 11.97 of the unified contract. It would assist in making the detention advice specification a more coherent and self contained document if the exceptions to Rule 11.97 were set out in the detention specification itself in full.

12. re 7.2.1 : ILPA assumes that where a client is moved to another detention centre (including a prison) situated anywhere in England and Wales that the representative will be paid travel and waiting time, and travel costs, for attending the client in the new detention centre. The LSC needs to clarify the position in respect to detainees who are transferred from England or Wales to Scotland (ie Dungavel Detention Centre) - what happens in this situation?

13. re 7.2.5: ILPA believes representatives should be able to charge as a disbursement the cost of photocopying their client's file of papers.

14. re 9.1.1: ILPA asks that further details and explanations be given as to the phrase "provide a variety of services" - what does the LSC mean by this? What are these services? It should be possible to give a relatively detailed if not exhaustive list.

15. re 9.1.3: ILPA would be concerned about arbitrary averages being set out and expected to be complied with. We understood that the work was to be paid for on an hourly basis for work actually done. Given the huge variety in the types of detained cases we see no role for averages.

16. re 9.1.4: What is meant by a "A proportionate mix of services"?

17. re 9.1.5: We ask that the LSC consult practitioner organisations before setting the Performance Standards.

18. re 10.2: The detainees make contact with the supplier either by telephoning the supplier, faxing their office or arranging for a relative/friend to contact the supplier. Suppliers should be allowed to assess the client's eligibility for legal aid through either a telephone conversation with the potential client or through obtaining details of their means from their relatives/friends. From the time they have done that and assessed eligibility on financial grounds, they should be entitled to commence work on the case. They should not have to wait until they have visited the client (or had a Legal Help form signed and returned in the post) to commence work on the case. Indeed much valuable work can be done before you initially see a client, which makes the initial consultation much more productive. It is often far better to have contacted the Immigration Service before your initial visit to find out from them the reasons for your Client's detention and to ask them to fax copies of any interview records and other documents. It is also often more productive to take instructions from potential sureties/family members etc before the first visit to the Client. It should therefore be made clear in the specification that this kind of work can be undertaken without you having to actually have had a personal attendance on the client. In some cases it may well be possible to lodge a bail application and have it fully prepared by taking instructions from the client over the telephone and considering documents faxed to you by the Immigration Service.

19. re 10.3: The representative should be able to claim the time involved in referring the client to an existing legal representative against their contract. This will ensure that such referrals are undertaken swiftly and properly.

20. re 11.1 : ILPA agrees that the scheduled surgery advice sessions should not be subjected to a means and merits test. We believe there should be no merits test in addition for a fast track appeal.

21. re 11.3: ILPA is concerned about the position where the first exclusive advisor has advised negatively in respect to CLR (either for a fast track appeal or for bail). 11.3 implies that the client cannot instruct the second exclusive provider even if that provider thinks the CLR merits test is met. We think it should be made clear that 11.3 does not apply where the previous exclusive provider has refused the CLR merits test and the second provider thinks that test is met.

22. re 11.4: Given the vulnerability of detainees and what should be a general presumption that CLR should be granted in most cases for bail and fast track (because they should at the very least be unclear on the merits) all decisions to refuse CLR should be brought to the attention of the LSC. This is best done by requiring that a CW4 is completed in all circumstances (even where the detainee does not want to appeal) and sent to the LSC so they have a record for the reasons CLR is refused for all exclusive providers. The CW4 should be amended so that it has a box to tick to show that the detainee wants to appeal. The representative must ask the client whether they accept the decision to have their legal aid withdrawn. Where they say that they do not accept this then the representative must help them complete the relevant section of the CW4 and lodge an appeal to the IFA on their behalf. They must also complete the AIT appeal form on behalf of the client, even if they believe the merits test is not met, and ensure that it is lodged if the client wishes to appeal. They should ensure that the IFA determines the appeal at least 24 hours before the date of the appeal hearing and, if the IFA overturns their decision and grants CLR, the representative should notify the

23. AIT of this and apply for an adjournment of the appeal to enable it to be prepared. The LSC should seek an agreement with the AIT that such adjournment requests will be granted. The LSC should ensure that there is an IFA able to determine CLR merits test appeals in fast track within 48 hours of receipt of the CW4.

24. re 11.5: The LSC should negotiate with Language Line to provide services for all suppliers under the exclusive contract. Suppliers should be provided with an account number and Language Line should invoice the LSC directly. The LSC is in a very strong position (far stronger than suppliers) to negotiate "value for money" in accordance with its third aim. The LSC should also consider setting out the agreed terms for interpreters including the hourly rate and how much travel time they are willing to pay in respect to each IRC.

25. re 11.7: ILPA believes that there will **always** be sufficient benefit to the client in receiving the advice referred to and suggests the word *normally* is replaced with the word *always*.

26. re 11.8.1: We believe that at the end of the first paragraph you should add the following sentence : "*Your starting point should be Home Office policy that detention should only be used as a last resort and that the burden on justifying detention falls upon the Home Office*".

27. re 11.10: We believe that the representative should not only complete the CW4 but also ask the Client whether she accepts the refusal of legal aid or wishes to appeal against it to the IFA. If they say that they do not accept the decision and wish to appeal to the IFA then the representative should be required to send the CW4 form to the IFA. Since a person's liberty is at stake, the IFA should be required to consider CW4 in respect to bail applications within 48 hours.

28. re 11.12: This appears to suggest that when a supplier decides a client's case no longer meets the merits test they then have a duty to make an appropriate referral presumably to an organisation providing a service to fee-paying clients. Is this correct? What does "An appriopriate referral" mean in the context of 11.12? If a supplier does make a referral to a fee charging organisation and that organisation believes that the prospects of success are more than 50%, should they not have a duty to then explain their reasons to the supplier who should then take the case back and conduct it under CLR? ILPA is concerned about the ethical issues raised by 11.12. It is concerned that some suppliers may have a system for refusing CLR on the merits and then referring the case to fee charging providers with whom they have an arrangement.

29. It would be preferable for suppliers to refer in these situations to an approved list of Law Society accredited practitioners.

30. re 11.13: We are concerned at the implications of this. What does "A client who contacts" mean? Does this mean any client who telephones the office of a supplier or sends an unsolicited fax or e mail? Many of these are received. 11.13 implies that as soon as we receive such unsolicited contact that person "Must be regarded as a client of our organisation". That has all sorts of implications from the point of view of the Law Society and in ILPA's view they should only be regarded as a client of the organisation once they have been accepted by the firm as a client (ie after the application of the sufficient benefits and other tests and the supplier being satisfied that there is no other

31. legal representative). Until that time they should not be considered a client of the organisation.

32. What does "complete capacity" mean at 11.13(a)? Some suppliers may have for example 25 fee earners doing immigration work. They may decide that only 10 of these will do detention work. The other 15 accredited staff could do detention work but the organisation has structured itself in such a way that they should be doing other work. When is an organisation at complete capacity – when the 10 fee earners allocated to detention work are at full capacity or when the whole department is at full capacity?

On site surgeries

33. ILPA believes that if exclusive contracting is to work legal representatives should have extremely regular presence in the detention centre. There should always be at least one representative from any contracted firm present in a detention centre (10am -6pm) to deal with emergencies. The LSC should ensure that office space and facilities are provided in all IRCs for this purpose. We are concerned that the onsite surgeries may be irregular and only during limited hours of the day. We are also concerned that detainees have to book to attend a surgery. Our experience of the detention advice pilot is that many detainees are not made aware of the surgeries. We believe that all detainees should have an advice session arranged with a legal representative within 24 hours of their arrival in the detention centre. The LSC should make the necessary arrangements with the Immigration Service or the management of the IRC to ensure that this becomes an integral part of the detainees induction into the centre. One way of doing this would be to have one advisor on a "new detainee surgery" every day of the week. If there are no new detainees or a few detainees on a particular day the advisor should still be paid for their attendance.

34. We do not believe that the advice sessions should be limited to 30 minutes. There should be flexibility to take as long as is necessary. ILPA's experience is that on some days there are fewer detainees requiring advice and you can therefore spend longer with them and on other days the session is very busy – some of those attending sessions can be dealt with in less than 30 minutes(rarely), others need an hour. The system should be flexible enough to cope and if the surgery lasts longer than anticipated and goes into anti-social hours then the advisor should be paid accordingly.

35. Fast Track

36. We ask that you add to the specification the following statement:

> "*Suppliers are reminded of the agreement between the LSC and the Home Office that they should be given 24 hours notice of a fast track interview and that you should not accept a case unless you are given 24 hours notice and should refer the matter to the LSC*".

37. We believe you should consider inserting a sentence that says

> *"The LSC expects any person who is to have a fast track interview to have spent at least 2 hours with their representative prior to any interview. The LSC will closely monitor times spent advising clients prior to the fast track interview. Suppliers are*

reminded of the Home Office flexibility policy and what it says about giving representatives more time with their clients prior to interview".

38. We trust that anti-social hours payments will continue to be made as under the current fast track contract. This should be set out in the specification.

39. Reference to Rule 11.101 of the Unified Contract is made - to make the specification more comprehensive we suggest setting out Rule 11.101 in full where it is referred to at paragraph 6.

40. We repeat our request that there be no CLR merits test for fast track appeals or that it be amended as referred to above at 7.1.3

41. If it is to remain then at paragraph 9 we suggest that you amend the paragraph so that suppliers must notify the LSC in all cases where they refuse CLR in a fast track case in the way described at para 11.4 above. They must complete form CW4 and they must send it to the LSC for consideration by the IFA within 48 hours. If the client wishes to appeal to the AIT then the representative must assist in completing the appeal form and lodging it on their behalf even though they have reached a negative view on the merits test (in order to preserve the client's position pending the determination of the appeal by the IFA).

42. re 12: Referrals. 12.2(c) This needs to make clear to where the appropriate referral should be made when a client fails to meet the means and merits test. See comments above re 11.12. Suppliers should be paid for all time spent making referrals. They should be paid at the appropriate hourly rate to be set off against their contract.

43. **Sub Contractors**

44. For the sake of clarity we think you should make clear in paragraph 16 that any work subcontracted must be carried out by approved personnel as defined at section 5 (ie accredited under the IAAS).

Payment schedule

45. We understand that payment for this work will be done on an hourly basis at the hourly rates set out in the payment schedule annexed to the solicitor's specification. We need clarification as to whether this will include travel and waiting time. ILPA believe that it should include travel and waiting time.

46. ILPA believes that the LSC should be encouraging the more experienced personnel to be involved in detention work. Since most personnel working under these contracts will be spending a whole day at a detention centre the payment that the organisation receives for that fee earner's work during the day must be at least equivalent to what that fee earner would earn from working 7 chargeable hours in the office.

47. If the LSC wants the exclusive detention contracts to be a success they should seriously consider paying an enhanced hourly rate for detention work (10%).

48. If the LSC is not willing to do this they should at least consider paying an enhanced hourly rate for specific tasks – we would suggest paying the equivalent of the CLR advocacy rate as opposed to the legal help attendance rate for the following;

    48.1. The Level 2 surgeries (since these are undertaken in a highly time pressurised environment and it is essential to get the best advice at the start of a case).

    48.2. Attendance at fast track interviews by Level 2 advisors (since these interviews involve active advocacy particularly at the end of the interview when oral representations are made as to why a client should be taken out of the fast track).

49. Paying the advocacy rate for these interviews would help to ensure that the more senior Level 2 staff are doing detention work rather than it being delegated to the more junior Level 2 staff .

50. Level 3 advisors should continue to be paid 5% more and this should be made clear in the contract – ILPA repeats its request that Level 3 advisors be paid 15% more to encourage these highly experienced people to undertake detention work.

51. ILPA supports the proposal to make quarterly payments in advance. This would be one small attraction of carrying out detention work and may encourage some organisations to bid who would otherwise not bid if the quarterly payments were made in arrears.

52. ILPA assumes that disbursements include the travel costs to the IRC and we ask also that it includes any travel costs to liaison meetings that have to be attended as part of the contract.

53. ILPA believes that training is very important and that the LSC should fund detention training for personnel in contracted firms. Time spent on any training course should be time that can be offset against the contract in terms of hours spent on the training. ILPA would suggest that up to 2 training days in a year should be treated in this way per advisor.

Pilot and independent evaluation

54. Given the radical nature of these changes ILPA shares the view of BID that exclusive contracting should be piloted in one or two centres before it is rolled out. We suggest that the pilot should run for least 12 months. If at the end of it the system is considered a success and capable of delivering a high quality service then it can be rolled out to other IRC's. ILPA also supports BID's recommendation that there is an independent evaluation and monitoring group, facilitated by the LSC, with a formal remit to oversee the operation of the contract, at least for the pilot period.

Concluding remarks

55. ILPA shares the aim of the LSC to create an accessible, independent, quality and integrated legal advice and representation service for clients detained at every Immigration Removal Centre. It shares the aim that services provided by suppliers at the IRCs should meet the needs and priorities of the detainees. It is concerned however that if exclusive contracts are entered into with suppliers that cannot provide

56. this level of service due to inadequate funding by the LSC, then detainees will be worse off for not being able to instruct a representative of their choice from amongst all those accredited to do this work.

57. ILPA is concerned that a proper needs assessment has not been carried out (so far as we are aware) so that it is clear to the LSC exactly how many detainees are likely to require advice and assistance in each detention centre and how many hours of assistance they will require. ILPA urges the LSC actively to encourage all those suppliers, large and small, who currently do good quality detention work to continue to be able to provide that service.

Immigration Law Practitioners' Association ***16 April 2007***