Response of the Immigration Law Practitioners' Association to the Legal Services Commission consultation on the draft Unified Contract Specification April 2007

1. **Introduction**

    a. This is ILPA's response not only to the draft immigration specification, but also to aspects of the draft general specification and payment annex which are of particular concern to immigration practitioners.

    b. We wrote to the immigration policy team at the Commission on 22 March raising some initial queries on the draft immigration specification. Unfortunately we did not receive a written response, but our letter formed the basis of much of the discussion at the meeting chaired by Paul Newell at the Commission on 4 April. We will include reference to those queries and that meeting in this response. Where this response raises additional concerns not discussed at that meeting we trust that they will be given no less serious consideration.

    c. We do not restrict our comments to issues that are new in these consultation drafts, but take the opportunity also to raise and reiterate issues of continuing concern where these have been carried over from the previous specification into the current drafts.

2. **Payment rates – hourly rates**

    a. It is manifestly necessary for these to be adjusted to take account of inflation since April 2001 when the current rates were set. We assume that current personnel at the Commission and DCA do not accuse their predecessors of profligacy at that time. The same principles which informed that decision should apply now, or very clear reasons why not should be supplied.

    b. Prior to 2001, there was an enhancement to rates in the immigration and actions against the police categories with effect from 1 July 2000, but there had been no general cost of living increase since 1 April 1996. No doubt the Commission of the day in 2001 had this in mind when determining the increase then, which for immigration was 10% over the 1 July 2000 rate, which in turn had been 5% over the 1 April 1996 rate. When determining the appropriate increase now the Commission of today should have very firmly in mind the even greater lapse of time since the last increase.

    c. We do not know to what extent the rates fixed in 2001 were intended merely to acknowledge inflation to date, or whether projections were made so that

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they also included a component to allow for future inflation during the life of the contract. Even if the latter were the case, it is certain that they could not have included projections as far forward as even the 6 year mark which we have now reached, let alone the 10 years until 2011 that the current drafts contemplate.

d. We assume that the Commission's employees have benefited from cost of living pay increases during the past 6 years, that they will continue to do so as appropriate during the next 4 years, and that the Commission is funded to meet both those increases and other inflation-driven increases in running costs. The employees of its supplier organisations have also required, and will continue to require, cost of living increases. These, and other increases in overhead costs, have been funded from current rates for 6 years, but it cannot fairly or rationally be supposed that these unavoidable increases can continue to be met from an unchanged budget for another 4 years.

e. The Commission was quick to point out to suppliers who were hesitating to sign the contract last month that if they signed they would have the option of withdrawing at any time on 3 months notice. ILPA is aware that this consideration, and the knowledge that the specification was still open to consultation weighed heavily in the decisions to sign of some of our members, and that many will be keeping the continuation of their contracts under constant review. If the Commission persists in its expectation that suppliers can and will run their organisations throughout the period 2007-2011 on the basis of hourly rates that were appropriate to 2001 monetary values then it runs the real risk of a serious depletion in its supplier base, in both size and quality, as remaining providers struggle to retain experienced staff with no increase in budget to remunerate them.

f. An early announcement of a realistic increase to the base hourly rates – we believe 20% would account for inflation over the last 6 years without any future projection - and a recalculation of the fixed fees accordingly, will be necessary to stave off the risk of a rash of notices to terminate by the time the specifications come into force.

g. If this requires lobbying of the DCA and Treasury by the Commission on behalf its suppliers, so be it.

3. Payment rates – Level 3 enhancement

We repeat our request that the increment for those accredited at Level 3 should be 15% rather than 5%. This would do no more than treat immigration practitioners in the same way as family practitioners, who get a 15% increment if on various panels. There are very few Level 3 accredited solicitors or caseworkers. This we believe is partly because the current increment is so low (discouraging people from applying), and partly because Level 3 accreditation is difficult to obtain, requiring very high marks in the accreditation exams and evidence of contributions to immigration law and practice. It is arguably far more onerous than the requirements for family and children law panels, although we do not underestimate those requirements. The point is that these

are both civil areas of law and if the purpose of an increment is to keep senior people doing legal aid then the same increment should apply to immigration law as it does to family law. We are not second class suppliers.

4. Payment rates – complex points of law and public interest cases

There is no equivalent in the draft specification to 12.4.3.7 of the current specification which provides for additionally enhanced rates to be negotiable in cases raising complex or novel points of law, or having public importance wider than the interests of the individual client. Typically these are cases for which 3 person legally qualified panels of the AIT are convened, including asylum Country Guidance cases. None of the rationale for this provision has gone away, so why the omission? Please restore it, or explain why not.

5. Fixed fees and London weighting

a. ILPA is a national organisation, representing practitioners both in and out of London. We have never canvassed our membership on the issue of differential regional rates, and are unclear how we might interpret the results were we to do so. There would clearly be a greater self-interest in responding in favour among our London members, and that must surely also be the case in any soundings that the Commission itself has taken on the issue. We can say categorically, however, that no ILPA member, in or out of London, has ever expressed to us any opposition to London weighting, and that our expectation is that it will be as obvious to our membership as it should be to the Commission that overheads are higher in London, so payment rates should be too. This fact is certainly obvious to the Supreme Court Costs Office, and we see no indication that the differential is to be disapplied to certificated or other hourly rate work funded by the Commission. The logic of a national rate for fixed fees therefore eludes us.

b. If, however, the decision to apply national rates to the proposed fixed fee regime is to be maintained, then at the very least London suppliers should not be faced with a rate cut. The national fixed fees should be calculated on the basis of no less than the current London rates, with appropriate adjustment if our pleas for inflation increases in the hourly rates are heeded.

c. We are aware that, in response to correspondence from the Legal Aid Practitioners Group, Carolyn Regan has stated that *"as historically approximately three-quarters of our spend has been with London providers we have calculated the fees based on an hourly rate that is at the three-quarter point between national and London rates"*. This strikes us as a l *non sequitur* in relation to the issue of how London suppliers are to maintain the financial viability of their organisations on payment rates calculated without regard to their higher overheads, particularly if the fixed fee component of their work is actually to represent a reduction in income.

6. Payment provision – file reviews

a. There is no equivalent in the new general specification to the provision at 1.15 of the current specification for payment for file reviews required under the SQM. We are aware that this cut was heralded in the general post-Carter consultation. That does not make it any the less iniquitous or irrational, unless of course compliance with the SQM in this respect is to be made voluntary. Please clarify, and if that is not the position please explain, the rationale for the Commission persisting in its intention to start to refuse to pay for work done which is required by it and for which it has up to now accepted that payment is reasonable.

b. Unless the element of compulsion under the SQM is to be removed this simply smacks of exploitation of suppliers to meet a cost-cutting agenda ay the Commission. The issue is of particular concern to immigration suppliers because it represents a loss of income additional to the other threats to financial viability occasioned by all the payment regime changes in the category. It could be 'the straw that breaks the camel's back' for some providers as they review their continued willingness to contract with the Commission.

7. Payment provision – NASS

a. We reiterate all previously expressed concerns about the removal of this work from the immigration category. Even at this late hour we urge the Commission to reinstate an equivalent to 12.2.7 of the current specification, enabling the immigration advisor to open a new immigration matter start for NASS assistance beyond 30 minutes which is of a nature that does not require referral to a housing or welfare benefits specialist.

b. If this plea is to fall on deaf ears, please, for the avoidance of doubt, make express provision that additional tolerance matter starts can and will be allocated to immigration practitioners without welfare benefits franchises in order to meet this need. Alternatively, something along the lines of the provision at 5.5 of the draft general specification for self-authorisation of additional matter starts in priority categories would meet the case.

c. Please also include something in the immigration specification to clarify the position in relation to NASS assistance in existing asylum cases (both where a separate NASS matter has already been started and where one becomes necessary after the commencement of the new specification), and also in new matters in cases which, in accordance with 11.2 of the new immigration specification, are never going to fall under the fixed fee regime.

8. Payment provision – fixed fees – CLR travelling and waiting

a. We continue to deplore the inclusion of this within the advocacy "additional payment" provisions. The Commission is, or should by now be, aware that our position derives from concern about the impact on suppliers and on the immigration bar, and from the consequent access to justice issues as practitioners may be driven to protect their own financial viability by

declining instructions to appear in any but the closest hearing centres, this being the only control it is possible for them to exercise in this matter.

b. We have yet to hear any credible response from the Commission as to how, under the proposed scheme, it plans to protect the interests of clients with complex cases which require specialist counsel but are proceeding in hearing centres far distant from London or Birmingham.

c. For example, we are aware that, as a result of the new regime, the Commission is losing the services of one of its few good immigration providers in the North East, a firm with a CLR success rate which we believe to be the highest in the region and which we know to do excellent work in children's cases, currently representing almost all the asylum seeking children looked after by Newcastle. We hope that this firm's decision to close its immigration department is giving rise to very serious soul searching at the Commission about how it is to continue to meet its statutory responsibilities in that region. Even if alternative suppliers are found, the Commission ought to be concerned about quality for this particularly sensitive work, and about the ability of any supplier to call upon specialised counsel when travelling time to North Shields simply cannot be properly remunerated by the proposed Additional Payments alone.

9. Payment provision – reviews of s.103D decisions – draft 11.67-8

We welcome the provision for at least some payment for work done in relation to reviews of AIT decisions to refuse s.103D costs orders. But, given that that the work is to be undertaken at risk and the costs payable only if the review succeeds, we fail to see why uplifted rates should not be payable. Please reconsider. Apart from anything else, every inconsistency in payment rate or method introduces yet another complication into suppliers' accounting systems. All costs claimable under s.103D orders, including costs incurred in obtaining the orders, should be payable at the same uplifted rates.

10. Immigration fixed fees – timing of introduction

a. It is not acceptable that some suppliers with whom the Commission contracts should be subjected to the fixed fee regime some 18 months earlier than others. We are aware of the reasons that have been given for the deferrals for the Refugee Legal Centre and Immigration Advisory Service, and do not dispute them. We simply say that if deferral is necessary for some, for any reason, then it is necessary for all.

b. The date 1 October 2007 in 11.2(a) and (b) of the immigration specification should therefore be amended to 1 April 2009, or as may be appropriate to bring arrangements for all suppliers into line with those for RLC and IAS. This will give all suppliers the same opportunity to prepare for the change, and remove the unfair competition element of the present proposal.

11. Asylum claims predating the fixed fee start date

a. 11.2(a) of the draft specification needs further express clarification. It makes no reference to appeals, and the expressions "Home Office legacy cases" and "fresh applications" are insufficiently clear to communicate to practitioners that all the categories (including appeals) listed in our 22 March letter are excluded from the fixed fee scheme, which we were informed at the 4 April meeting was the case. Those categories, which need to spelled out in the specification, are (in addition to legacy cases and fresh asylum claims):

   i. appeals arising after 1/10/07 from asylum claims made before 1/10/07?

   ii. appeals against refusals of fresh claims made after 1/10/07 where the original asylum claim was made before 1/10/07?

   iii. applications made on or after 1/10/07 for indefinite leave to remain following 4 years exceptional leave to remain, or for further leave to remain following limited leave as a refugee, for further humanitarian protection or for further discretionary leave to remain, in cases where the applicant originally applied for asylum prior to 1/10/07?

   iv. assisting failed asylum seekers whose original claims were made prior to 1/10/07 with applications post-1/10/07 on alternative non-asylum grounds for seeking leave to remain?
   v.post-1/10/07 assistance to failed asylum seekers whose original claims were made pre-1/10/07 re status issues pending removal (reporting requirements, destination, voluntary departure etc).

b. Please also clarify the position about NASS assistance in these cases, as requested at our point 7.c above.

12. "Form filling"

a. We have never understood why this forms part of the immigration rather then the general specification. Does the Commission pay for assistance with simple form filling which does not require legal advice in other areas of law? Why are immigration practitioners supposed to need this special prohibition?

b. All applications to the Home Office, other than asylum and Article 3 claims, now require forms. It is therefore necessary for the ambit of the restriction to be clarified if it is to be kept in the immigration specification. 11.102 says, as the previous specification also said, that it is not limited to travel document, passport and citizenship applications. What else might it include? Logically it would seem to be the case that any immigration application that includes the completion of a form falls within this exclusion from fixed fees. In a settlement application, for example, the SET(O) form itself is on its face simple enough so that *prima facie* it would seem to be caught by 11.102, but issues of law are likely to arise so 11.103 applies. This seems to us to be no different to the reasoning process that would apply in deciding whether to

accept instructions to assist in a citizenship application. Clarification is needed if this restriction is indeed to remain in the immigration specification.

c. We submit that the better course would be to remove the restriction from the immigration specification and, if it is considered necessary at all, to locate it, suitably reworded in the general specification, leaving it to the good sense of practitioners to apply it as appropriate in the immigration and nationality context.

d. That leaves the question of how an immigration or nationality application that involves the completion of a form is to be remunerated once the fixed fee regime is in operation. The Commission surely cannot be labouring under the illusion that what we are talking about here is merely assistance with the filling of the form itself. What is at issue is the whole process of preparing and making of the application. If legal assistance is necessary at all in, for example, a citizenship application, then advice will be needed on supporting documentation and on the meaning of the declaration and the good character questions, representations will be needed on any issues of Home Office discretion (eg in relation to the language requirement, the "clear period" for unspent convictions, the interpretation of "lawfully resident" or numbers of days absent), and further advice and assistance will be needed in respect of any Home Office queries or negative response. In essence the process is no different in a citizenship application, which the Commission has singled out for characterisation as a "form filling" exercise, from, for example, a settlement application which the Commission has not (as yet) so characterised. So why should the remuneration arrangement be different in a nationality case than it is in an immigration case, given that Funding Code criteria will be equally applicable to both at every stage?

e. We submit that if there are to be fixed fees at all, then all Home Office applications arising after the relevant date which meet the Funding Code criteria, including the less complex, should attract the fixed fee. To do otherwise would be to impose needless accounting complications on suppliers, and would smack of attempting to deprive them of whatever "swings and roundabouts" benefits might otherwise arise under the fixed fee regime.

13. Fixed fees – matter ends – Legal Help

a. It is not acceptable for suppliers to be expected to continue work unremunerated on matters arising from a concluded matter under fixed fees. This applies to the open ended requirement at 11.9 and 11.14 in the draft specification that the fixed fee is to cover not only advice on outcome and any status granted, but also "carrying out any necessary work". Where CLR is not needed, or not granted, but action other than advising on outcome and reporting the matter as concluded is needed (and meets the Funding Code criteria) then a fresh matter start is both justified and necessary. The specification should say so for the avoidance of doubt.

b. In our 22 March letter we gave the example of a successful application, which under the present draft specification would attract no further funding for further work, and contrasted it with unsuccessful applications in which further work would potentially be funded under CLR. At the meeting on 4 April Paul Newell commented that we opposed the payment of an "early success" bonus in asylum cases which might have mitigated this contrast. But that proposal was never expressed as being intended to cover post decision work, and in any event would have mitigated the problem only in asylum cases. The principle that a fixed fee for dealing with an application should be restricted to dealing with that application and advising on its outcome applies in asylum and non-asylum cases alike.

c. It also applies to successful and unsuccessful applications alike. If a refusal is not to be appealed under CLR for any reason (whether because it does not meet the merits test, or because the client has made an alternative application or intends to make a voluntary departure), but the client requires continuing advice on status and requirements pending removal or other outcome then, provided always that the Funding Code criteria are met, a fresh matter start is justified.

d. We have in the past been given to understand that the Commission wishes to discourage the practice of some suppliers of simply abandoning clients to whom CLR is refused but who would benefit from continuing advice. The only way of meeting that aspiration is by making it clear now, in this specification that new matters are to be opened in such circumstances, whenever the Funding Code justifies it.

14. Fixed fees – matter ends – CLR

a. It is not acceptable now to seek to extend the ambit of CLR to demand that suppliers in future undertake post-appeal work under their CLR fixed fee, being work which up to now has always been funded under Legal Help. It might be different if the ambit of CLR is to be changed across the board, but if that is to be done then the fixed fees would have to be recalculated to take account of the further work.

b. CLR hourly rates are slightly higher than Legal Help rates. For those cases that will continue on an hourly rate basis (which will include all new asylum appeals arising from fresh claims and pre-fixed fee regime applications) are we to take it that NIAT will in future grant extensions under CLR, and at CLR rates, to cover "any post appeal advice and assistance"? If not, why not? And if not surely the Commission must see that it cannot rationally include work under fixed fee CLR that is not included under hourly rate CLR.

c. Our observations above about the circumstances in which fresh matter starts will be justified following the conclusion (whether successful or not) of a fixed fee Legal Help case apply with equal force to post-CLR work. Amendments are therefore required to the draft specification at 11.11 to omit point 5, at 11.12 to omit points 7 and 8, and to 11.17 to omit point 7. The draft should *not* be amended to apply the objectionable 11.11.5 and

11.12.7 to non-asylum appeals. Those provisions should be removed altogether, in favour of fresh matter starts for further work.

d. We reiterate the point made at 5)b)iii of our 22 March letter that the unsustainability of the present draft is illustrated by comparing an appeal in which a s.103 review application is made (automatically triggering the closure of Stage 2b CLR) and one in which it is not. Post appeal work plainly cannot be covered by s.103D costs orders, so in those cases any post-appeal work justified under the Funding Code will perforce have to constitute a new matter start. The same ought to be true in all cases.

15. Fixed fees – matter ends – Legal Help and CLR

If our submissions above about matter ends and new matter starts are not accepted then ILPA will require full details about how, if at all, the requirement to undertake further work has been factored into the calculation of the fixed fees. It is our understanding that in fact it has so far not been so factored. If that is correct then we would require an undertaking that the fees will now be recalculated taking this into account, and that we will be provided with full details of those calculations and the assumptions on which they are based. Failing this we believe that any attempt to proceed with this specification as it stands would be susceptible to legal challenge for *Wednesbury* unreasonableness.

16. Fixed fees – matter and stage ends – claiming – 11.74

We reiterate the point made in our 22 March letter that unless it is clear that post-decision work under fixed fees relates only to advice arising immediately from the fact and contents of the decision, then the "end" of a stage is going to be a moveable feast, with unfair consequences to suppliers and confusing accounting and monitoring consequences for the Commission.

17. Fixed fees – calculation of "exceptional cases"

a. In the light of what was said by the Commission's representatives at the 4 April meeting, we are content for "additional payments" to be excluded from this calculation at least for the time being, subject to review, and to the expectation that the Commission will behave reasonably under the contract and that it would amend it if the proposed arrangements proved to be adverse to suppliers.

b. In taking this position, we rely on Paul Newell's statements on 4 April that, in cases where counsel or other outside advocates are instructed, it is entirely a commercial decision for suppliers as to where to draw the line between preparation (including conferences and preparation of skeleton arguments), which can count towards the exceptionality calculation, and advocacy on the day which can only attract the "additional payment". We understand that this is consistent with what the ambit of advocacy fees has been held to be in family cases. We look forward to seeing it confirmed in the amended immigration specification for the clear guidance both of suppliers and of counsel.

c. At the 4 April meeting Chris Handford suggested that the correct approach to exceptionality calculations would be to calculate the true total hourly rate cost of a case and then deduct any additional payments. If correct this would of course be most welcome as it would obviate all our concerns about the inclusion of travelling and waiting time in the additional payments. We look forward to receiving clarification.

18. Fixed fees – appeals to Independent Funding Adjudicator

At the 4 April meeting it was agreed that clarification would be provided as to the intended ambit of 11.8.4, 11.11.4, 11.14.4, and 11.16.4. We agree that this clarification is needed.

19. Fixed fees – disbursement limits

a. At the 4 April meeting it was agreed that at the very least the bald term "maximum sum" at 11.23(a) and (b) will be modified to indicate from the outset that this is merely the maximum that may be incurred without obtaining authority to exceed it. It is the Commission's responsibility to do all it can to ensure that suppliers do not misinterpret these limits as hard caps which would be greatly to the detriment of clients.

b. We reiterate concerns expressed at the 4 April meeting that these disbursement limit arrangements are too complicated, and should be simplified. The ideal simplification would be to abandon the concept of maximum sums and limits altogether, leaving it to suppliers to judge what is necessary for a case and what could be justified on audit or peer review.

c. If the concept of an extendable maximum sum is to be retained then we urge the Commission to include here a clear indication that it regards it as the duty of a supplier to apply to exceed the maximum sums in any case where this is in the best interests of the client. Too often it seems that the grant of extensions is perceived, or is at risk of being perceived, as the granting of favours to suppliers, rather than as meeting the needs of clients. The opportunity should not be lost to send. to suppliers and NIAT caseworkers alike, a clear message of the correct approach

d. We also reiterate that suppliers should continue to be remunerated for making extension applications if the Commission considers that a regime requiring them is necessary. Presently 30 minutes is routinely allowed for CW3 applications. Either a radically simplified form and procedure for applications under the new regime is needed (possibly a voluntary scheme for obtaining prior authorisation, as in licensed work), or additional payments will be needed to cover suppliers' time.

20. Hourly rate cases – post appeal CLR work – para 11.56:

a. The current specification at 12.4.1.1 provides that the CLR Upper Cost Limit includes costs incurred in ". . . advising the client and taking further

instructions *regarding the immigration judge's determination*", [our emphasis]. It has never been understood that this would justify charging CLR rates for continuing work where there are no further appeal proceedings. Practice has always been to revert to legal help for any continuing work justified under Funding Code criteria. Clarification is need as to whether the new wording, *"following the substantive appeal hearing"*, is intended to change this, and this so how. If it is not intended to change the ambit of CLR then the current wording should be retained, possibly with the substitution of the word "Tribunal" for "immigration judge" so that panel cases are included.

b. The current specification provides for up to 3 hours costs (including counsel's fees) to consider the merits of a s.103A application. Why is this now reduced to £100? In what universe does work that will take 3 hours on 30 September suddenly become do-able in less than 2 on 1 October? What on earth is achieved by this change, other than further exploitation of suppliers and counsel in the interests of parsimony at the Commission? If the Commission really cannot afford to do other than to treat suppliers in so pettily shabby, a fashion then it is imperative that it lobby its political masters for a more realistic budget. We urge that the previous provision, expressed in hours of work rather than monetary value, be restored.

21. Claiming – fixed fees and hourly rates

a. 11.74 and 11.75 of the draft specification both stress that claims **must** be submitted within 3 months of the relevant trigger. It was stated at the 4 April meeting that that failure to meet this deadline would not necessarily attract a costs sanction. This, and the ambit of discretion in this regard, needs to be made clear in the specification so that a supplier who inadvertently omits to make a claim in time is not discouraged from making a late claim in a cases where discretion might be favourably exercised.

22. Signatories to CLR forms - para 11.88

a. It was stated at the 4 April meeting that the cases of children and those who lack mental capacity are dealt with in the general specification. We accept that is so, but so bald a statement as 11.88 appears on its face to displace the general provisions, especially as it has always been our understanding that category specific provisions override the general specification in cases of conflict. In any event, wherever it is necessary to refer to the general specification in order to construe a provision of the immigration specification, there ought to be an express cross- reference to the relevant general specification paragraph(s).

b. Amendment should therefore be made to draft paragraph 11.88 to incorporate the provisions for Children and Patients in B% of the Funding Code and 2.30-33 of the draft general specification.

c. It was agreed at the 4 April that the Commission would consider the points made by ILPA and others about the wisdom of continuing to accept

signatures from sponsors who have a sufficient interest in the proceedings, as under the current specification. We do not see how abandoning this sensible provision would assist with the problems presented by forced marriage appeals, but its abandonment would certainly deprive some of the most vulnerable appellants of representation in circumstances in which they do not have the option of representing themselves.

d. As previously pointed out, this is acutely relevant to family reunion cases where appellants may be in refugee camps, or otherwise unable to access post or fax facilities. In all cases it would introduce an unnecessary element of delay into what is already a very tight timetable for giving notice of appeal. We also reiterate our concern about the extent to which suppliers can be satisfied that even those overseas appellants who can be reached by phone or fax (at whose expense?) have properly understood the declaration they are being asked to sign on the form. We do not understand why such a signature would be preferred by the Commission to a signature by a sponsor in this country against whom action might actually be taken in the event of misrepresentation.

e. The desired effect would be achieved by amending B3 of the Funding Code to echo the provisions in B7.2 of the Code for postal applications from outside the EU. In other words, if the residence is not purely temporary (which will invariably be the case in entry clearance appeals save those by 3rd country nationals applying within the EU), and the authorised person is the sponsor, and it would not be "otherwise unreasonable to accept the application", then the application may be accepted from the sponsor as an authorised person on the appellant's behalf. Express cross-reference to the revised Funding Code and general specification rules should be included here in the immigration specification.

f. This solution would base the financial assessment on the means of the appellant, with the result that the appellant, not the sponsor, was the Client. This seems consistent with what we take to be the aim of 11.88, and may meet some of the Commission's concerns about forced marriage cases. It would certainly meet our concerns about suppliers' ability to give adequate advice on the meaning of the declaration, as responsibility would be assumed by the sponsor as authorised person.

23. Licensed work

a. 11.96 of the draft specification needs to be amended to make clear that in a fixed fee case the work of advising on and applying for a certificate is not covered by the fixed fee but justifies a new matter start. This would be consistent with 11.2(g) which specifies that this work is always paid outside the fixed fee scheme at hourly rates.

b. It should also be clarified that where a devolved power firm grants an emergency certificate then all work in relation to the submission of the application forms to the Commission is chargeable under that certificate at

licensed rates, with no need to open a Legal Help matter purely for that purpose.

24. Concurrent applications / appeals

a. It was agreed by the Commission at the 4 April meeting that 11.125 of the draft specification would be reconsidered, as it may be that there are cases which should be excluded from its wide embrace.

b. Likewise 11.127 needs to be revisited as there may be cases involving 2 applicants or appellants at the outset which subsequently become joined.

25. s103A advice to new clients

a. We were told at the 4 April meeting that 11.40(c)(ii) of the draft specification is to be amended to make clear that its intention is consistent with the concern we expressed in our 22 March letter. We assume that this will involve the deletion of the words *"ie they were previously unrepresented"*, and clarification that the *"the matter"* means the matter of whether there are s.103 grounds. The result should that it is only potential clients who have previously received publicly funded advice on the s.103 point who are excluded. A potential client should not be excluded because s/he at some previous point in history received some publicly funded advice on some aspect of the case.

b. How can £100 possibly be a justifiable limit for this work given that it will almost always be an entirely new case to the advisor? To advise properly in these circumstances it will be necessary to look not only at the face of the determination, but at all that went before in the Tribunal, otherwise there is no telling what has been ignored or misquoted. Please refer to our comments at our point 20 above about the irrationality of reducing claimable costs for s.103A merits advice to £100 in an ongoing case. It is incalculably even less justifiable where the advisor is not already familiar with the case, and where assessment of financial eligibility has also to be undertaken. We are astonished by this proposal. This work should be funded in the usual way as a new Legal Help matter start at hourly rates with the ordinary non-asylum financial limit.

26. Notification of refusal or withdrawal of CLR

ILPA welcomes the requirement at 11.146, for which it has long pressed. At the 4 April meeting we were promised sight of the draft form before it is finalised. We look forward to receiving it.

27. Non-exclusive contract detained cases - travelling & waiting

a. At the 4 April meeting it was stated that there is an error in the draft paragraph 11.110, and that it is to be amended to apply both to 11.109a and to 11.109b, with the result that, in fixed fee cases, travelling and waiting time may be claimed in addition to the fixed fee not only in existing client

cases but also in all cases where there are no Exclusive Contracting arrangements in operation in the place of detention.

b. Again we deplore the unrealistic limit of a 3 hour return journey. There are many locations in the prison estate which it is simply impossible to reach in an hour and a half, and return journeys are often even longer because one's starting time is dictated by the end of the prison visiting hours regardless of the train or bus timetable. Indicate a guideline norm by all means, but it is imperative that provision is made for it be exceeded where necessary, whether on application to the Commission (on what form, under what procedure and at whose expense?) or by written justification on the file for reference in the event of audit or peer review.

c. Waiting time in prisons should also be claimable as needed. It is unpredictable, wholly outside the practitioner's control, and there is usually no possibility of mitigating the position by working on other cases because one is not allowed to take material irrelevant to the visit into high security prisons.

d. The idea that it is not necessary to make proper provision for travelling and waiting because the representative can get on with other chargeable work is indefensible. There is a limit to the sheer number and weight of files that a person can carry, and to the work that can be done without recourse to office and reference facilities. There are client confidentiality issues on all forms of public transport. Even where a sufficient degree of privacy can be achieved there will be frequent distractions, and where a journey involves several changes of transport the time can be broken up in such a way as to make productive work impractical.

e. In circumstances where it is possible to work while travelling or waiting, then the travelling or waiting time charged will be reduced accordingly. We trust that the Commission no longer contracts with suppliers whom it suspects of double charging, and it should not use this consideration as an excuse for being tight- fisted where its suppliers genuinely need to claim for travelling and waiting time in order to provide a specialised service to prisoners with immigration problems who may not be in a position to instruct representatives local to their prisons.

28. Non-exclusive contract detained cases - costs

a. Express clarification is needed that paragraph 11.2(a) of the specification applies to detained as well as to non-detained cases, with the result that fixed fees do not apply to any advice, application, appeal or bail application for a detained client where an initial asylum claim was made prior to the coming into force of the fixed fee scheme.

b. Where fixed fees do apply then clarification is needed in the "Claiming" section at 11.74-11.76 as to how to claim for these cases. Are travel/wait and bail costs to be treated as "additional payments" so that any such costs

incurred during a stage are claimed at the same time as the claim for that stage?

29. Non-exclusive contracting detained cases - bail

a. It was agreed at the 4 April meeting that further thought would be given to this, and to our view that bail should be dealt with under a single separate "bail only" CLR form, both at Legal Help and appeal stages.

b. Otherwise, how would costs claiming operate for bail applications made during the Legal Help stage? Presumably "bail only" CLR will necessarily have been granted in those circumstances. Is that to be brought to a conclusion when stage 1 Legal Help concludes? But what if bail is continuing? And what if CLR is then granted for an appeal? Does bail from that point on get subsumed in the appeal CLR, or can there be a bail CLR form and an appeal CLR form running concurrently? That would seem to be the only way that suppliers could be covered for work on those aspects of bail matters that would not attract an additional payment as an "advocacy event" (eg variation applications in writing dealt with without appearance, renewal hearings where legal representation it is not considered necessary), but which have not been factored into the calculation of graduated fees for appeal preparation.

c. "Bail only" CLR running concurrently with appeal CLR neatly meets the need for costs cover for bail applications and renewals in s.103A cases. Stage 2b appeal CLR comes to an end when s.103 CLR is granted, but the client may still be on bail subject to renewal applications, or it may become appropriate to apply for bail for the first time pending the s.103A application. There is no problem if bail is always dealt with under separate CLR, but if not what is to be done in these circumstances? Is a fresh bail-only CLR grant to be made under hourly rates subject to the £500 Upper Financial Limit specified at 11.51.(c), resulting in 2 concurrent CLR matters for this stage only? Would it not be better to fund bail separately throughout? At the 4th April meeting we made clear our view that the £500 Upper Financial Limit for bail was far too low. Paul Newell invited us to suggest what we thought would be a suitable limit and we suggested £1,000 to which there was no objection voiced from the Commission staff present. We hope that this new limit will appear in the final specification.

30. Future Exclusive Contracting – draft paragraph 11.100

The Commission refused the Law Society's request to make reasonableness a general contractual term, but assurances were given during the attempts to cajole suppliers into signing that the contract would be operated reasonably. For the avoidance of doubt therefore please amend 11.100 of the specification to make clear that power under it will always be exercised reasonably, and never without adequate notice and full consultation. Suppliers need to be able to make decisions to develop their practices in particular directions, including decisions about engaging and training staff, and about relocating or opening additional offices,

secure in the knowledge that the Commission will not arbitrarily add "further sorts" of work to Exclusive Contracting on short notice.

31. **Unaccompanied asylum seeking children**

a. Work for these clients is said to be subject to Exclusive Contracting, but we were told on 4 April that contracts will not be ready to be put out for tender until after 1/10/07, and that meanwhile all work in these cases is chargeable at hourly rates as at present. We understand that this applies not only to ongoing and paragraph cases, but also to new children's claims. Please include something in the specification o confirm this clearly and expressly.

b. We wish to state for the record that at no time, no matter what delays there might be in the implementation of special arrangements for this group of clients, would it be appropriate to subject this work to graduated fees that have been fixed according to the Commission's perception of the norms in adult cases.

32. Separate Matters

As mentioned at the meeting on 4 April, paragraph 11.122 of the draft specification needs amendment to make clear that a new asylum matter start is justified where there is reason to believe that there may be grounds for a fresh claim, not just where a client has already made such a claim. This would clarify what we understand already to be the position, namely that, despite the current clumsy wording and strange use of the past tense, suppliers are intended to be covered for investigating potential claims, as well for taking on cases where a fresh claim has already been made or where it is immediately obvious that representations that are capable of amounting to a fresh claim are required.

33. Asylum matter starts:

a. The Office Schedule under the Unified Contract, like its predecessor under the GCC, defines "Asylum" as "a matter involving a claim that it would be contrary to the United Kingdom's obligations, under the Refugee Convention [or] Article 3 of the Human Rights Convention, for the claimant yo be removed from, or required to leave, the United Kingdom". The whole tenor of the current specification however is apparently predicated on an assumption that the rules and costs limits were for the conduct of an initial or fresh asylum/Article 3 claim, not a claim for further leave to remain following an initial grant of protection. Doubtless this is because the present specification pre-dates the era of Home Office Active Review. The ambiguity does not matter much under hourly rates because one can always apply for a financial limit extension in a FLR matter that was opened with only a non-asylum initial financial limit, but it is going to be crucial for Active Review cases under graduated fees.

b. The new specification therefore needs express clarification that "a matter involving a claim . . ." is not restricted to initial and fresh claims, but extends to all applications invoking protection issues under the 1950 and 1951Conventions. It simply cannot be expected that the additional work in Active Review asylum/Article 3 extension applications be undertaken for the non-asylum fixed fee. At the representative bodies' meeting on 22 February Fiona Hannan for the LSC indicated that such cases would constitute asylum matter starts, but there is nothing in the draft specification to confirm this. Please amend to include it.

c. If Home Office decision-making speeds up as intended this issue could become live in further DLR Article 3 cases (in which policy is to grant DLR for no more than 6 months at a time) within less than a year of the commencement of the fixed fee regime. Account needs to be taken of this when future numbers of asylum matter starts are determined and allocated. Please confirm to us that this will be so.

34. **Sufficient benefit and merits tests**

These appear now only in the general specification. We can comprehend a rationale for this, but it makes the immigration specification even less useful to providers as a stand-alone reference document than it might otherwise have been. Please therefore include a paragraph cross-referencing to the relevant paragraphs in the general specification.

35. **Conclusion**

a. We have invested considerable care and unremunerated time on behalf of our members in preparing this response, which we believe to be measured, and to contain reasonable and reasoned suggestions. We hope that our time has not been wasted, that this is a genuine consultation process, and that accordingly changes will be made to the draft specification in the light of our comments.

b. In respect of any of our submissions that are not accepted, we hope that we may expect the courtesy of a reasoned written response expressly addressing the concerns we have raised and why the Commission has not elected to address them in the ways we have suggested.

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