



Sarah Garside
Legal Services Commission
Corporate Legal Team
85 Gray's Inn Road
London WC1 8TX

sarah.garside@legalservices.gov.uk

21 November 2006

Dear Ms Garside

Consultation on the Draft Unified Contract

I write to give the response of the Immigration Law Practitioners' Association to this consultation.

The terms of, and issues covered by, the contract and associated documents go much wider than ILPA's concerns as an organisation, so we do not propose to provide a comprehensive response. We do, however, wish to make the following observations on certain aspects of the draft documentation:

1. Timing of publication and incompleteness of documentation:

- 1.1. It was, to say the least, unfortunate that the LSC saw fit to publish the draft unified contract documentation (albeit incomplete) before the consultation period on the DCA/LSC document *Legal Aid: a sustainable future* had even closed, let alone before responses had been considered.
- 1.2. We appreciate that the pace of contract change is dictated by, among other things, the need to allow for consultation with the representative bodies, and in this instance has been dictated by the desire to be in a position to implement by the start of the next contract year on 1 April 2007. We also accept that some of the draft contract terms need not be affected by the responses to the *Sustainable Future* consultation; but significant parts, for example Specification Section 7 on Payment, are grounded in assumptions which do not encourage faith in an open-minded approach to consultation responses. The timing and content of this documentation both smack of a headlong rush to implementation, which ILPA deplored in its response to the *Sustainable Future* consultation, and which we still deplore now.

- 1.3. One obvious adverse consequence of the attempt to cram the whole process into the period that began with the publication of *Legal Aid: a sustainable future* in July 2006, and will end with the issue of contracts in March 2007, is that the draft contract documentation on which we are now being consulted is incomplete. Of particular concern to ILPA is the absence of the Equality and Diversity Annex to the draft Standard Terms, which it is said is "to follow", and the omission from the draft Specification of the whole of the Section 9 Category of Law Specific Provisions, including the immigration specific provisions. Perhaps this is because they are dependant on the government's response to the *Sustainable Future* consultation responses. If this means that minds are not yet closed then it is to be welcomed, but we wonder why the same inhibition did not apply to the proposed payment arrangements in Section 7.
- 1.4. For obvious reasons the immigration specific part of Section 9 of the Specification is of particular interest to ILPA. You have told Matthew Davies of our executive committee by e-mail that it is not yet known when it is to be published. Please confirm, however, that it will first be circulated in draft, and that an adequate period for genuine consultation will be allowed.

2. Indemnity and clashes of duty:

- 2.1. In our response to *Legal Aid: a sustainable future* ILPA expressed grave concerns about the discriminatory potential of the proposal to include interpreting and translating fees in the fixed fee for asylum cases, instead of making separate provision for them as disbursements as proposed for every other area of law. Clause 14 of the draft standard terms requires suppliers to indemnify the Commission against claims arising from *inter alia* their "provision of, or failure to provide, Contract Work . . ." or their "failure to comply with any legislation". If the odious asylum interpreting provision is indeed to be forced upon us, then there will need to be a corresponding indemnity from the Commission to its suppliers against the eventuality that they are thereby found to be in breach of discrimination law.
- 2.2. The Client Service Annex to contract clause 3 requires suppliers to act in "Clients' (and potential Clients') best interests", but makes that requirement "subject to the provisions of this Contract". If the contract specification creates a situation where suppliers must discriminate in favour of certain language groups in order to sustain their businesses so as to be able to continue to represent clients, then the Commission should carry the can if that is shown to be a breach of legislation.
- 2.3. We do not believe that the prohibition in 7.13 of the Specification against suppliers intentionally targeting their case mixes or targeting "certain sorts of Clients or types of work in order to have the effect of maximising lower cost work" will be sufficient to get the LSC off the hook in this regard. A substantive asylum case is never going to be "lower cost work", with or without interpreting costs.

3. Non-payment for file reviews and quality auditing:

- 3.1. The withdrawal of funding for file reviews was a "common issues" proposal in *Legal Aid: a sustainable future*. ILPA did not comment on it then as our response was focussed on the specific immigration and asylum proposals. We do, however, now wish to deplore its inclusion in the draft contract before responses to the consultation have been considered, and to say on behalf of our members that no justification has been offered for requiring them to continue unpaid to do that for which they have previously been paid.
- 3.2. It would be perfectly possible to continue the separate payment regime for file reviews without disturbing the fixed or graduated fees principle for substantive case work. If file reviews are worth doing, they are worth remunerating. This proposal strikes us a petty economy on the part of LSC, but would be yet one more inroad into the financial viability of our members and hence into the ability of the hard pressed immigration and asylum sector to survive and continue to offer a service to clients. This proposal should be withdrawn and arrangements for remunerating file reviews should continue as at present.
- 3.3. We are generally concerned about the increased amount of unpaid quality monitoring and record keeping contemplated in the draft contract documentation as reflected in the Monitoring Annex to Clause 3. The production of an Annual Report is a new and potentially onerous requirement. Its purpose is said to be "to reduce unnecessary intrusion into the businesses of LSC Partners". Maybe so, but a predictable by-product will be reduction of costs to the LSC, with the bill being picked up by its "Partners". Consideration should be given to some form of remuneration for this administrative work, lest this become yet one more nail in the coffin of publicly funded immigration practitioners' will to continue in the face of all odds.

4. Ending Controlled Work:

- 4.1. The new provisions at 4.49-50 of the Specification have clearly been drafted on the assumption that fixed fees are to be imposed, and are aimed at preventing suppliers closing files, or switching to private funding, when the fixed fee has been exceeded. If a fair, workable fixed or graduated fee system, with an exceptionality escape trigger set at an appropriate level, can be devised (and, for the avoidance of doubt, we do not believe that Section 8 of *Legal Aid: a sustainable future* meets this description) then we accept that some such provisions will be needed.
- 4.2. Indeed, even if the imposition of fixed fees were to be deferred, or an exception made for immigration cases, then a variation on these provisions which had the effect of prohibiting the closure of a Legal Help matter just because the initial financial limit had been reached, or just because CLR had been refused, would usefully discourage undesirable practices which we understand are unfortunately still current among some suppliers.



5. Key Performance Indicators:

5.1. ILPA welcomes the pre-eminence given to Independent Peer Review, and the fact that it is proposed that deviations from the Success Rate, Assessment Reduction and Fixed Fee Margin Indicators are to be treated as triggers for enquiry rather than as breaches of Contract.

5.2. This is consistent with the approach which we ourselves proposed in our response to the CLR Performance Indicator consultation. We hope that there will be nothing in the immigration section of the as yet unpublished Section 9 of the Specification which will undermine it in relation to immigration and asylum CLR.

In conclusion, I reiterate our request for information on the publication date and consultation arrangements for the as yet unpublished parts of the contract documentation, including Section 9 of the Specification.

Yours sincerely

Chris Randall
Chair, ILPA