Response of the Immigration Law Practitioners' Association to the LSC / DCA consultation paper *Legal Aid: a sustainable future*

October 2006

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INTRODUCTION

Lord Carter's report on his review of Legal Aid Procurement stated that:

> *"9.The effective operation of the legal aid scheme is necessary to ensure equal access to justice for those who may not otherwise be able to secure their rights."* [1]

His report set out the conditions for satisfying the test of "effective operation":

> *"3. Fundamental change must be made in the way legal aid services are procured so that*
>
> - *clients have access to good quality legal advice and representation*
> - *a good quality, efficient supplier base thrives and remains sustainable*
> - *the taxpayer and government receive value for money; and*
> - *the justice system is more efficient, effective and simple"* [2]

So Lord Carter starts with the clients, and the need for equal access to justice for those who may not otherwise be able to secure their rights, recognizing the role of quality legal advice in this.

By contrast, the proposals that have been put forward for asylum and immigration in the consultation paper fail on all four counts identified by Lord Carter. If implemented, the proposals would mean that:

- Potential clients find it difficult to access legal advice and representation, and that they do manage to do so the time their representatives are able to devote to their cases will compromise the quality of that advice and representation.
- Suppliers will leave the field, because they cannot provide a quality service and cannot shoulder the levels of risk created by the proposals.
- The taxpayer and government will be shortchanged because those most in need of help will be unable to find it, and unable to access the services of those best skilled to deliver publicly funded services.

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[1] *Legal Aid: a market-based approach to reform: Lord Carter's Review of Legal Aid Procurement.* July 2006, Chapter 1, *Purpose of the Review*, paragraph 9.
[2] *Ibid. Executive summary*

- The justice system will be starved of effective input from quality representatives at Tribunal level, with consequent risk of injustices and/or of more cases requiring ultimate resolution by the higher courts.

In summary, clients will not have equal access to justice, and will not be able to secure their rights.

By "quality", here and throughout this submission, we mean no more and no less than work fulfilling ethical requirements, the inability to fulfill which must lead us, in accordance with our professional obligations, to decline conduct of a case.

PART 8 CONSULTATION QUESTIONS AND RESPONSES:

Q8.1 Do you agree with the proposed scope of the graduated fee scheme? If not, please explain why.

1.1 Before addressing scope we will consider issues of principle, derivation, timetabling and viability.

1.2 We have difficulties in principle with the idea of a universal fixed or graduated fee regime for immigration and asylum. It is not straightforward to separate those difficulties from concerns about the way in which these particular proposals for immigration and asylum work have been derived, the speed with which it is intended to implement them, the level of fees set and the proposals for exclusive contracting.

Derivation:

1.3 The Consultation paper says of Family Law:

> *5.9 For Family work covered by the existing TFF scheme, except for Public Law Children, which will be covered by a separate scheme, we intend to introduce a graduated fee scheme covering all controlled work and some work currently paid for under certificates. We have already consulted on this approach in 2004 (see the consultation paper A new focus for civil legal aid – encouraging early resolution; discouraging unnecessary litigation) and a trial and data gathering exercise commenced in October 2005. The proposals in this paper build on the trial and the previous consultation. The data gathered from the trial has proved invaluable in the development of these proposals and we will continue to monitor and learn from the trial . . . .*
>
> *5.12 We are also proposing a graduated fee scheme for childcare cases covered by Section 31 of the Children Act 1989 and this paper presents our proposals for comment. We propose to work towards introducing this new scheme from April 2007, but recognise because of the complexity and importance of this work that following consultation this date might be revised*
>
> *7.1 . . . . We do not have any current plans to amend the Family Graduated Fee Scheme for the Bar.*

This approach is in stark contrast to that adopted towards the no less complex and important work covered by the Immigration and Asylum proposals.

Principle of fixed fees:

1.4 Our members' views on the question of the principle of fixed fees for immigration and asylum work range from:

> "The fixed fees must be considered in the light of the long-term objectives for procurement. Fixed fees seem to be only the precursor to price competitive tendering which is by nature designed to drive fees down further…On principle, it is simply not [the] right [route] to go down, they ignore the real issue of getting efficiency on quality" *Private practice provider, London*

to:

> "We do not have devolved powers, so we believe the cut in bureaucracy, faxes and letters to LSC with CW2 applications, funding certs, etc. will have a big effect on how we run our team. It is mainly for this reason that we welcome a graduated fees scheme…" *Private practice provider, outside London*

The present proposals – preliminary observations:

1.5 What is proposed does not equate with our understanding of a true graduated fees scheme. Rather it is an *ad hoc* collection of fixed fees and additional payments for various stages which takes no account of the complexity of cases. Even a "simple" case could pass through all the stages and attract the same total fee as a more anxious and complex one.

1.6 We recognize that in one respect the proposed regime offers suppliers a potential reduction in financial risk in that they would no longer be subject to audits of sample files, at which, if they have "spent" over 10% more than the LSC thinks reasonable on the sample, an equivalent percentage can be clawed back across all files.

1.7 This benefit would, however, be obliterated if the level of "exceptionality", at which a case is lifted out of the fixed-fee scheme, is set as high as is proposed. This would be to re-introduce risk on a grand scale. During much of the life of a complex case there could be no certainty about whether costs as high as four times the fixed fee would be incurred, or whether the bulk of the work would be unremunerated. For example, on the figures presently proposed for the first stage of asylum Legal Help, if costs were £2,200.01 they could be claimed in full, but if they were £2,200 only the fixed £550 could be claimed – a £1,650 loss on one case. This promises far too high a level of risk for providers.

"There must be some accompanying concerns about the incentive to even consider heading towards the escape criterion of four times the work…Clearly if this is the only offer on the table to allay concerns about the viability of firms continuing to undertake publicly-funded immigration and asylum work, it is an offer which must be discounted as, frankly, ludicrous. Such an offer simply does not factor in the need for at least a degree of business certainty/predictability – i.e. as to whether or not work four times in excess of the fixed fee will ultimately be remunerated. *Private practice provider, London*

1.8 We have made efforts to understand the approach taken by the LSC, including obtaining additional information about it through a Freedom of Information Act request. In response we have been provided with various LSC assumptions, with numbers attached, but these turn out on closer inspection to be assumptions not grounded in evidence, reflecting desires to spend certain sums rather than calculations on the basis of which factual data about an appropriate level of fixed fee have been derived.

1.9 Much is made of the administrative ease fixed fees create for the LSC,[3] but this is not sufficient reason to change a system so radically and so rapidly, on the basis of untried assumptions, that its very existence will be threatened. The LSC has not undertaken detailed research-based analysis of the effect on quality or suppliers' willingness to continue to undertake this work.

The present proposals – our members' responses:

1.10 Whatever their position on the principle, ILPA members have described the derivation of these proposals as completely unsatisfactory, and the regime proposed as formulated so as to threaten the viability of their work and affect their willingness and ability to continue working in this field.

1.11 We conclude from our consultations with members[4] that there is a real risk that a significant number of suppliers will decide drastically to reduce their publicly-funded casework, or to leave the field entirely, because they see no prospect either of making the work pay or of reconciling the proposed levels of remuneration with the duties to client and to court that they accept in taking on any case. Doing a case well is a key part of motivation for continuing to work in this very difficult field.

1.12 We asked our members *"Does your organisation believe that it can make the present proposals for a "graduated fees scheme" from next April pay while*

[3] See e.g. the briefing prepared for the Carter team *Carter 2: Asylum Legal Aid* (undated), disclosed by LSC in response to ILPA FOI request: *"The new contracting regime that will be put in place in April 2007 will significantly reduce the Commission's asylum administration costs".*

[4] See also the survey by the Law Society, the results of which are posted on its website

still maintaining the quality of its service?" A sample of typical responses is presented below – we should be happy to provide further examples but they repeat the same points.

"Accepting the high level of quality in our work, our data shows that a choice will have to be made between financial imprudence and compromise on quality. However the latter is not a genuine option and we cannot continue as a viable business on the basis of the former. Peer review cannot address a halving in time spent on casework." *Private practice Category 1 provider, London*

"We will have no choice but to reduce the volume [of immigration and asylum publicly funded work] further, because we are not prepared to compromise on quality." *Private practice provider, out of London*

…as they stand, the proposals would render our service financially unviable *Not For Profit, outside London.*

"This will be impossible….It is highly unlikely that my firm would continue doing publicly funded immigration work if the current proposals are implemented" *Private practice provider, London*

"Certainly not…. We are committed to our legal contract, but with each systematic reduction in our income from LH/CLR work we are reducing our exposure to it and increasing the proportion of privately paid work…We will have no choice but to reduce the volume further, because we are not prepared to compromise on quality." *Private practice provider, outside London*

I have lost staff who cannot see any future in legal aid but especially immigration and asylum legal aid and I can't really blame them. This is bound to continue as they read the terms of this proposal. *Private practice provider, outside London.*

"No. We understand that […] of the LSC has said that he is aware of "several" category 1 immigration firms who have said that they can, but we have yet to meet anyone who works at one of them…
… As a Not for Profit agency our ability to make decisions not to renew our contract with the LSC is different from those in private practice, as there is no option for us to carry out work on a private basis instead, or in order to subsidise a reduced contract. We would be very reluctant to refuse to renew our contract… Handing back our whole LSC contract would be likely to lead to the demise of our organisation. Given our duties to clients and our position in the Advice Alliance in the borough such a decision would have a huge impact on advice provision…There is a real possibility that we may withdraw from some parts of our contract if it appears to become unworkable in terms of remuneration vs quality." *Not for Profit provider, London*

No – if the present proposals stay as they are then I do not see how we can make them pay while maintaining quality… If the proposals are introduced as in the consultation, then we would have to seriously consider whether we could renew the contract…*Private practice Category 1 provider, London.*

> We cannot maintain standards and quality of service and make the present proposals pay…some of the figures given are laughable…I believe they *[my managers]* will take the view that the department is uneconomical and I fear we will not be able to continue. Unless we get a UASC contract which can guarantee us income. I think the latter will depend on volume in the region – we get all the child cases but this isn't enough to keep a department going. We are subject to the whims of dispersal and if we don't get cases from the beginning I can't see how we can keep going. I have spoken to another 3 firms and one NFP – they are saying the same things. *Private Provider, outside London*.

> "In our response to the LSC we will highlight the significant differences between the graduated fees scheme and our average case costs…[we] would anticipate pushing for the niche work with UASCS and work with detainees… I firmly believe that we can only be viable as a department if we supplement legal aid with private immigration work." *Private practice provider, outside London (This is the provider without devolved powers whose welcoming of graduated fees on grounds of reduced bureaucracy is cited above.)*

> "We cannot do it for those fees." *Barristers' chambers, London*

> I will be unable to afford to do immigration work in the future. The fees are already so low that I can already ill-afford it, and am trying to reduce the proportion it represents of my practice *Barrister, Outside London.*

> "I personally will not be able to continue with my virtually exclusively immigration and nationality practice after April. The fees for counsel are set at such a low level that I will be forced to diversify my practice. Talking to other colleagues at the Bar it is clear that immigration will no longer be a financially viable area of practice for all but the most junior members of the Bar." *Barrister of 11 years call, London.*

1.13 The contention that the proposals threaten financial viability is supported by evidence provided by members – we have analysed a sample in Annexe 2 and are also aware of other members providing figures in their own organisations responses to the consultation. Two large Category 1 London providers who have been endeavouring to assess the effect the proposals would have on their business have told us that they anticipate a drop in their gross income of some 35% which they consider will turn their firms into unsustainable loss making enterprises.

Timetable – feasibility – untested and unsound assumptions:

1.14 Our concerns about the timetable for implementation are intimately linked to our concerns about the reliability of the assumptions on which the proposals are based.

1.15 We recognise that the DCA is determined to move towards a fixed/graduated fees scheme, but we do not recognise the necessity for the proposed pell-mell rush towards full implementation of an untried scheme within a period of less than 6 months from the close of this consultation.

1.16 If fixed fees are to be imposed in this area of law for the first time then time should be taken to accrue the data that would allow an appropriate fixed fee scheme to be devised based on the actual cost to suppliers of conducting immigration and asylum cases, in all their variety and frequent complexity, to the high quality standards required both by the LSC and by professional duty.

1.17 If this suggestion is rejected, then at the very least there needs to be a pilot period of EITHER a tailored fixed fee scheme (as was done in *all* other areas of civil law) OR, if the state of the data is really shown to be such as to make tailored fees in immigration and asylum not feasible, that the fixed fee scheme should be introduced with the level of exceptionality capable of taking a case out of the scheme set at no higher than a multiple of 2 for at least the first contract year, accompanied by careful collection of data and monitoring and analysis of this, giving both the Commission and its suppliers a realistic opportunity to test the water and make modifications in the light of experience.

1.18 This suggestion is consistent with the Carter report. Immigration and asylum was expressly excluded from Lord Carter's review because of "the detailed recent review"[5] which brought about the 2004 changes, and although he did not exclude immigration and asylum from "the procurement strategy to 2010" he envisaged this being achieved by "a move towards" a graduated fee scheme[6], not by the sudden imposition of a scheme with no intermediary stages, no amassing and collation of the appropriate historical data and with everything done and dusted by April 2007. We recall the challenge to the Commission's previous proposals for family law cases, leading to the introduction of tailored fixed fees there. We suggest that the LSC is vulnerable to the same charges of irrationality now in respect of the fees it proposes to set in asylum and immigration as were levied against it when it proposed fixed fees for family cases at that time.

1.19 These suggestions are made, not in the spirit of postponement at all costs of these unwelcome developments, but in recognition that fixed fees are coming

[5] Carter Report, Chapter 1
[6] Carter Report, Chapter 10

and with the desire to achieve a scheme that not only is capable of working, but also is capable of being perceived by suppliers now as workable and worth giving a chance, rather than one that they shun now, for fear of being driven out of business later. The data obtained would make it possible to undertake the detailed analysis to which areas of law such as family law have already been subject. We believe that no less time and care should be spent on the development of the scheme for immigration and asylum work.

1.20 It was suggested to ILPA at a meeting with the Minister at the DCA on 19th September, attended by Crispin Passmore and Paul Newell of the LSC, that the desire was for larger firms and organisations, and that firms and organisations could take on more junior staff to do simpler cases and thus absorb the costs of their more complex cases. It was suggested that this could be beneficial as, with supervision, more complex cases would be more likely to be spotted at an early stage. As discussed below, the levels at which fixed fees are set do not provide scope for this "swings and roundabouts" effect. Nor can there be any question of swings and roundabouts for the Bar as explained further below.

1.21 We are unconvinced that the suggested benefits would occur. For an expert in criminal deportations to spend time supervising family visit applications does not seem a good use of expertise. All firms and organisations competent enough to be deserving of a contract should already be able to spot complex cases at an early stage. Complexities identified will not necessarily be in an area where the firm has specialist expertise and may continue to necessitate onward referrals or, if kept in house, mean that the firm is spending time on complex cases outside its own areas of specialism.

1.22 The suggestion that the intention is for junior staff to undertake simpler cases to offset the cost of the more complex cases at an early stage seems to be at odds with the statement in the consultation paper that "as with other categories of law, there will be no provision for existing Level One work under the new arrangements"[7]. What then is to happen to Level One work? The decision to cease to fund it runs counter to all proposals to ensure early advice, front-loading, etc. It should be retained.

1.23 Even if an off setting effect is achievable through changes in working practices, devised and introduced by suppliers carefully so as to protect quality and client care, it will not be achievable instantly. Nor can changes in size be achieved by April 2007, much less in the context of a scheme in which uncertainty and unpredictability make it impossible to assess levels of risk. Such changes affect organisational structure and necessitate many other changes – for example of premises if more space is required. Recruitment and training must be undertaken, support staff increased and equipment purchased. It is difficult to see how any responsible organisation could

[7] Provider Q & A: *Legal Aid : a sustainable future* Civil and Family Legal Aid.

contemplate such financial exposure in the face of the threatened imposition of the present untried scheme within 6 months.

1.24 If something is not announced very soon indeed to signal that the scheme is not about to be imposed as presently proposed then we fear that many will not renew their contracts, and will use the run-up period to next April in planning for redundancies or for shifts in the direction of their practices away from legally-aided immigration work.

Timetable - lack of historical data – untested and unsound assumptions:

1.25 The Consultation paper, in the section on the tailored fixed fee replacement scheme, says that standard fees were calculated using average tailored fixed fees, and goes on to answer questions about what suppliers will be paid on the basis of this. This is not so for immigration and asylum. We are told in the immigration section of the consultation paper:

> *"Values have been set for those services that we consider to be both fair to providers and represent good value for the Commission and taxpayers, based on current hourly rates."*

There is no information on how the number of hours to be spent on a case has been calculated. ILPA sought to elicit this information through its FOI request, but this revealed that the number of hours was based on assumptions not sourced by reference to the hours it takes to do these cases. We note that the fixed and graduated fees have not been based on current hourly rates, we should appreciate confirmation that they have been rounded down (save for advocacy) solely to simplify the purposes of consultation and that the rounded-down rates are not intended to be used in practice, as were that the case it would represent a cut of n 2% and 4% for London firms in particular.

1.26 We are particularly concerned that the DCA is proposing implementation by April 2007 when the LSC has admitted that its historical data, upon which fixed/graduated fees should surely be based, is inadequate for that purpose. The LSC stated in its response to our FOI request:

> *"The fees have not been predominantly based on historical case costs as per other schemes. Due to changes to legal aid in 2004/05 and again in 2005/06 we do not have reliable and complete historical average costs and in any event changes in processing mean that historical case costs are largely irrelevant . . . ."*
> *As explained at the Immigration Policy Team stakeholders' meeting, the fees were not predominantly based upon historical costs data and are modelled to be cost neutral against expected spend in 2007/08 . . . .*
>
> *The fees were not calculated based on the average cost of devolved power category 1 suppliers and/ or suppliers who are currently meeting the CLR*

Performance Indicator. It is difficult to correlate the status of providers at the time that work was performed with the corresponding claim data, not least because of the delay in claiming. However we are currently undertaking initial analysis of the relationship between success rates and case costs and devolved power status and case costs. This information will be shared with representative bodies when it has been completed. The initial indications are that whilst the costs of providers with devolved powers are higher than the costs of those without, there is no correlation between case cost and success rate . . . .

As we have explained, the fees for immigration and asylum have not been predominantly based on historical case costs as per other schemes . . . . The fees that individual suppliers would receive under the proposals cannot be easily mapped to average cost data for individual providers or groups of providers. . The fees were not predominantly based upon historical costs data and are modelled to be cost neutral against expected spend in 2007/08."

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1.27 Historical case costs may not currently be available, but this does not make them irrelevant, as the quotations from the "Family" proposals in the consultation paper, cited above, make clear. "Cost neutrality" gives a veneer of respectability, but this falls away when we note that the proposals are understood to be "costs neutral" against "expected spend". This appears to translate as: "We have decided what we wish to spend and then created a model that spends those sums". This may be an excellent way of balancing the books, but it does not provide a substitute for data, testing and analysis as a basis for designing a system of remuneration based on the legal advice and assistance that clients need.

1.28 The figures for "projected spend" themselves appear to have been derived from untested and unsound assumptions, as discussed below.

Timetable - projected spend - untested and unsound assumptions:

a) The LSC's November 2005 briefing paper to the Carter team:

1.29 This document, headed Immigration and Asylum Legal Aid, and released to ILPA as an annexe to the LSC's response to our FOI request, states:

"Legal aid (cash) spending in this area of law increased from £33m in 1997/98 to £201m in 2003/04.
The main reasons for the increase in expenditure were:

- *Legal aid for representation at appeal became available from January 2000.*
- *The clearance of the backlogs of decisions and appeals.*
- *The increase (until 2003/04) in the number of persons seeking asylum."*

1.30 Although the document does not make this point, the clearance of the backlogs is of particular significance because in 1997/1998 much of IND was closed for refurbishing, chaos ensued, disruption was enormous and very few decisions were made. This is but one example of way in which case length and cost are affected by the vagaries of the Home Office, a factor for which the proposed scheme makes no apparent allowance but would leave the hapless fixed fee supplier to bear the financial brunt.

1.31 Another apparently unrecognised factor in the increased spend since 1997/98 is that on 3 April 2000 permission to work for people seeking asylum was curtailed[8], and curtailed further on 22 July 2002[9]. Thus, with a few exceptions where people had capital, all people seeking asylum became likely to be eligible for legal help.

1.32 The briefing paper goes on to state that the factors identified above do not fully account for increased expenditure, and identifies the following as reasons for increases in individual case costs:

- *Duplication of work following the movement of clients between suppliers.*
- *Increased use of experts and interpreters.*
- *Delays in the process that resulted in further work being carried out by suppliers.*

The LSC does not suggest that it is able to influence these factors, so we are puzzled to know how it feels able to propose to fix the cost of interpretation in asylum cases, or fix the amount of work to be done on any case. These observations weaken any rationale for a fixed fee.

1.33 Conspicuously absent from the list is any consideration that increased quality, as a result of the accreditation scheme and other measures adopted by the Commission to drive out the poor and encourage the good supplier, may have increased costs. Good practice takes time, care and a willingness to incur necessary disbursements. If the Commission believes that its quality drive has had a positive effect, then it should surely acknowledge and defend its costs consequences.

1.34 We will now comment in turn on each of the 3 factors listed above which the Commission has identified as relevant to increases in individual case costs:

i. Duplication of work:

1.35 This issue is raised frequently by the LSC, but apparently without appropriate examination of why such duplication occurs. Changes in Home Office processing, including changes in the way dispersal is practised, are one factor. The question of delays, with the resultant "legacy cases" and fresh

[8] *Hansard* HC Report 6 Jun 2005 : Column 314W, Tony McNulty MP
[9] *Ibid.*

asylum claims (which may arise at a time when the previous representatives no longer exist or no longer undertake publicly funded asylum work or when the client is in a different part of the country) is also relevant.

1.36 We point out that if clients are changing from one representative to another then we should be able to assume that this is in circumstances where the criteria for transfer are met in accordance with suppliers' contracts with the LSC, whether the decision to approve the transfer is taken by the LSC or by a devolved power supplier. If the LSC does not share this assumption it should say so, and offer some justification for the implied lack of faith in the decisions of its own staff and suppliers to whom it has devolved this power.

1.37 Questions to be considered in connection with transfers of cases include:

- How many clients are changing representatives because of geographical location?
- How many because of dissatisfaction with service?
- How many because their former representative is ceasing to undertake publicly funded asylum work?
- How many cases being deemed not to meet the sufficient benefit or merits test by one provider, only to be taken on by another?
- Are there other factors, such as the need for a particular form of specialist expertise?
- Is there a role for the LSC in the more effective monitoring of contract compliance in respect of decisions to grant transfers and of the application of the sufficient benefit and merits tests? What, if any, action does it take in respect of the first supplier when it becomes aware (for example via information provided in connection with applications for new financial limits) of a transfer occasioned by a client complaint about quality or an apparently inappropriate refusal of CLR?

ii. Increased use of experts and interpreters:

1.38 Please refer to our comment at 1.33 above about the impact of quality on costs. If there are now more good quality suppliers than previously then it is not surprising that there is less cutting of corners in the use of interpreters and a greater alertness to the value of medical or other expert evidence.

1.39 A proportion of asylum cases are going through the system faster now than previously. This may be another explanation for increased use of interpreters: a recently arrived client may not have picked up the basic English even for routine queries that might have been dealt with over the

telephone in other cases, adding these costs to the costs of providing interpretation for substantive discussions.

1.40 Delays in process, as considered in greater detail below, lead to the need to take instructions and give advice, through interpreters, on new circumstances.

1.41 Increased use of experts can also, in circumstances such as the use of medical experts, lead to increased interpretation costs.

1.42 As to increased used of experts, we remind the LSC that it has funded best practice guides[10] providing information about when to use experts, and this is also a matter taken up within the accreditation scheme. It should be a matter of satisfaction that its efforts to improve practice in this regard have evidently borne some fruit.

1.43 This is, however, one of the areas I which it is necessary to look at Home Office and indeed AIT practice, and the effect that these have on costs. If, for example, it is the position that a person will not be accepted to be a child, or to be a torture survivor, without a medical report, then it will be necessary to obtain such a report. If it is the case that a fact about a country will not be accepted without expert evidence, then it will be necessary to obtain such evidence.

1.44 The AIT practice of issuing "country guidance" cases is relevant in this regard. To distinguish a case from an adverse country guidance case it will commonly be necessary to obtain expert evidence, and where a case is itself designated as potential country guidance it may be necessary to call the expert to give evidence and be cross examined in person, thus increasing costs yet further. The AIT values reputable experts, whose expertise has to be paid for from the legal aid fund. There is, for example, a Jamaican country guidance case, *AA/03838*, pending at present which has been adjourned because the court wishes the expert to address additional issues. This will, obviously, be at additional cost.

"Impossible to save costs by standardising arguments or utilising generic expert reports as the HO and courts reject them on the basis 'this report does not mention your client'" *Not for profit supplier, London.*

[10] For example, ILPA is grateful to the LSC for contributing funding toward *Asylum seekers: a guide to recent legislation* ILPA and The Resource Information Centre March 2001; *Making an asylum application: a best practice guide* ILPA May 2002 – with a foreword by Steve Orchard of the LSC; *Challenging Immigration Detention: a best practice guide* ILPA, Law Society and Bail for Immigration Detainees, October 2003; *Representation at immigration appeals: a best practice guide*

iii. Delays in process:

1.45 These are, sadly, beyond representatives' control. They are, however, endemic, despite the intentions and endeavours of both the IND and the courts to reduce them. Delays inevitably mean that facts and circumstances, both those of individuals and of the world around them, as well as the law, change. All of this impacts on the work necessary to continue a case, or to present a fresh claim

1.46 Witness the decision of the Court of Appeal on 4 October 2006 in *JM (Rule 62(7); human rights unarguable) Liberia* * [2006] UKAIT 00009. The AIT had held in its starred (i.e. reported and to be followed) decision of 6 February 2006 that human rights claims cannot be adjudicated in variation appeals, and that it was the further immigration decision to remove that would trigger an appeal at which human rights arguments could be considered. Both *JM* and the Secretary of State contended that the AIT was wrong. The Court of Appeal agreed, rejecting the AIT's analysis and holding that human rights claims are justiciable on variation appeals. ILPA members, at a meeting in July, had commented on this very case in the context of discussions on the proposed 40% CLR success rate. A note of the meeting records:

*"Cases such JM (Liberia) *. Wrong, all parties, including HO think wrong. But binding. We will lose appeals, but if we do not grant CLR we shall lose right to challenge. Affects a lot of [our] clients cos we do mainly immigration cases" (speaker from a Not for Profit organisation)*."

It took 8 months for the Tribunal's mistaken but binding determination to be overturned, with incalculable consequences to the legal aid fund now and into the future, both in respect of those who lost their appeals as a result of *JM* and lodged challenges in the Court of Appeal behind his, and in respect of those who did not and will therefore face enforcement action later.

1.47 The November 2005 briefing paper goes on to discuss "Future funding arrangements", thus:

> *"The new contracting regime will require minimum service standards in terms of both access and outcome for clients. The payment structure will be flexible but based broadly around a fixed or graduated fee scheme. Much depends on the ongoing discussions with the Home Office about the role of legal advice within the asylum process. The Commission is also looking critically at which areas of non-asylum law should be eligible for public funded and what is the most efficient and effective method of delivering that advice."*

1.48 The rationale for wishing to move rapidly to fixed fees in immigration and asylum appears all the weaker at a time when, as stated above, the LSC is participating with the Home Office in a pilot which is potentially examining

fundamental assumptions about the most effective way of delivering advice in the initial asylum process, a stage which accounts for a large proportion of the Commission's expenditure in this area of law.

1.49 It is also all the more difficult for suppliers to make decisions about whether they wish to seek contracts for public funding when it is suggested, as in this paragraph, that the very question of what advice in this area should be publicly funded is up for discussion.

b) The LSC's other (undated) briefing paper to the Carter team:

1.50 This document, headed Asylum Legal Aid and also annexed to the LSC's response to our FOI response, describes immigration practitioners as "more regulated than in any other area of law". It goes on to state:

> *"The vast majority (95%) of immigration and asylum legal aid work, including representation at the Tribunal, is paid for as Controlled Work rather than Certificated Work. This makes representation in particular far more cost effective as the rates of pay for Controlled Work are significantly less than for Certificated Work."*

1.51 There is, however, no apparent appreciation by the LSC of the effect on morale of these proposals on its admittedly already highly regulated and poorly paid immigration suppliers, or at least no apparent willingness to fight our corner in its submissions to Carter. This is especially disappointing in view of the feedback it so regularly receives from its suppliers, directly and via ILPA, both in responses to the plethora of changes and formal consultations inflicted on us in recent years and also at stakeholder and other meetings.

1.52 The LSC mentions in this document the removal in 2004 of "more than one hundred suppliers where there were concerns about quality and/or cost", but fails to mention the loss of other suppliers, where there were no such concerns, who were not prepared to stomach the prospect of those changes, and of others subsequently who are no longer able or willing to contend with the bureaucracy, frequent high handed changes and low remuneration rates that are the hallmark of contracting for publicly funded immigration and asylum work. It is extremely dangerous from the perspective of maintaining quality for the Commission to work on the assumption that the ratchet can be turned ever tighter without losing more of us.

> We feel very dispirited having got through everything which has been thrown at us over the last few years and also I feel extremely angry given the efforts my team have made to make sure that above all else the client comes first often to the detriment of the finances. *Private Provider outside London.*

"My firm feels badly let down by the LSC who are not being loyal to those of us that adopted all the 2004 and 2005 changes when many others stopped doing publicly funded immigration work." *Private practice supplier, London, cited above as considering it "highly unlikely" that the firm would continue to do publicly funded work if the proposals are implemented.*

1.53 There also appears to be an untested assumption here that certificated costs will remain at their present relatively low level even if the fixed fee proposals have the effect, which we believe they will, of driving experienced advocates out of the AIT with consequential impact on the quality of representation and hence on the sustainability of determinations. ILPA believes that one effect of the proposals in their present form may be to generate more certificated work as more cases will ultimately have to have recourse to the higher courts when points have been missed below.

1.54. This document goes on to state that:

> *". . . . A change in Home Office policy on legal advice, even if it results in attendance at interview being brought back into the scope of legal aid, will enable the Commission to significantly reduce the level of duplication by providing services in a more structured manner.* "

No explanation is given as to how attendance at interview affects levels of duplication. We take it that this assertion is based on the assumption that the changed Home Office policy will be implemented smoothly and universally. We would it were so, but fear that this assumption is rather a triumph of hope over experience.

1.55 The document further states:

> *"The Commission is also looking critically at the costs currently incurred in providing immigration (ie non-asylum) advice and representation to see whether there is scope to make reductions in the c£20m per annum spent on this area of law."*

No indication is given as to where savings might come from. We take it, however, that this aspiration has prompted the proposed fixing of fees for immigration work at an even lower rate than for asylum work with no, or no adequate, consideration of whether this is justified in terms of relative case complexity. This is a topic which we shall address further later in the consultation response.

c) The LSC's "Needs analysis project assumptions":

1.56 This document is another of the annexes to the LSC's response to our FOI request. It contains several caveats on its own reliability, for example:

"The model's predictive capability is impacted heavily by the fact that reliable data, especially predictive data, is very difficult to obtain and the potential margin of error is high as a result."

and:

. . . the focus tends towards asylum advice away from non-asylum, often meaning information is even more difficult to obtain…The number of immigration (non-asylum) cases will be predicted by looking at the number of cases over the previous years and assuming these trends will continue.

1.57 The idea that a trend will continue is itself an assumption: the "naturalistic fallacy" of the philosophers. No information is provided as to how the projection escapes the fallacy. This is all the more unhelpful in a paper that makes special reference to the pace of legislative change in this field.

1.58 The documents list four "inputs" which "will form the basis of the model to determine where asylum applicants will be located, therefore where they will require advice". These "inputs" are NASS supported applicants, Fast Tracked applicants, Unaccompanied Asylum Seeking Children and Detention figures. No apparent account is taken of those who are NASS supported but not accommodated; of fresh claimants, who are unlikely to be NASS accommodated at the point of seeking advice; of patients or those supported by local authorities for mental health reasons; or of asylum seekers held in prisons other than in "the detention estate".

d) The LSC's April 2007 Remuneration Assumptions:

1.59 These two documents, making separate assumptions about asylum and immigration cases, are also annexed to the LSC's response to our FOI request. The assumptions here come so thick and fast that they fall to be dealt with elsewhere in this response.

Timetable - why now?

1.60 The only justification the LSC is putting forward for fixed fees in immigration and asylum is that the "time is right" and they want to move to "outputs". For example:

"We have now made considerable strides in controlling costs and developing an increasingly quality assured and good value provider base and believe that now is the right time to begin this transition to an output based system."[11]

"The LSC does not think that there would be benefit in trying to introduce a tailored scheme for immigration and asylum cases. This would go against the direction of travel in other civil categories, as they move away from tailored

[11] Chris Handford, LSC, letter to ILPA of 15 September 2006 in response to FOI request.

schemes and towards standardised fixed and graduated in preparation for potential price and quality competition, as recommended by Lord Carter."[12]

These statements indicate what the LSC "thinks" and "believes", but not the reasons for those thoughts and beliefs. Immigration and asylum work has not travelled the roads travelled by other areas of civil law, which have included the collation of historical data and use of tailored fixed fees.

1.61 We note that an analysis of the relationship between success rates and case costs, and between devolved power status and case costs, is being undertaken. We await the full result. We observe that if the analysis is to be meaningful, it must provide a sophisticated analysis addressing:

- Complexity of cases. If devolved power suppliers are taking on the more complex cases, as one would hope and expect of the most trusted providers in the field, their costs would be expected to be higher. Similarly, straightforward cases falling within the rules would be expected both to cost less and to have higher success rates.

- Specialisms and variations in composition of caseloads as between on devolved power supplier and another.

- Home Office conduct. This varies, and affects the hours that need to be put in to resolve a case.

- Hours worked versus hours billed. Members contend that they work more hours than they bill. This is not a practice ILPA encourages, as we consider that the true cost of cases should be known. It is, however, a practice we believe to be widespread. Please refer to the details of supplier 5 in Annexe 2, who provided details of average times per matter show as well as of billing.

> The minutes per case/matter reflect the time recorded as having been worked, not simply the time that was billed. It will not surprise you to learn that that former amount of time often exceeds the latter, to which extent the LSC/taxpayer is already getting a significant amount of work done pro bono...The minutes billed are often lower than those recorded." *Private practice Category 1 supplier, London (Firm 5, Annexe 2)*

> "The lowest amount billed was 15 minutes . . . good heavens, do people even bother to bill for that?" *Private practice Category 1 supplier with devolved powers, London, contemplating the Excel tables at Annexe 2 (Firm 6 Annexe 2)*

> "Where we consider we have been under-assessed – it costs money to fight this and is not always worth the cost of time spent where the sum to be gained is small." *Private practice supplier, London, ILPA meeting 26 July 2006*

[12] *Ibid*.

"Although the current scheme of applying for extension is onerous, it does at least mean that we are paid for (most of) the work that we do." *Not for Profit supplier, London, email to ILPA (Provider 3, Annexe 2)*

Viability – Matter Starts

1.62 It is striking that this issue is nowhere mentioned in the consultation paper. The allocation of an adequate supply of matter starts will an obvious *sine qua non* for the viable operation of the scheme for any supplier. The number of available matters starts will determine the cap on the maximum costs an organisation could recover under the proposed scheme. It will also define the limit of the organisation's capacity to take on a sufficient number of cases to achieve the "swings and roundabouts" effect necessary to make a fixed fee scheme viable. We request more information about this aspect of the proposed arrangements.

1.63 One solicitors' firm has recently been informed by its Account Manager that there is a moratorium on granting additional asylum matter starts in London pending an exercise attempting to recall unused matter starts from organisations with surplus, and that it is expected to take "at least a month" before further news about this is available. Such inflexibility would plainly be unacceptable under a fixed fee regime.

Scope of the scheme:

1.64 We now turn to our responses to the specific consultation questions on scope. It is difficult to isolate these from the sums on the table. Questions of client care and of effective representation depend on having the time to undertake the necessary tasks. We deal, however, in this section with what the proposals purport to cover.

1.65 We agree that only providers holding a contract in immigration should conduct immigration work. We observe, however, that this is not an additional benefit that the scheme would bring but merely reflects existing policy and accreditation arrangements.

1.66 We agree that the new remuneration arrangements should not apply to cases started before the proposed scheme, or a variant, comes into operation, whenever that may be.

NASS:

1.67 We do not agree that NASS related advice in excess of 30 minutes should no longer be in the scope of the immigration category, but shifted entirely to the Section 6 scheme, presumably to be dealt with by welfare and/or housing law suppliers, for the following reasons.

1.68 Many immigration suppliers do not hold a welfare or housing contract, and even if the overall aim of these proposals is to encourage larger organisations offering a multiplicity of services that is simply not achievable by next April. Growth has implications including the availability of space within premises, or in new premises, and the level of predictability needed to recruit and train new staff.

1.69 In response to our FOI request, we were told:

> *"With the reforms to immigration and asylum legal aid in 2004 the Immigration Specification which forms part of the General Civil Contract was amended to provide that NASS only advice in excess of 30 minutes must be opened as a non-asylum NMS in the immigration category. This was to prevent the perverse situation where the financial limits for advice relating to NASS would be higher than the financial limit for an immigration / asylum application itself."*

But any such perversity arises because of the way the system of support for people seeking asylum operates, not because of any action on the part of the supplier. The relative spend on welfare and matters pertaining to the claim for asylum is determined by the complexity of legal problems in each area. This is perhaps a matter for discussion with the government departments concerned, with the availability of legal aid reflecting the decisions government reaches on what it wishes to do about the system of support for people seeking asylum.

1.70 This proposal, if imposed now, will lead to duplication of work and undermine the principles of Carter as, in the short term at least the asylum clients, of many organisations will have to be referred to other suppliers for NASS assistance, with the fixed fee regime making it difficult for the immigration lawyer with conduct of the case to give guidance and assistance to those other suppliers in understanding it.

1.71 The proposal would also deprive immigration practitioners of the hands on experience of the workings of NASS which is invaluable in providing the basic advice and assistance of up to 30 minutes which has since the inception of the scheme been considered integral to the provision of legal services to asylum seekers.

1.72 NASS work in excess of 30 minutes should therefore continue to be undertaken by the immigration supplier, and continue to be paid for

separately. We suggest that it be remunerated in the form of an additional payment equivalent to the relevant Part 6 fixed fee.

1.73 The immigration supplier could and should still refer a case to a welfare/housing specialist if appropriate in the circumstances of a particular case and if a local supplier was available. Here, to avoid duplication and encourage effective joint working, it is necessary to ensure that both welfare and immigration lawyer can work together, each contributing their specialist expertise to the rapid resolution of the more complex or intractable NASS cases.

Q8.2 Do you agree with our approach to produce different forms of remuneration for those services and clients outside of the graduated fee scheme? If not, what suggestions do you have for contracting for these services?

2.1 We do not object in principle to the LSC providing different forms of remuneration for some services to clients outside the graduated fee scheme, but we have concerns about these particular proposals and about exclusive contracting.

2.2 We deal with the separate question of the ASU in response to the specific question below.

2.3 The question of how the LSC will use its position as the only player in the "market" with money, becomes all the more acute where it is proposed to award exclusive contracts to a limited number of suppliers. How far will those suppliers be protected as long as they are cheap, whether or not they provide a quality service? How far will they be required, and financed, to deliver quality work?

2.4 Unaccompanied children, national security cases, detainees – it might be inferred that these groups have been excluded from debate on the proposals because the DCA/LSC are aware that the fixed fee proposals are inadequate for the proper conduct of asylum and immigration cases and that these are areas where that inadequacy would be most controversial. One is tempted toward such an analysis because the information provided is so woefully incomplete, with such a lack of information about the basis and terms on which those participating in the schemes would be remunerated.

2.5 We also have concerns about the impact on quality, the timescale and scope of this aspect of the proposals:

Quality:

2.6 All those requiring legal aid for immigration or asylum advice should receive it, with the proviso that this advice should be of quality, not just "good enough" to satisfy the complacent that the appearance of justice has been served. To ensure access to quality, the LSC needs to remunerate quality providers adequately, and to devise and implement the scheme in such a way as to ensure that the best providers are encouraged to continue to deliver legal aid services.

2.7 If the LSC wants to ensure that quality providers perform this work then each part of the scheme must be properly remunerated so that suppliers believe the work is worth bidding for, and can be done to quality standards. ILPA would be very concerned if the suppliers contracted to do this work were of

anything other than the highest standard, and the more so if clients were to have no option of transferring to another supplier.

2.8 Those tied into block contracts will be vulnerable to pressure from the LSC to accept changes to their contracts. Concern has already been expressed, for example by the organisation Bail for Immigration Detainees (BID) in its report *Working against the clock: inadequacy and injustice in the fast track system*[13], that block contracting for fast-track detained work has resulted in firms protecting their costs by improperly declining to represent at an appeal where the prospects of success are borderline, or failing to give other assistance (for example representation at bail hearings) to clients whom they have declined to represent at appeal. The LSC has stated "...it is difficult to assess to what extent a detainee can make an informed decision about the advisor he or she instructs"[14], indicating that it is alert to the possibility that the detainee may have little ability to find an alternative advisor if there are problems with the advisor allocated under the fast-track.

2.9 Similar concerns were raised by other organisations at the 2 October 2006 meeting on the financial aspects of the proposals convened by BID, which was attended by Fiona Hannan and Cordelia Hamid of the LSC. We are aware that BID has asked the LSC to provide the evidence on which paragraph 8.72 of the Consultation paper is based. This states:

> *". . . exclusive contracts in fast track locations successfully eradicated many of the touting practices that had become prevalent, ensure that clients had access to good quality services and reduced the number of clients changing representatives unnecessarily"*

Timescale:

2.10 More details are required before ILPA can respond fully to the detention work proposals. We are concerned that there will not be enough time to consult properly on that detail, and for suppliers then to consider whether they wish to bid for such block contracted work, if the LSC insists on keeping to its 1st April 2007 timetable.

2.11 We regret very much that it was decided to publish the outcome of the Detained Duty Advice project on 13 October 2006, the day after this consultation closes[15]. At best, this is extremely bad planning. We further regret that the LSC chose not to heed the requests made to its representatives at the BID meeting cited above that the evaluation be released earlier. The result is that we have not had the opportunity even to skim it before finalising this response.

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[13] July 2006

[14] Email of Fiona Hannan to Sarah Cutler, Assistant Director, Bail for Immigration Detainees, forwarded by Cordelia Hamid of the LSC on 20 September 2006

[15] Communicated by Fiona Hannan at BID-convened meeting on 2 October 2006

Scope - Unaccompanied children

2.12 It is unclear whether this group will include those whose age is disputed by the Home Office. Such cases are complex, requiring the supplier to ensure that the client has the benefits of all safeguards accorded to a child, while the Home Office treatment of the child as an adult (i.e. as liable to detention, with the claim processed as that of an adult) must be contested and evidence obtained to prove age.

2.13 Nor is it clear whether children granted discretionary leave to 18 and are then faced with removal and attendant appeals will fall within the scope of the unaccompanied children exclusion. Such cases involve working with vulnerable young people, dealing with events that took place when those young people were children, and require the provider to incorporate safeguards into their approach. Our approach chimes with that of the government's proposals announced just this week for improving the quality of care offered children and young people looked after by local authorities by, *inter alia,* potentially extending it to the age of 21.

2.14 It is also unclear whether or not this category will include all children who are "looked after", whether under full care orders or not – i.e. whether it includes both those taken into care and those "accommodated by local authorities. Such children may or may not be claiming asylum: theirs may be immigration and/or nationality cases. Their parents or legal guardians may or may not be in the UK. But they cannot live with their families, and require the special support and safeguards due to any child or young person.

2.14 All these children and young people should form part of an "unaccompanied children" exception.

Scope - Detained clients:

2.15 See also our response to question 8.12. Those working with detainees regularly complain about detainees being unable to access representation. In our members' experience, the Detention Duty Advice surgeries only scratch the surface of what is required. Exclusive contracting with only a few providers could reduce access if providers are not able to represent all detainees adequately. The amount of money proposed will not be nearly enough to fund proper advice and representation for the number of detainees that there are. The findings of BID's *Working Against the Clock*[16] research deserve careful consideration as the proposals for providing advice and representation to those who are detained are worked up. We do not (on the basis of the limited information in the documents supplied to us) support exclusive contracting for detained work because it denies the detainee the opportunity of accessing advice on their own initiative from accredited

[16] *Working against the clock: inadequacy and injustice in the fast track system,* BID July 2006

suppliers willing to undertake this difficult work. These points were also made by a range of NGOs working with people in detention at the BID-convened meeting at the Diana Fund on 2 October 2006, attended by Fiona Hannan and Cordelia Hamid of the LSC.

2.16 The Consultation Paper states at paragraph 8.73 that the LSC

> *"will prevent any provider without an exclusive contract from delivering the services excluded from the graduated fee scheme…with the possible exceptions already in place for existing clients and their close family members."*

ILPA's understanding from meeting with the LSC is that it intends that the exceptions described will apply. This is welcome as far as it goes, but in itself it is not adequate to meet the reality of immigration detention which, like almost aspects of immigration work, is variable and often unpredictable.

2.17 Some people are detained on arrival and remain detained throughout the life of their cases, but many people will be released from, or be taken into, detention at different stages. For example, people who have been on temporary admission may be peremptorily detained for removal on the occasion of a routine signing on. A lawyer who already has conduct of the case would be able more quickly to assess any outstanding matters and the merits of any challenges, than an exclusively contracted supplier looking at the case for the first time in such crisis circumstances. But the first supplier would able to afford to continue only if payment outside the fixed fee regime were available.

2.18 To construct a scheme requiring or encouraging such cases to be passed to a different provider would appear to run counter to the stated desire to avoid duplication. In all cases where a client has an existing LSC funded representative prior to detention that representative should be enabled to continue to act.

2.19 We stress that if existing providers are to continue to represent their clients when those clients are detained, then it must be acknowledged that this cannot be done within the fixed fee. This work, and also all work for immigration clients detained otherwise than in the immigration detention centres covered by the block contracts, should be remunerated at hourly rates outside the graduated fees scheme.

"Restricted legal visit times often means that what might be one lengthy attendance in the office to take a statement has to be spread over 2 or 3 visits to a detention centre. There is waiting time often to get through the detention centre security or where there is a delay in bringing the detainee to the legal visit." *Private practice supplier, London*

"Detained clients absorb nearly 100% of my time during the detention period – sometimes I have to refer them on so that my other clients do not suffer." *Not For Profit supplier, London*

"We have many enquiries from detained people who need representation but owing to our capacity we cannot take on many at a time….I understand from those contacting us from prisons and IRCs that there are many people without representation so limitation on choice and numbers of providers is unwise." *Private practice supplier, London.*

"Clearly travelling and waiting are essential [in detained cases] but are poorly paid compared to office work at £30.30 – this is not a great use of our time but is essential to get to the client – interpreter fees at centres soon soak up the disbursement limit at legal help stages…it is imperative in the tight deadlines that apply to those in detention that accurate information is taken expeditiously." *Private practice supplier, London.*

SIAC:

2.20 Appellants who appear before SIAC are at a severe disadvantage because they do not have access to all of the evidence on which the Secretary of State is relying. This evidence is "closed". A Special Advocate is appointed to look after the appellants' interests in the "closed sessions". It is for appellants' lawyers to represent them in the "open sessions", and guide them through and advise as best possible. Communication between Special Advocate and appellant's lawyer is not permitted once the Special Advocate has seen the "closed" evidence. This is a complex and difficult area of law so we see the temptation to argue for the establishment of some sort of panel or special accreditation scheme. The reality is, however, that much of this work is already done by a small number of firms who do clearly have the expertise. Those firms should not be put through unnecessary costs (in time and money) of special accreditation or panel membership.

2.21 We have concerns about exclusive contracts for all SIAC work, because of the importance of the appellant being able to appoint a legal representative of their choice. This should be safeguarded, especially in view of the fact that SIAC appellants perforce must rely on advocates not of their own choosing to represent their interests in the closed session. In SIAC cases the position of the State is so powerful, and that of appellants so weak, that any further erosion of appellants' rights by the denial of the representation of choice must be resisted. Appellants may wish to retain their existing representatives, or instruct solicitors known or recommended to them or their community. However good the firms with the exclusive contracts were, there would be a danger that, if exclusive contracting were brought in, it would be perceived as the Government imposing tame lawyers on appellants against their wishes.

2.22 It should be born in mind that a case is not necessarily a SIAC case from the outset. A client may already have a long established relationship with a

representative by the time the Home Office certifies an appeal under s.97 and it transfers to SIAC. Duplication, which the LSC deplores in connection with other aspects of these proposals, would result if transfer to exclusively contracted suppliers was also required. The result would be not only discontinuity of client care, but also avoidable additional expense.

2.23 Appellants in SIAC should therefore continue to have the freedom to instruct the representatives of their choice. SIAC cases should also continue to be funded as certificated work under the aegis of the Special Cases Unit whose case workers may surely continue to be relied upon to satisfy themselves that the merits test is met at least to borderline level, and that the conducting solicitor is suitably qualified and experienced.

Q8.3 Are there other services or client groups that should be considered outside the graduated fee scheme?

3.1 This question cannot be isolated from our concerns about the particular fixed fee proposals. If fees are fixed such that they will cover the cost of only the simplest of cases then it can be argued that all but such cases should be outside the scheme – see our response to Q.8.4 below.

> *Many organisations like ourselves will have our ability to provide specialist advice severely reduced, especially our ability to meet the precise needs for which we were set up, i.e. to carry out the marginal, difficult, complex and often ground-breaking casework and work for the most marginalised, excluded and isolated clients. These are the kinds of cases for the kinds of clients which will precisely be ruled out by the fixed fee regime. Not for Profit supplier, London.*

3.2 The question of the "exceptional" threshold at which a case should be lifted out of the fixed fee scheme is relevant here. Indeed, it is integral in our view to any hope of establishing a feasible graduated scheme. If the threshold is set so high that the level of financial risk is one that firms cannot or will not carry, then vulnerable people with complex cases will be disadvantaged in their attempts to find representation.

> Law Centres and the more reputable firms are more likely to get referrals of complex cases or vulnerable client groups, and if many suppliers begin to "cherry pick" the more straightforward cases, this is going to affect us even more. I know that the LSC claims that firms don't cherry pick…but this is not the experience of our housing department [seeing clients refused representation elsewhere] since tailored fixed fees were introduced. *Not for Profit supplier, London*

> One would be very reluctant to take on the more challenging cases which would require more time to be dedicated to them. The more needy and vulnerable clients (who need more time) would suffer as they would be left unrepresented" *Private practice supplier, London.*

> Asylum work will no longer be viable. We may continue with immigration work but may have to cherry-pick cheaper cases and focus on private immigration work. *Private practice supplier, London.*

3.3 The same effect as deliberate "cherry-picking" would be achieved if representatives felt compelled to refuse representation to clients with complex cases because they could not, under the fixed fee scheme, provide representation in accordance with their professional, ethical obligations.

3.4 The question of the exclusion of some cases from the fixed fee scheme should be considered separately from the question of exclusive contracting. A

potential reduction in bureaucracy because financial extension applications would no longer be needed in most cases could be off-set by the bureaucracy involved in holding, and reporting on, a multiplicity of block contracts.

3.5 We identify certain groups with special needs, and with special costs related to their cases, who are not likely to be present in one location in sufficient numbers to make exclusive contracting viable, but who require the help of specialists and whose cases are unlikely ever to be absorbable into a fixed fee regime. We also observe that even if a supplier were in a position to take on large enough numbers of special needs clients to make an exclusive contract financially feasible that would not make it desirable for that supplier to shoulder an unleavened caseload of very stressful cases, for example for clients sectioned in mental hospitals or secure units. These cases should be open to all willing suppliers competent enough in immigration law to hold an LSC contract, and should be paid for at an hourly rate. The following is a (not necessarily exhaustive) list of the special needs categories we have so far identified:

- *Non-SIAC criminal deportation cases (including serving prisoners being considered or liable to be considered for deportation, and people detained following forgery and document offences on arrival – please see further discussion of this category in our response to Q.8.13 below).* These cases involve specialist expertise, as all will involve dealing with people involved or who have been involved in criminal proceedings. There are likely to be limited numbers in any one location - many will be held in prisons, not necessarily in areas where there are communities usually requiring immigration advice, or immigration advisors. These might be either immigration or asylum cases.

- *Clients sectioned under the Mental Health Act and other mentally ill clients in hospitals.* Sectioned clients will be held in hospitals and secure units. It is important to recognise that where a person agrees to a voluntary admission, the power to section may not be used (it might be invoked if a person expressed an intention to leave), therefore the group should not be confined to those patients who are sectioned. There are likely to be limited numbers in any one location and these locations will not necessarily be in locations where there are communities usually requiring immigration advice, or immigration advisors. Travel and waiting times may be greater and not everyone, be they representative or interpreter, has the skills to work with the severely mentally ill. These too might be either immigration or asylum cases.

- *Clients suffering significant mental or physical disabilities.* Such clients may find it more difficult to travel than others. Communication is often more difficult. It may be necessary to communicate with them in sign language – sometimes using more than one interpreter – for example signing into one language and then translating into English, or Braille. It is likely to take longer to take a statement, receive instructions and give

advice. It may also be difficult to conduct long interviews, necessitating repeat appointments. Specialist expertise is needed, not only from representatives but also from interpreters in dealing with mentally disabled clients. Medical evidence will be a feature of many of these cases, with the attendant instruction, liaison and interpretation. Clients' needs must be communicated to Home Office and court, and related housing and support problems are likely to be more complex, and more difficult to resolve. Again, these might be either immigration or asylum cases.

- *Victims of domestic violence.* These cases will usually involve related criminal or civil (injunctions etc.) proceedings. Clients may need to be accommodated in safe houses or shelters and in some cases open visits to representatives will not be possible. Clients may be suffering physical injuries and are likely to be extremely distressed. Cases will usually involve obtaining medical or psychological evidence, as well as work to evidence the abuse. Once again these might be either immigration or asylum cases.

- *Victims of trafficking in people.* Again, these cases may involve related criminal proceedings, and/or intelligence gathering to gain information about the traffickers. This should increase if government proposals to take action against trafficking in human beings are implemented[17]. Clients may need to be accommodated in safe houses or shelters and in some cases open visits to representatives will not be possible. Clients may be suffering physical injuries and are likely to be extremely distressed. Cases will often involve obtaining medical or psychological evidence. They are both evidentially and legally complex. These are most likely to be asylum/human rights cases.

[17] *Tackling Human Trafficking – Consultation on proposals for a UK Action Plan,* Home Office and Scottish Executive, January 2006 and ongoing work on this.

Q8.4 Do you agree with the stages of the graduated fees and the services that we would expect to be provided in the majority of cases? If not, please explain why.

4.1 We do not agree. The stages are too simplistic and do not reflect the diversity of immigration and asylum cases.

4.2 The "Suppliers Q & A" paper provided to us[18] states:

> *"The fees have been calculated by mapping the processes that an immigration or asylum case would routinely follow and the corresponding services that we would expect to see provided in relation to those applications.*
>
> *We are also proposing that all non-mainstream cases are excluded from the graduated fee scheme and will be subject to separate payment arrangements and different contract schedules[19]."*

The notion of "processes that an asylum or immigration case would routinely follow" is beguiling, but one that is not supported by experience. If the LSC is to remain true to its second proposal, and if the definition of "non-mainstream" cases is cases that do not follow these processes, then very large numbers of cases will be excluded from the fixed fee scheme.

Fee stages and levels - Immigration

4.3 According to the consultation paper, 4.5 hours casework hours have been allowed for immigration cases, on the basis that during this time the representative will provide the following services:

> Grant of Legal Help
> Initial Advice and completion of the application form where appropriate
> Consideration of Home Office decision and advice to client thereon and carrying out any necessary work
> Applying the merits test for appeal
> Grant of CLR or appeal to FRC against refusal

4.4 The first, and the last two of these stages, are part of suppliers' obligations to the LSC. They are very important, but they do not represent work on the substantive case. Taken together we estimate that in straightforward cases with clearly defined issues and clear merits for clients with simple financial circumstances they might take 30 minutes, but they can take considerable longer in the absence of any one or more of those provisos, and will certainly take longer in the case of an appeal to the FRC. Advice to the client will of

[18] *Provider Q & A Legal Aid A Sustainable Future Civil and Family Legal Aid*
[19] *Ibid.*

course include client care letters, and other procedural matters as required by good practice and the contract, as well as advice on the substantive merits of the case.

4.5 It is striking that this list of stages is apparently predicated on the false assumption that where an application form is appropriate no preparation other than its completion is required. This is very far from reality. We ask the LSC to tell us what research it has done to calculate the average hours spent on the following types of case that proceed as per the "case map":

- Advice on and preparation of a family visit entry clearance, as distinct from a student entry clearance.

- Advice on and preparation of an in-country spouse application, as distinct from an entry clearance spouse application.

- Advice on and preparation of an unmarried partner application, as distinct from a spouse application.

- Advice on and preparation of a child's application for entry clearance where the parent has had sole responsibility for a child, as distinct to one where they have not but there are considerations rendering exclusion from the UK undesirable.

- Advice on and preparation of an elderly parent's application for leave to remain where the parent is over 65, as distinct from one where the parent is under 65 and hence has to show they are living alone in the most exceptional circumstances.

- Advice on and preparation of an application for ILR on the basis of 10 years lawful residence, as distinct from one based on 14 years residence some or all of which has been unlawful.

- Advice on registration for citizenship, whether with entitlement or at the Home Office's discretion, as distinct from naturalisation.

- Advice to someone who is facing administrative removal who clearly comes within a Home Office policy, as distinct from one who does not but has an arguable case that removal would breach the Human Rights Act.

4.6 We could go on. The point is that each of the above "types" of immigration case will require differing amounts of time, and within each "type" there will be those that are more straightforward than others. Where is the LSC's analysis that 4.5 hours covers all these cases?

4.7. Bear in mind too that all the examples just listed are of cases which at least present with a standard structure to be followed, regardless of the complexity

of content. Many others do not. We highlight in particular those cases falling outside the Immigration Rules but coming within a Home Office policy or concession: examples include enforcement action against families with children who have long residence, against people with settled spouses or unmarried partners, against those with serious health concerns where removal might raise human rights issues and family reunion applications for recognised refugees whose dependants are not their spouses or minor children. Where is the LSC's analysis that has led, despite this variety, to the conclusion that the case map model is universally appropriate and that £250 is the fee that should be paid for all?

Fee stages and levels - Immigration – members' comments and figures:

4.8 When we look at the sample of cases studied in Annexe 2 we find that the figures for asylum and non-asylum for the year March 2005 to April 2006 can be tabulated as follows.

Supplier (Annexe 2 number)	Non Asylum LH average	Non-Asylum LH highest	Lowest non-asylum LH average	Asylum LH average	Asylum LH highest
1	246.72mins	774mins	60	755.93mins	3986mins
2	161 mins	2481mins	6	273mins	1136 mins
3	298.48mins	1848mins	12	1019.74mins	3834mins
8	300mins	2310mins	66	900mins	2178mins
10	205mins	882mins	42	674mins	2016mins
6	465.78mins	2205mins	36	1685.37mins	3690mins
7	6hr 36 mins	31hr 30 mins	42	14hr 45 mins	59hrs
9	189 mins	522	30	240mins	1452mins

These figures must be treated with a degree of caution, given the statement in the Consultation paper that

> *"As with other categories of law, there will be no provision for existing Level One work under the new arrangements"*

because we believe that figures such as six and twelve minutes work on a non-asylum Legal Help case may be Level One work wrongly reported in response to our questionnaire[20]. It would appear to be envisaged by the proposals that Not for Profit organisations do Level One work for free, covering their costs with the putative profits made on fixed fees. We reach this conclusion because £250 for 6 minutes work, an equivalent to a billing rate of £2500 an hour would be rich pickings indeed, and no responsible stewardship of public funds could countenance it.

[20] Both suppliers reporting these figures are not for profit agencies that are likely to do advice surgery work involving considerable Level 1 work.

Any mistaken inclusion of Level One work in the responses to our questionnaire would have the distorting effect of bringing down averages.

4.9 All these suppliers spent more time on average on asylum cases than on immigration cases, but it will be seen that some suppliers' averages for immigration were in excess of others' for asylum. In one case (supplier 8) the highest time was on an immigration case. The maximum difference between average and highest immigration time (provider 7) was a matter of some 25 hours. The lowest time spent was 6 minutes, as discussed, but the longest time spent by that provider on a non-asylum legal help case was 2481 minutes – over 41 hours. The supplier is rated category one.

4.10 An exceptionality threshold of four times the fixed fee, where the fixed fee pays for 4.5 hours work, is reached when the work passes 1080 minutes – 18 hours. Five of the suppliers in the sample had cases over these limits. The other three did not. For those that did (suppliers 2,3,8,6 and 7) only 1 (supplier 2) had averages below the fixed fee threshold. Those that never reached the exceptionality threshold (suppliers 1, 9 and 10) had averages below the fixed fee threshold. Supplier 1 is a not for profit organisation and their average may be brought down by Level One work, as explained above.

4.11 The crucial question is how many cases a supplier has that will pass the exceptionality threshold. Our survey shows that 3 out of 10 never reached it, and of those that did we understand that those cases represented a tiny percentage of their overall caseload.

4.12 Supplier 9 commented:

> "Immigration cases include some of the most vulnerable clients who are not seeking asylum – i.e. Human rights/medical grounds – HIV related – Terence Higgins have just closed their unit/domestic violence applications/7 year application (children)/cases related to care proceedings (children and parents)/they are not "less complex"."

.

4.13 Members have elsewhere commented as follows:

". . . [we] see larger proportion non-asylum. Wrong to say it is simpler. Great variety. *Not for Profit supplier, London, ILPA meeting July 2006*

"Immigration cases include many vulnerable clients – e.g. domestic violence. Cases take a long time." *Private practice supplier, London, ILPA members meeting July 2006*

"Examples of cases which take much longer than expected . . . the length of time waiting for Entry Clearance appeals to be listed frequently means that major changes in family circumstances take place and further advice is required…EEA applications take much longer than they are supposed to . . . .Anything involving the Criminal Casework Team is ridiculously long-drawn out and complicated . . . . Applications under the Long Residence rules – these are complex by their nature since proof of residence in the UK over 10 or 14 years are necessary." *Not for Profit supplier, London*

"Our casework shows…there are some kinds of immigration cases which are similar and shorter than asylum, but often there is no difference in complexity or time between the two . . . relatively small number of providers who are willing to deal with the awkward cases which are not quite awkward enough to merit judicial review*." Not for Profit supplier, London*

Fee stages and levels - Immigration – conclusions

4.14 Based on the information received from our members, we accept that there may be a case for a lower fixed fee for immigration than for asylum Legal Help, but we challenge the assumption that immigration cases are invariably simpler. A complex immigration case is no less demanding, and may be more demanding, than an asylum case. Of course within the rules applications with straightforward documentation are less time consuming than asylum claims, and presumably the manipulative supplier under fixed fees will be able to do a fair trade in those, but it is precisely the compassionate outside the rules applications for the most vulnerable that the LSC should be encouraging us to take on by fixing the fee at a realistic level to take account of them and/or by setting exceptionality threshold low enough to passport those cases out of the scheme.

4.15 The LSC should conduct a detailed "case mapping exercise" based on a review of work done by Category 1 quality providers. Our sample of figures at Annexe 2 underlines the need for the LSC to do such an analysis. We suggest that the LSC should enlist the assistance of a number of Category 1 and NFP organisations (allowing adequate time for the exercise and paying suitable remuneration) in deriving realistic figures, given the admission that the LSC's own historical data is not fit for the purpose. The LSC should "case map" against the stages in a case required under Best Practice recommendations, both in the form of the LSC/ILPA Best Practice Guides and Law Society recommended best practice. The LSC should also formally ask its Peer Reviewers to give their opinion on the average time they think it should take a supplier to do the required work adequately on a wide range of case types. Their opinion should be made public.

Fee stages and levels - Asylum

4.16 The "Provider Q and A" document states:

> *"For asylum cases the graduated fee scheme will focus on the remuneration for the majority of clients processed through most segments of NAM or in other words "mainstream" cases. It is thought that this will equate to approximately 75% of asylum applications"*[21].

The Consultation paper makes clear that non "mainstream" cases are identified as those where clients are held in detention or are unaccompanied children. SIAC cases are also, as noted above, subject to a separate payment regime.

4.17 We challenge the assumption that any graduated fees scheme in asylum can be based on the notion that all or most cases will follow the Home Office NAM targeted path. There has never been a Home Office asylum process yet that ran universally as anticipated. ILPA's experience goes back 20 years, and the experience of individual members much longer. We are seeing new asylum legislation on an almost annual basis, with a plethora of secondary changes and procedural changes every month. We have been alerted to expect the announcement of a new Bill in the forthcoming Queen's Speech. The Home Office is going through a major change and reform programme. The LSC's "Needs Analysis Project Assumptions" document, provided in response to our FOI request, acknowledges that:

> *"Asylum and Immigration law has for many years been one of the most high profile and fast-changing areas of publicly funded law, highlighted by the successive acts of legislation of the recent past, which have impacted on all parts of the asylum process."*

Does the LSC believe, against all evidence and experience, that this era of change will have drawn to a conclusion by April 2007?

4.18 As far as cases designated to go through NAM are concerned, it would be sanguine to assume that NAM will survive, or survive in a recognisable form. Even if it does, this tells us little. NAM cases are to be segmented, with cases passing through different procedures according to the segments in which they fall, but NAM has yet to finalise what those segments will be. Already practitioners are reporting delays in determination of some cases in NAM as so far implemented.

4.19 Moreover, even on current models, it cannot be assumed that 75% of cases, or that all cases not involving unaccompanied children, national security or detention for the duration of the case, will pass through the NAM system. Many cases will require work falling outside NAM for at least some of their

[21] *Provider Q & A: Legal Aid: a sustainable future: Civil and Family Legal Aid.*

duration. These include not only the old cases already stuck in the recesses of the IND (referred to by the Home Office as "legacy cases"), but also include new cases for long term overstayers/illegal entrants. In these cases, detailed instructions on convoluted immigration histories need to be taken before considered advice on claim can be given.

4.20 Fresh asylum claims do not seem to have been taken into account at all in these proposals. These can take months (or even years) of persistence even to get recorded by the Home Office, let alone admitted into the asylum process (NAM or otherwise).

Fee stages and levels - Asylum – members' comments and figures:

4.21 Our members have made these points forcefully to us:

> In 26 years, only about 3 [of our] clients have been removed/deported. The rest, as far as we can determine are still in UK. *Not for Profit supplier, London, at ILPA meeting July 2006*

> "The majority of our asylum cases are clients making fresh/exceptional applications… NAM will not cover everyone. If there around 450,000 failed asylum seekers in the country – with immigration problems, possible fresh claims, etc., they will go to any rep, they will not be in NAM area." *Not for Profit supplier, London ILPA meeting July 2006*

> …the N[orth] E[ast] generally is a big dispersal area and is set to remain so. Clients we get up here are often dispersed having had legal representation already. Under NAM nearest Reception Centre is Leeds. Clients would only seemingly be dispersed upon refusal so in Newcastle it seems we would get mainly appeal cases and very few undecided asylum cases (except fresh claims…) *Private Provider, Newcastle*

> "NAM have a lot of ability to control our business. Have seen 6 hour NAM interviews. Caseworker was on overtime. They have incentive to make process longer." *Private Practice supplier, London, at ILPA meeting July 2006*

> In my team we are dealing entirely with fresh claims and legacy cases in asylum…Although we have been members of the Solihull NAM rota for 6 months, we have yet to receive one effective referral. We have tendered for the October NAM pilot but have received no response. *Private practice supplier, Out of London, September 2006.*

> Our casework consists of . . . new asylum applicants not being processed through NAM (such as persons found guilty of s.2 AI(TC) A offences and imprisoned locally…Existing asylum applicants who wish to change solicitor or have no solicitor. Whose cases are in the "black hole . . . lingering . . . ILR Exercise and other concessions cases many several years old . . . renewals of humanitarian protection, exceptional leave and discretionary leave – these are dealt with on "active review" and amount to a new asylum/art 3 claim requiring equivalent work . . .Refugee family reunion applications . . . Deportations of foreign prisoners and ex-prisoners." *Not for Profit supplier, London*

[the proposals]…ignore the complex needs of the vast majority of immigration and asylum clients presenting to inner-London agencies at least, whether existing applicants of "failed asylum-seekers", all of whom are to be dealt with by the Home Office's "legacy directorate", effectively a giant oubliette concerning up to as many as 500,000 cases. *Not for profit, London*

4.22 The consultation paper proposes that 8 casework hours of Legal Help, plus interpretation and translation costs, (total £550) will be allocated in asylum cases. This is to cover:

> Grant of Legal Help
> Initial Advice, drafting of statement and representations
> Consideration of Home Office decision, advice to client thereon and carrying out any necessary work
> Applying the merit test for appeal
> Grant of CLR or appeal to the Funding Review Committee against refusal

It is proposed that interpreting, translating, travel and waiting costs and 30 minutes of advice on NAM all also come out of the £550 fixed fee.

4.23 Eight hours casework (480 minutes) equates to £440. Only one supplier in our sample (supplier 9) averaged less than 480 minutes legal help casework in asylum cases (for the period April to July 2006 that supplier averaged 550 minutes in asylum cases, so the trend was not sustained). Three of the Not for Profit suppliers averaged times of less than 480 minutes during the April to July 2006 period, but as noted, these figures must be regarded with caution as they may be affected by Level One advice given by those agencies, and bringing down the average, as discussed under immigration above.

4.24 110 (£550 minus £440) has been allocated to cover interpreter and translation costs. Are swings and roundabouts supposed to operate? We cannot see any assumption about the percentage of asylum cases needing an interpreter. But the assumptions provided to us in response to our FOI request show that it is assumed that interpreters will be paid £20 an hour and that interpreters will be used for 75% of casework hours, i.e. 6 hours – already the costs of interpreters are £120 which is more than the sum said to be allocated to them, and goodness knows how their travelling time and costs are to be met. And all of this is before any translation has been undertaken. Letters to the client, the asylum statement and, where applicable, the Home Office refusal letter, will need translating and this is additional to any documents in support of the case.

4.25 As we understand it, based on the LSC's assumptions for interpreters, six hours are assumed to be client-contact hours (thus necessitating an interpreter where the client does not speak English), leaving 2 hours to accomplish all other tasks, of which a part may be the 30 minutes allocated to NASS advice. In these two hours we must do all the reading for the case,

including country and legal research, collate the relevant documents, instruct experts (although they will be paid separately) and undertake drafting.

Fee stages and levels - Asylum - conclusions

4.26 The putative number of hours on which the scheme is based needs to be increased overall so that there is some room for the "swings and roundabouts" effect that is necessary to the operation of any fixed fee scheme.

4.27 The exceptionality threshold must be lowered.

4.28 Interpreting and translating costs must be reimbursed separately.

4.29 The figures proposed are based on a serious underestimate both of the numbers of cases which require more hours work than allowed for, and also of the number of hours which many of those cases require, and/or a serious overestimate of how many cases are likely require fewer hours than the estimated norm and how much lower than the norm they are likely to be.

Fee stages and levels – all cases

4.30 Time spent on a case and the quality of the service provided are linked. Often one of the reasons that poor providers are poor providers is that they do not acknowledge (or care) that time is required to do a multiplicity of tasks that will lead to the best result for the client. Time spent on taking and checking sufficiently detailed instructions pays dividends in any case. A statement that is taken carefully, allowing time to probe the client's answers, is a statement that will serve the case best. This is not say that a hefty time claim is a guarantee of quality, but it is certain that rushed work risks missing vital points, especially in factually complex cases or those for vulnerable clients. As an illustration of this we quote from the determination of an Immigration Judge in respect of an asylum appeal prepared by on of our member organizations:

"I wish to point out once more, as it is of the greatest importance, that the care and attention of the Appellant's representatives have resulted in a favourable determination in what was a certified case. I have no hesitation in stating that on the basis of the Appellant's interview and SEF I would not have found him credible, and his appeal would accordingly have failed. The provision of the psychiatric report and, more importantly, the careful and lengthy process of taking down the Appellant's own words and account have provided the appropriate explanation for the inconsistencies otherwise evident and have left me most unusually satisfied both with the credibility and the thoroughness of his account as laid out in the witness statement. I wish to record my gratitude to them for their conscientious and professional handling of the appeal." *Appeal determination, case CC/33751/2003*

4.31 We stand ready to be tested on all the comments that we have made about the proposed fee stages and levels. An LSC exercise to collect historical data and move to a tailored scheme could mitigate these defects, as would introducing an exceptionality trigger of no more than twice the fixed fee, accompanied by monitoring and evaluation. If it is the LSC's intention to make this scheme costs neutral so far as casework is concerned, (as opposed to costs neutral in relation to a fantasy future figure) then we cannot see what objection there can be to this, at least for a trial period.

Q8.5 **Do you agree with the proposals for additional payments? If not, please explain why.**

5.1 We agree with the stages identified as far as they go, but the amounts for substantive representation at appeals are unacceptably low and, if there is to be a graduated fixed fee scheme at all, then consideration should be given to additional payments for classes of work other than those proposed.

Additional payments for attendance at Home Office interviews:

5.2 We agree that additional payments for representation at Home Office interview in asylum cases is a sensible arrangement, but in addition we suggest a similar additional fee be paid, in both asylum and non-asylum cases, for any other interviews which are to be conducted under caution, for example illegal entry interviews.

Additional payments for representation in appeals – all types:

5.3 We also agree that additional fees for representation at appeal hearings, including Case Management Review Hearings, are sensible but the amounts proposed for substantive hearings in both asylum and non-asylum cases are dramatically inadequate, and risk destroying the specialist immigration bar. Words fail us at the notion that specialist sets of chambers should expand or re-deploy existing counsel deliberately in such a way as to take on more simple cases than they otherwise would, and that this will somehow mitigate the fact that their more experienced colleagues will be underpaid for the complex cases which may not only benefit the individual client but also develop the law.

5.4 The allowances for adjourned hearings, called "Additional hearings" in Table 6 of the consultation document, are also grossly inadequate. They fail to take account of the variety of reasons there may be for an adjournment. These include lack of court time (often after the representative has waited for hours before the immigration judge orders the adjournment), failure of the Tribunal to provide an appropriate interpreter, non-availability of the immigration judge, non-appearance by the Home Office, failure of the Home Office to provide documents or otherwise comply with directions, and new issues arising during the course of a hearing which require adjournment for further evidence to be sought (either by the Home Office or the appellant). A flat fee of just £200 (presumably to be shared between solicitor/caseworker and barrister in cases where counsel is instructed) comes nowhere close to covering the additional preparation and client contact required by an adjournment, even in those cases where further evidence is not required.

> We face many adjournments owing to lack of court time and the booking of inappropriate court interpreters – despite our request for certain dialects (especially Sudanese Arabic). We need assurances that extra work and counsel's fees following adjournment will be covered. *Private practice, London.*

5.5 Based on the figures proposed, it appears to be the intention that neither counsel nor specialist in-house advocates will be used in substantive hearings. If this is so then it should have been made explicit in the consultation paper. We base the inference on the proposed time allowances. These are incomprehensible unless based on an assumption that advocacy is to be undertaken by the same person who had conduct of the case at the initial stages and is thus already familiar with it. It seems that every caseworker is to be a sufficiently skilled advocate as to take cases right through from legal help to substantive hearing without benefit of counsel, or even of time to brief a more senior colleague. This is of course wildly unrealistic, but the disclosure in the LSC's response to our FOI request that just *"one hour preparation time has been allowed for the interview and substantive hearing"* in both immigration and asylum appeals fans our suspicion. So does the notion that there will be a "swings and roundabouts" effect, whereby the high costs of one case are recouped by savings on another.

> Appeals will only be possible if in-house advocacy is undertaken and then results will be affected (unless experienced Counsel decide to come in house – hardly likely for the risible salaries we will be able to offer) as we simply are not experienced at this. *Private Provider, outside London.*

> ..in a meeting between law centres and the LSC shortly after devolved powers had been reinstated to (nearly) all of us, we made representations to them that our self-authorised disbursement limit of £250 was too little to allow us to instruct Counsel in an immigration appeal without requesting prior authority in all but the most limited of circumstances. They accepted this point and raised our self-authorised disbursement limit for immigration and asylum matters to £500..it is ..a recognition that £250 is too little. *Not for Profit, London*

5.6 The proposals militate especially against the use, and indeed the continued availability of, counsel for immigration work at first instance Tribunal level. A barrister is a self-employed individual. It avails him/her nothing if a colleague in chambers is doing "simple cases" if his/her own caseload is one of complex cases. The specialist immigration bar offers advocacy skills, specialisms and an up-to-the minute alertness to developing case law that cannot feasibly be held within every, or even most, suppliers' organisations. If the intention is that barristers not be used for appeal hearings before the AIT, then, as

already noted, this should have been spelled out in the consultation paper so that respondents could properly consider its effects.

5.7 Once again we contrast the manner in which immigration practitioners, including the bar, are being treated in the process leading up to the intended implementation of these proposals with that outlined for family practitioners in the extracts from the Part 5 of the consultation paper which we quoted earlier in this response.

Appeals – fees and additional payments - immigration

5.8 The proposals are for about 4 hours casework (£250) for cases in which CLR is granted but concludes before a substantive hearing. They envisage that the work to be done is:

> Lodging and drafting the appeal
> Preparation of appeal
> Reapplication of the merits test
> Where CLR is withdrawn, explaining the decision and assisting with FRC review process and carrying out any necessary work

5.9 The proposals are silent on time to be spent in advising and taking instructions at the outset on the strengths, weaknesses and grounds on which the decision may be appealed prior to preparing the notice. This is especially remarkable given the wording of the representative's declaration on all AIT appeal forms:

> *"I, the representative, am giving this notice of appeal in accordance with the appellant's instructions . . . ."*

5.10 The proposals are silent too as to time spent advising on evidence, and client and/or witness contact during the preparation of the appeal up to the point when it becomes clear that it cannot proceed, which might well include the preparation of statements.

5.11 In cases that proceed to hearing, the proposal is for a further 4 hours preparation to a total of about 8 hours in all (£500), plus £250 for representation at appeal (see response to next question). The 8 hours work includes the first 2 points described above, plus 4 hours (£250) for

> Consideration of determination - and advice to client thereon;
> Applying the merits test for application for reconsideration;
> Where the appeal is refused and the onward appeal is not being pursued, explaining the consequences of the decision,
> Where the appeal is allowed, explaining the consequences of the decision.

5.12 It is noteworthy that no more time is allocated for preparation of the appeal in a case that proceeds to hearing as opposed to one that does not, save that

we infer that the time that might have been spent on an appeal against the discontinuance of CLR may be devoted to the preparation of the substantive appeal when CLR continues. For the LSC to equate the work connected to a paper appeal to the FRC with the substantive preparation of an asylum or immigration appeal almost beggars belief.

5.13 And if the FRC grants the appeal, what then? How would the proposed scheme cope with a change of representative in mid-appeal? Alternatively, if the same representative were to continue (in the unlikely event that this were professionally proper if it had been the supplier rather than the LSC who made the refusal decision) how would the organisation be compensated for the lost preparation time?

5.14 We are aware that it is the duty of suppliers to apply the CLR merits test on a continuing basis, and to withdraw funding promptly if the test is no longer met. The rationale for that in an hourly payments remuneration system is clear, but it is much less so in the present Stage 2a proposal. It would be only the supplier, not the LSC, who would lose if much work were done before withdrawing funding. Indeed the unscrupulous may be tempted to profiteer by granting CLR inappropriately and withdrawing it quickly or, which would be even worse, granting it appropriately in a borderline case and then finding a pretext to discontinue at a profitably early stage.

5.15 In its response to our FOI request, the LSC informed us of the following assumptions about hourly rates and time allocations in immigration appeals:

- CLR attendance and preparation - £60
- CLR advocacy - £70
- Travel and Waiting - £30

  - 4 hours travel and waiting has been allowed for "each advocacy event"
  - One hour of preparation has been allowed for the substantive hearing and 15 minutes for a part heard hearing (on the basis that an hour has already been allowed for the substantive hearing).
  - 1 hour has been allowed for the substantive immigration hearing.
  - Half an hour has been allowed for a part heard appeal.

5.16 Based on these figures, of the £250 allocated where an immigration appeal proceeds to hearing, £120 will be absorbed in travel and waiting costs. Four hours travel and waiting time is in itself a highly questionable assumption. If we consider for the moment only London suppliers and the London Bar, travelling time to Hatton Cross can be a good 2 hours each way, and waiting time is unpredictable, so a 2-3 hour hearing can easily occupy 7-8 hours on the day of the hearing alone, disregarding the advocate's preparation time.

5.17 Taking the LSC's figures however, deduction of the travelling and waiting allowance leaves £130, or less then 2 hours, for advocacy at the hearing itself, assuming no allowance for conference with client or negotiation with the Home Office Presenting Officer. The Consultation paper states that in

immigration cases "the hearing itself is likely to be shorter". We take issue with this – it is highly variable from case to case. Immigration cases of complexity may take as long as asylum cases, and in immigration cases there are more likely to be witnesses in-country who will be called to give evidence. Such cases will frequently take more than two hours.

"The appeal hearing lasted nearly five hours. My verbatim notes from the hearing run to 28 pages." *Extract from determination of immigration entry clearance appeal ref IM/12855/2006 - 70 year old Sudanese widow - allowed on both immigration and human rights grounds*

Appeals – fees and additional payments -asylum

5.18 The structure described above applies also to asylum appeals, save that:

- the fixed fee for an asylum appeal that does not continue to hearing is £300 and £750 for one that does (ie £50 and £250 respectively more than in an immigration case);
- the substantive hearing fee is deemed to cover a 2 hour hearing; and
- additional payments are available for Case Management Review Hearings.

5.19 It is stated in the *April 2007 Asylum Remuneration Assumptions* appended to the response to our FOI request that the assumption is 20 minutes preparation for an oral CMRH and 20 minutes hearing. The fee for an oral CMRH is £150. Attendance and preparation are paid at £60 per hour, advocacy at £70 per hour. We assume that £120 is attributed to travelling and waiting, as for any other "advocacy event" – they will be in the same place as other hearings. As stated we have concerns with allowances for travel and waiting to hearings in general. Travel will be the same, and waiting may be more or less for a CMRH. What is certain is that there will be a number of cases in the CMRH list so some waiting is therefore inevitable for all but the representative whose case is dealt with first. Given that a telephone CMRH is assumed to last for 30 minutes (ie £35 at the advocacy rate) and that preparation is likely to be the same (the LSC's calculations are 20 minutes at £60 per hour, giving £20) why is the cost of an oral CMRH not the cost of a telephone CMRH plus travel and waiting time?

All appeals - costs of counsel:

5.20 We set out below the figures from those cases in our sample of members' responses where it was possible to identify the costs of counsel at appeal hearings. The numbers of cases are small, and we do not claim to have produced representative figures across so small a sample. The figures are, however, instructive:

Sample immigration appeal cases – average costs of counsel:

Supplier	Private Or Not for Profit	London or outside	March 2005 to April 2006	April 2006 to end July 2006
1	NFP	O	Not available	£271.87
3	NFP	L	£449.07	£763.63
10	NFP	0	£579	£435
6	P	L	Not available	£305.56
7	P	L	Not available	£446.95
9	P	L	Not available	£350

Thus all the firms or organisations in our sample averaged expenses for counsel that are above the £250 allowance.

Sample asylum appeal cases – average costs of counsel:

Supplier	Private Or Not for Profit	London or outside	March 2005 to April 2006	April 2006 to end July 2006
1	NFP	O	£226.60	£350
3	NFP	L	£1,315.15	£569.83
10	NFP	0	£581	£516
6	P	L	£1,166	No response
7	P	L	£473	£763.59
9	P	L	£350	£166 to £1021

In the period April-July 2006 one supplier in our sample spent more on average for counsel in immigration, than an asylum case (supplier 3) and this appears to be the case also for supplier 9. For suppliers 1 and 3 there is less than £100 difference in the spend in asylum and immigration cases in the same period.

5.21 Our observations above in relation to travel and waiting time apply to counsel also. In immigration cases, after 4 hours travel and waiting is subtracted, the £250 fee is reduced to £130. In asylum cases the £350 fee is reduced to £230. These sums must cover conference, preparation and advocacy. It is not at all unusual for at least 5 hours to be required for conference and preparation, including preparation of the skeleton argument which is required by court directions in asylum cases and is good practice in all. So remuneration for a 3-hour asylum hearing (again, not unusual) would, under these proposals, be effectively reduced to about £28.60 an hour (which is below the travelling and waiting rate) for the substantive work. The rate for an immigration case would be yet lower.

5.22 This simply will not be adequately offset by large numbers of simple appeals requiring shorter preparation and advocacy and listed conveniently on one's doorstep, even if off-setting against junior colleagues fees were an option open to the bar, which, as we have already pointed out, it is not.

5.23 We would also observe that the very term "simple asylum case" is oxymoronic, save for cases so hopeless that they would not have passed the CLR merits test for public funding in the first place. Most immigration appeals which pass that test will also be relatively complex, many with human rights elements.

Conclusions on CLR fees and additional payments:

5.24 The distinction between the asylum and immigration CLR fees is unjustifiable, both in relation to the basic Stage 2a and 2b fixed fees and in relation to the "additional payments" for representation at substantive hearings. As already stated in relation to Legal Help fee, a complex immigration case is no less demanding, and may be more demanding, than an asylum case.

5.25 We have serious concerns about the adequacy of the fixed preparation fee for cases proceeding to hearing, but are even more alarmed by the low level of additional payments for substantive and adjourned hearing. As indicated above, the proposed rates fall far below what counsel (or in-house specialist advocates) can expect to claim at present. They will be a powerful disincentive to counsel to accept instructions at all, and it simply is not feasible to suppose that every supplier can so organise itself that it has a Level 2 or above caseworker available to represent at the substantive hearing of every appeal. There is no organisational skill presently available to us with the power to prevent the AIT at Loughborough (to whom all appeal notices are initially submitted) from listing the cases of two appellants with the same representative in 2 different hearing centres.

5.26 And even if a senior caseworker from the organisation can be available, there is no guarantee that s/he will be familiar with the case or the client so s/he will need to squeeze time out of the fee for conference and skeleton and submissions preparation in just the same way as counsel would. After all, the LSC cannot reasonably expect us to try to make the scheme work by allocating the apparently simpler Legal Help cases to junior staff and simultaneously have every case conducted by someone sufficiently experienced to undertake the court advocacy if the case later turns into an appeal.

5.27 Nor is this simply an issue for junior caseworkers, who may be perfectly competent to prepare applications but not yet ready for advocacy. Many senior solicitors and caseworkers with years of experience in advising, preparing applications and preparing appeals for hearing simply have no wish to undertake their own advocacy, which inevitably involves many hours outside the office away from other case preparation. We appreciate that the

LSC wishes to move from a position *"in which we pay for services that providers choose to deliver to one where we pay for the services that we wish to purchase"* (Consultation paper 2.23), but it really would be to cut off its nose to spite its face to deprive its clients of the services of such experienced providers.

5.28 One way to ameliorate the problems we have identified would be to take travelling and waiting out of the "additional payments" and remunerate it separately on an hourly basis. On the figures cited above it cannot rationally be argued that proper allowance has been made for them in the proposed amounts. Neither can it be right, for example, that organisations and chambers in central London should be paid proportionately so much more for every case that happens to be listed at Taylor House rather than York House, and proportionately more than those who must travel inconvenient distances to all hearing centres. Travel time is dictated by location. Any "swings and roundabouts" effect will occur by happenstance, if at all. Organisations and counsel should not be penalised, and the time available for the preparation and presentation of their clients' appeals reduced, because of something beyond their control.

5.29 The impact on clients' ability to access representation will be disastrous if travel is not to be remunerated separately on an hourly basis. For example, one of our London based devolved power members recently had listed on the same day an asylum appeal in Bradford for a NASS dispersed former detainee, and a deportation appeal in Newport for a disabled client who had been unable to find suitable representation local to HMP Dartmoor. Such cases would be too financially crippling to undertake under these proposals.

5.30 We hope that waiting times may be reduced with the co-operation of the AIT in reforming its listing practices. This could also allow travel times in some circumstances to be divided between cases by making it possible for one representative to deal with more than one case at a hearing centre on the same day, safe in the knowledge that they will be listed so as not to clash. ILPA can only press for such reforms, not impose them or dictate how well they work. Separate payment arrangements for travelling and waiting will, in addition to other benefits, enable the LSC to keep statistics which may be useful in encouraging the DCA to require reforms at the AIT so as to minimise this cost to the legal aid fund.

Further additional payments:

5.31 The remuneration figures currently proposed risk driving specialist barristers, solicitors and senior accredited caseworkers away from immigration and asylum appeals work by forcing them to choose between professional ethics and job satisfaction on the one hand and economic viability on the other, thus costing more in the long run as the higher courts will have to pick up the pieces.

5.32 If there are to be fixed fees we believe the following further additional payments need to be provided:

- For attendance at any interview being conducted under caution or an interview where the application relates to Human Rights but not asylum – on the same front loading principle as for NAM;
- For preparation of a skeleton argument where the AIT directs
- For a Conference with Counsel where Counsel is instructed
- For considering the outcome of an appeal and the merits of an application for review and reconsideration and advising the client (currently 3 hours is considered necessary and is paid in addition to the CLR limit).
- For preparing an application for a Certificate of Public Funding for any Judicial Review or Court of Appeal litigation arising from the case.
- To deal with detained cases other than under block contract (i.e "own representative" cases, and cases for those detained or imprisoned outside the immigration detention estate (unless it is agreed to take these cases outside the scheme altogether and pay for them on an hourly rate basis).

Matters requiring clarification in relation to additional payments:

5.33 It is not clear whether or how the exceptionality proposals would apply to "additional payments". The representation element should be subject to this principle.

5.34 here is also a need for more clarity in what the "additional fee" is expected to cover. For example, is "preparation of the appeal" in CLR Stage 2b intended to include the skeleton argument or is it included in the "additional payment"? Where is the pre-hearing case conference with the client supposed to figure?

5.35 It should be clarified that where the court orders a preliminary hearing in an immigration case (whether called a CMRH or a PHR or a "for mention") then the CMRH additional payment applies. The heading and layout of Table 6 in the consultation document imply that this is so, but the text does not.

5.36 Has any attention been paid to the ILPA Best Practice Guide on the Preparation of appeals? We take the opportunity to remind the LSC of the words of Lord Justice Sedley in his Foreword to that publication in 2003:

"Good practice takes time and trouble, but is never wasted. It shows in the standing and reputation of practitioners, in the respect in which opponents and tribunals hold them, and above all in the satisfaction of doing a job well. In the end, by avoiding disasters, it also saves money."

"Make the polluter pay":

5.37 Most legally aid cases are cases against the State. The pace of change in other government departments will have a knock on effect on the work of the DCA and funding of the LSC. A requirement for impact assessments to take this into account, and for the Treasury to ensure that the DCA and LSC are put in a position to meet the responsibilities thrust upon them, is something for which the DCA and LSC could and should make the case. We would wish to support them in so doing.

5.38 Over and above this, there is the question of the way individual cases are handled by the representatives of the State. In too many asylum and immigration cases, the conduct of the Home Office pushes up the costs. This is implicitly acknowledged in the assumptions described in response to our FOI request, and in the LSC's targets. It is assumed that 40% of cases will win at the first instance appeal stage. That is to say, it is assumed that in 40% of cases the LSC will be funding an appeal because the Home Office did not make a sustainable decision at first instance.

5.39 Beyond that is the question of the way in which those representatives of the State conduct cases, regardless of whether or not they eventually reach the right decision. ILPA members voiced their frustration on the point:

". . . applications for ILR following ELR – although the majority of these cases should be reasonably straightforward the delays in the Home Office department which deals with these often render them complex…EEA applications…caseworkers don't take into account additional representations made and refuse to grant leave when they have no entitlement [to do so] . . . . Anything involving the criminal casework team is ridiculously drawn out and complicated out of all proportion to the substance of the case . . . . Trafficking cases often drag on because of the failure in communication between the various police involved and between the police and IND" *Not for Profit supplier, London*

"The increase in case time and costs arising directly out of Home Office intransigence. . . never agreeing issues before a hearing; rarely conceding an appeal; appealing virtually ever allowed appeal . . . the increased case costs arising from Home Office inefficiency . . . we regularly threaten judicial review proceedings simply to obtain a reply to a letter." *Not for Profit supplier, London*

If criminal casework were able to respond to us, and detainees themselves, many CLR bail applications would not be necessary. We have to apply to the court as the Home Office does not respond or leaves clients in detention with no prospect of removal. *Private Provider, London*

5.40 The AIT should be given the power to order the Home Office to make payments into the Legal Aid Fund when cases have to be stood out for Presenting Officers to read files on the day, or adjourned because of other Home Office unpreparedness or failure to comply with directions. If we face a glorious future when this will never happen then the LSC will gain by not paying for any wasted waiting time or adjournments caused by Home Office dereliction. But we doubt that this is so, and if the legal aid budget is limited (as we are aware it is) then the LSC should be compensated for its wasted costs. A payment culture might also contribute to better Home Office practice, but unless and until it does we anticipate that the sums thus made available to the Legal Aid Fund would be significant.

Q8.6 Do you agree with the proposals to include interpretation and translation costs within the fees in asylum cases? If not, please explain why.

6.1 We strongly disagree with these proposals. They are discriminatory and we believe that they would not survive a challenge under the Race Relations Act. The LSC should guard against complacency – it may not be only its hapless suppliers who are called to account for the discrimination which this aspect of the proposed scheme will encourage. Suppliers must meet the terms of their contracts and their professional and ethical obligations. The LSC in funding them, determines which cases they can take on in accordance with those obligations, and which they cannot.

6.2 Nothing in the proposals indicates why the rationale (based on experience of the tailored fixed fees scheme) given in paragraph 10.12 at page 74 of the Consultation paper for excluding disbursements from the fixed fees does not hold good for asylum cases also:

> *"10.12 We propose that disbursements will be reported as a separate item on the CRMF and credited to the providers account in the normal way. This is a change from the rules for the TFF scheme as we recognise that it is currently in the best interests of clients that providers are able to make decisions on the issue of disbursements based on the requirements of the clients case and free of any financial considerations."*

"It is facile in an area with 100 first languages to expect language issues to be dealt with by employing mother-tongue speakers." *Not for Profit supplier, London*

6.3 We understand that the basis of this proposal in this, but no other, area of law is that interpreting is likely to be needed in almost all asylum cases. As explained above, no figure has been provided to us about the percentage of clients assumed to require interpreting services. If the assumption is 100% then there can be no recourse to a "swings and roundabouts" argument, but without such an assumption the figures do not add up.

6.4 The LSC assumption about which we have been informed is that interpreting will be needed for 75% of casework hours (ie 6 hours) per case at the asylum legal help stage. We accept that there will usually be some correlation between hours spent on an asylum case and hours of interpreting in the cases of clients needing interpreting services. We also accept that a higher proportion of asylum seeking clients need interpreting services than clients in other areas of law. But neither of those propositions justifies the present proposal to include interpreting in the asylum fixed fee, without historical data that would allow the LSC to look at the real costs of interpreting and translation, and, indeed of interpreters' travel and waiting time.

6.5 If the LSC's working assumption is that interpreters will not be needed in all asylum cases then, if the fixed fee were set high enough, the inclusion of interpreting fees might achieve a "swings and roundabouts" effect across a large sample of cases. We appreciate that the thrust is indeed towards large organisations. As explained above, however, the fixed fee is set too low overall, and too low in respect of these costs, for there to be any prospect of this effect in any size of organisation. Moreover, as also explained above, it would take time to move towards the composition of an organisation that could achieve it. As matters stand, the only organisations that might stand to gain from these proposals would be those who turned away all would-be asylum seeking clients whose cases would require an interpreter to be engaged.

6.6 Even on the basis that a large enough organisation could offset interpreting costs in some cases against others which incurred none, there is no valid argument for including translating costs within the fixed fees because these are so wildly variable from case to case as to be incapable of rational or fair treatment in that way. We attempted to collect figures on this, but unfortunately, as described at Annexe 2, our questions to members were defective because we failed to identify clearly whether the average cost of disbursements (part of the calculation) should include cases in which there were no disbursements. We were thus unable to proceed with the subsequent calculations. On the basis of the figures that we did collect, however, interpreting (likely to include interpreters' travel, waiting and fares) appears to average out at more than £20 an hour for ¾ of the casework hours, and for this year to average some ten hours on legal help and 16 on CLR. Given that these are the figures based on data where some suppliers factored in the cases in which they made no disbursements, the data that we would have collected on costs only in cases where interpreters were used may well have shown higher figures.

6.7 To implement this proposal as it stands would be to run the following risks:

- That organisations will favour taking on English speaking clients, or clients who speak languages which can be offered in-house. They stand more chance of giving a service to these clients that meets their professional, ethical obligations because they can devote the whole of the fixed fee to case work. Non-English speaking clients, especially of the less common languages, will find it even harder to find representation than at present.

- Of encouraging organisations to fail to provide a quality service but instead to cut corners, perhaps by skimping on statement read-back time or by using the interpreter only for statement taking and not for advice giving or instructions updating as the case progresses.

- Of encouraging organisations to fail to provide a quality service but instead to rely on clients' friends or family members, at worst children, who, due to schooling often learn English more rapidly tan their parents, to interpret.

Such arrangements are never appropriate in the case of children and rarely appropriate in the case of adults, not least because they mitigate against disclosure of rape or other humiliation, and against admission of previous fabrication or other unheroic conduct.

> They are dangerously encouraging practitioners to farm out work on vulnerable client's cases to interpreters or even encourage firms to use no interpreter at all. Quality and client care will inevitably go out of the window. *Private Practice, Outside London.*

6.8 Clients who speak relatively rare languages whose interpreters command commensurately higher market rates will accordingly have even greater difficulties, as will their representatives if any can be found.

> "It is already virtually impossible to get translations done at LSC immigration rates, particularly where the language is non-Roman script." *Not for Profit supplier, London (Not for Profit 1 in Annexe 2)*

6.9 These difficulties will be exacerbated outside London where interpreters of most languages are in shorter supply than in the capita, often need to travel further, and are correspondingly more expensive. The consultation paper acknowledges this in one of its attempted justifications for the abolition of London weighting, but that is no remedy for the ills we have identified. It leaves all of our other objections intact, and is inadequate to solve the problem.Clients in hospital or prison who require interpreting services will find these proposals yet another obstacle, in addition to the many they already face, in finding representation as the interpreting fees will be increased by the interpreters' likely increased travelling time.

6.10 There will be widespread perception of unfairness among potential clients, migrant support groups and communities, to the detriment of the reputation of the profession, the LSC and the government. This is especially so because there is no similar proposal for any other client group.

Q8.7 Do you agree with the proposals for exceptional cases? If not, what other structures should we put in place to pay for these cases?

7.1 We do not agree.

7.2 The LSC's response to our FOI request stated:

> "The LSC is consulting on an exceptional case threshold of four times the fee for all the remuneration schemes to promote consistency. Please see the LSC's Q&A document for the civil remuneration schemes, which contains further detail on setting four times as the threshold. The modelling was primarily undertaken for TFF providers, and does not include immigration and asylum cases."

But modelling that was primarily undertaken for Tailored Fixed Fee providers (who, unlike us, have experience of operating a three times to fixed fee threshold for exceptionality) cannot properly be presented as a rationale for having a "four times" exceptional case threshold in asylum and immigration cases.

7.3 The fixed fees should be set so that the costs of work done in the majority of cases in the scheme are within a small percentile range either side of the fixed fee. If this is not achievable then the scheme is flawed. It is stated in the April 2007 Asylum Remuneration Assumptions annexed to the response to our FOI request that it is assumed that 5% of asylum cases will fall into the "exceptional category" (as costing more than 4 times the fixed fee). We have not seen the calculations and assumptions used to derive this figure. No figure was given for the percentage of immigration cases assumed to be exceptional in the equivalent document dealing with immigration assumptions.

> It would…be very helpful to know whether and how the LSC are likely to monitor the number of "exceptional" cases that a particular organisation has, and whether organisations will be penalised for having a lot of exceptional cases. Law centres and the more reputable firms are more likely to get referrals of complex cases or vulnerable client groups [especially] if many suppliers begin to "cherry pick" the more straightforward cases. *Not For Profit., London*

7.4 If the fixed fee is set too low to achieve the "swings and roundabouts" effect, then there will be a significant amount of work remunerated only, if at all, though payment of the exceptional fee. A category one LSC provider commented on its analysis of its own figures:

"if the total profit/costs for LH and CLR together are all that would be covered by the graduated fees, as per the example at para 8.46 in the consultation paper, only one case climbed above the £5,200 threshold.

This supplier organisation looked at the costs of its successful appeals[22] during the period July 2005 to July 2006. The average costs of its asylum Legal Help matters (proposed fixed fee £550), before interpreting/translating costs, was £,077.13. The average in CLR matters (fixed fee £750) was £1,527.16, again before adding interpreting/translating costs. The average costs of counsel in asylum matters was £1,205.82, more than double the proposed fixed fees for the substantive hearing and one adjournment (£350 and £200 respectively, a total of £550). Roughly speaking, their costs are double the fixed fees and additional payments. All of their work above that level would go unremunerated.

7.5 We require more detail on how and when exceptional case claims would be made and paid. The Consultation paper states at paragraph 8.45:

> *The exceptional case calculation can only be performed at the conclusion of the case or following an application for review and reconsideration (the conclusion of stage 2) to incorporate all relevant stages within the graduated fee.*

7.6 It is unclear from this whether payment would only be made at the end of the case or at some other stage. Under the existing tailored fixed fees scheme payments are made annually, occasioning long delays before the additional payments are credited. This, or payment at the end, could cause cash flow difficulties for suppliers in a non-tailored scheme, especially in the first year, and provide yet another incentive not to sign up for the scheme.

7.7 As already discussed, all other areas of civil law have had a period of tailored fixed fees where the exceptional trigger was three times. After a period of analysis the LSC is now proposing that it should be four times in these areas of law. In immigration there has been no such analysis. We have explained in this submission why we think four times is inappropriate. We have suggested that the LSC spend time amassing historical data, and that tailored fixed fees and/or lower exceptionality thresholds are used, with information about spend collected and monitored. We have identified the level of risk for suppliers built into the proposals as drafted.

7.8 It is arguable that if a case costs the supplier more than 50% in excess of the fixed fee then it should be treated as exceptional and be paid at an hourly rate, subject to assessment. Certainly if the cost of the work done is 100% more than the fixed fee it should be remunerated on an hourly basis. If the LSC would agree to this for a pilot period of at least one full contract year, during which historical data were collated, this would provide information as to whether a fixed fee were feasible at all in the fields of asylum and immigration and if so, at what level exceptionality should be set. This would

[22] LSC endpoint success codes.

allow wrinkles in the scheme to be ironed out while suppliers have the assurance of at least this degree of safety net.

7.9 We take this opportunity to observe that the current hourly rates have been unchanged for the past 5½ years, and that no future predications or estimates ought to be predicated on an assumption that that this situation can continue for ever. Whether as a basis for calculating fixed fees or for remunerating outside the scheme the means must be found to persuade the Treasury that the LSC's suppliers cannot continue indefinitely without so much as a cost of living increase.

Q8.8 Do you agree with the proposals for an early resolution payment? If not, how else might we encourage positive outcomes for clients early in the process?

8.1 ILPA has long advocated "front-loading". The importance of getting things right first time runs throughout our LSC best practice guides. In our view, good, thorough work at the early stages will always pay dividends, both for the client and in terms of cost savings, at some point in the life of the case. It can lead to an early resolution but, due to Home Office vagaries, we are not sanguine that this is achieved in all, or even the majority, of carefully prepared cases.

8.2 We have concerns about the principle of "early resolution" being applied to asylum claims, and asylum claims only. We reject the apparent underlying assumption that whether someone gets asylum at the initial stage is entirely down to the work of the representative, and that if only representatives would seek early resolutions they are there to be had. This is simply not so. Strongly meritorious cases diligently presented are too often refused, only to be won at a later stage.

8.3 Level One advice work is an important part of front-loading; it can help to ensure that difficulties are identified at an early stage, and referrals made to the appropriate advisor. This again will pay dividends eventually, even if not at the stage that these proposals would single out for special reward.

8.4 Members have commented that the proposed fees and structure do not fit with the notion of front-loading:

> What seems clear is that the professed intention to front-load work is not reflected in the fee scheme *Private Provider, outside London*

> ...we are now meeting Somali clients who had been granted leave and for whom there is no practical or legal prospect of removal) who are now being refused and having to go to appeals…the LSC knows that the Home Office refuses virtually every asylum case and good work at the application stage is simply laying an adequate groundwork for a winnable appeal *Not for profit, London*

> As if we have control over client origin and the quality of the decision…We have no control over which cases are dispersed. *Private Provider, outside London*

8.5 No quality supplier requires any incentive other than the client's best interests to aim for early resolution, and the LSC should not be contracting with anyone who does. We suspect that this proposal may in fact betray some doubt on the LSC's part about the viability of the 1st stage fixed fee. We suggest that it would be better resolved by redistributing the proposed early

resolution payment (stated in response to our FOI request to be worth a total of £379, 688) into an increase in the fixed fee. The best way to encourage work capable of leading to early positive outcomes is by setting that fee at a level likely to keep good suppliers willing to contract for the work.

8.6 Quality of work is not the only variable leading to an early positive outcome. Much will also depend on the facts of the case, the strength of the client's asylum claim as a matter of law if the facts are accepted, not to mention the calibre of the Home Office decision maker. Changing country conditions and Home Office determination polices (for example the moratorium on Iraqi decisions during the invasion) are also highly relevant factors outside the control of practitioners. Where the country from which the person comes is relevant, practitioners' caseloads are affected by who is dispersed to their area – a factor outside their control.

8.7 Good quality work (such as a very detailed statement covering all the issues) will not necessarily lead to the grant of asylum, but may lead to discretionary leave or humanitarian protection. In many cases that will be the appropriate outcome, but it is not be rewarded under this proposal.

8.8 Good quality first instance work may also mean that, although a claim is refused, credibility is not in issue on the appeal leading to success on legal or country background grounds, but no reward is offered in those cases either. Timely good quality work can also lead to earlier resolution than would otherwise have been achieved in the post decision stage (for example Home Office concession of an appeal in the face of well-drafted grounds, in both asylum and immigration cases).

8.9 There thus seems to us to be no defensible rationale for favouring good work with one particular favourable outcome at one particular stage over good work at other stages, or indeed throughout the process.

8.10 If such payments are to be made in asylum cases we believe they should also be made if humanitarian protection or discretionary leave is granted, and that consideration should also be given to making similar payments at other stages of a case (for example, if the Home Office, having considered the grounds of appeal, withdraws the decision and agrees to grant status prior to or on the day of an appeal hearing). But we believe that the better solution is to re-deploy the budget for this proposal pound for pound in an increase to the graduated fixed fee for Legal Help asylum.

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Q8.9 Do you agree with the proposed arrangements for stage claims? If not, please explain why.

9.1 We do not agree.

9.2 Further thought needs to be given as to how having graduated fees works with the concept of stage billing. When is the fixed fee to be claimed as a payment that can be reconciled against the contract? ILPA members would like to claim it when the matter is opened and when each additional payment event occurs. This would assist reconciliation. We would not want members to have to wait until the end of the case before they could claim.

9.3 Given the difficulties suppliers are currently experiencing in reconciling their contracts ILPA is strongly in favour of having a voluntary six month stage claim for cases that have not reached a stage to date. If the LSC will not allow claiming when the matter is opened (or additional payment event occurs) as suggested above, the LSC should at least allow firms to claim the fixed fee if the matter has not been concluded within six months of opening

9.4 We reject the assumption that making an immigration or asylum application no longer involves considerable delays. This may be true for some types of application, but there are still lengthy delays, particularly with fresh claims and applications made outside the immigration rules. The LSC should guard against being too dazzled by the Home Office's New Asylum Model and Managed Migration aspirations, and should heed its suppliers about the reality, as discussed in our response to question 4 above.

Q8.10 Do you agree with our suggested approach to provide advice, information and referral at the ASU? If not, how else could these services be provided?

10.1 A referral service should be available for unrepresented applicants at the ASU, but not at the expense of resources currently provided to suppliers who advise clients under legal help prior to lodging their claims.

10.2 Currently there is also an important pre-claim role fulfilled by Level One work in the Not for Profits sector. The LSC has stated that there will be no provision for Level One work under the new arrangements[23] and yet puts forward these proposals for all the world as if it values pre-claim advice.

10.3 The Home Office should certainly make generic information about the asylum process available to all applicants, but this should be done at its own expense, not that of the legal aid fund.

10.4 If a supplier takes on a case before the client goes to the ASU then that supplier should retain conduct of the case, and be funded to represent at the screening interview as an additional payment if the current criteria of the contract are met.

10.5 If the effect of the proposed referral system were that clients who would otherwise be unrepresented were enabled to access a quality representative in their local or dispersal area then ILPA would be in favour. We do, however, query whether the costs of this referral service (which is administrative rather than legal in content) should be met from the LSC budget for paying suppliers for the provision of individual case advice.

10.6 As we understand it, in addition to referral, the proposed service will provide generic information as opposed to advice on the individual's case. To that extent we reiterate that it should be funded from the Home Office not the LSC budget. That this is indeed the nature of the proposed service is confirmed in the Home Office Improving Asylum Decisions through Early and Interactive Advice and Representation Proposition paper[24] which reads in part:

> Pre-Screening Information Service
> A duty information service is established on-site in each Asylum Screening Unit to provide pre-application information to asylum-seekers before their first contact with IND. This advice covers the entire asylum process and possible outcomes, the rights and responsibilities of the applicant in the process, the time scales to which they are likely to be subjected, the

[23] Provider Q & A – Immigration question 4.
[24] Evan Ruth, NAM Quality Team. Available on LSC website at http://www.legalservices.gov.uk/docs/cls_main/Early_Advice_Proposition.pdf as part of the tender documents for the NAM Solihul pilot.

information they will be expected to provide in the decision-making process as well as information relating to NASS and other aspects of the process. The advice provided will be generic and will ensure the applicant is fully briefed before first contact and information gathering by IND regardless of whether or not they already have legal representation.1

The initial screening interview and any subsequent screening interview will be recorded and a recording of the proceedings made available to the subsequent legal representative to ensure that all parties can deal effectively with information arising there from.

Once segmentation and routing decisions have been made, the duty advice service will (where the applicant is not already represented) immediately arrange referral to a quality legal representative in the area to which the applicant is to be dispersed, providing an initial appointment date to the applicant before s/he leaves for the dispersal area. The service will also provide information on voluntary sector advice provision in the dispersal area and, where necessary, arrange an onward appointment.

10.7 We appreciate the undesirability of the Home Office being the perceived conduit of referral to independent legal advice, but that could be overcome by contracting this part of the service to an independent supplier to be funded from the Commission's administrative or CLS Direct budgets, not from the funds available for asylum case work.

10.8 The savings to be made for the LSC in not picking up the tab for the Home Office elements of the ASU sessions could most usefully be directed to funding Level One work by Not for Profit organisations, with the aim of assisting the front-loading of cases, and/or increasing the proposed fixed fee for legal help asylum cases.

Q8.11 Do you agree with the proposal to restrict client choice and allocate clients to particular providers on a rota basis? If not, what alternative mechanisms do you think could be introduced to ensure that clients are guaranteed access to legal advice in the short period available between making their asylum application and their substantive interview?

11.1 Where the client is unrepresented, or has no preference about who to instruct, ILPA has no objection to the proposal, but if there is a specific legal aid supplier whom a client wishes to instruct (and who has agreed to accept instructions) then this should be permitted and funded. The reasons for wishing to instruct a particular supplier are varied, and should be respected. For example:

- the supplier represents or has represented the client's family, close friends or political colleagues;
- the supplier has a reputation for effectively representing certain nationalities/political groups and having a good knowledge of the country from which the asylum seeker flees
- the supplier may have a reputation for representing social groups of which the asylum seeker is part (eg lesbian and gay asylum seekers, women who are victims of domestic violence, victims of trafficking etc)

11.2 The allocation of referrals on the rota for the unrepresented should be done fairly, based on quality criteria that should be consulted upon. The operation of the scheme should be subject to independent monitoring.

Q8.12 Do you agree with our suggested approach to provide legal services to clients in Detention Centres? If not, what alternative arrangements do you think could be introduced to ensure that clients are guaranteed access to legal advice and representation whilst reducing the administrative burden on the Commission?

12.1 We refer to our comments on detention in response to question 8.2., which explain why we do not support the LSC's suggested approach.

12.2 When consulting on this aspect of the proposals, the LSC should listen especially carefully to those NGOs, such as BID, who deal with detainees on a regular basis and have a good idea of what makes a good detainee representative and what does not.

12.3 Exclusively contracting with a few providers could reduce access if the providers are not able to represent all detainees adequately. The amount of money proposed will not be nearly enough to fund proper advice and representation for the number of immigration detainees that there are. These proposals have been brought forward before a proper needs analysis has been undertaken for each of the nine detention centres where the LSC intends to contract for services.

12.4 The LSC has no knowledge of the numbers going through the detention centres, how many have substantive applications, how many need only advice on matters relating to being deprived of their liberty. Until this data is obtained and analysed the LSC cannot determine how many suppliers it will need for how many matter starts and at what cost per case.

12.5 The LSC also has no data on how many bail applications firms make or what are the outcomes. It cannot therefore contract on the basis of which suppliers have the most experience of doing detention work and make the best attempts at securing bail or temporary admission.

12.6 ILPA believes a period is required in which such data as we mentioned in the previous two sub-paragraphs is obtained and analysed before exclusive contracts could be awarded.

12.7 There should be room for the smaller quality firms who do detention work well to be able to take on detained clients when they have capacity to do so – as is the case now, and as will remain the case in the immediate future if funding allows. We reiterate that the DCA's vision of large conglomerates of suppliers will not have come to fruition by next April.

12.8 There should also be room for the detainee who is receiving poor quality publicly funded representation to seek an alternative. Whilst exclusive contracting with high quality providers who are well resourced, motivated and remunerated may be of benefit to many detainees, we fear that it could leave

some in a worse position if they are left with poor quality, under-resourced, over-stretched, demoralised caseworkers and cannot look for quality publicly funded representation elsewhere

12.9 We are concerned to know how suppliers who do enter exclusive contracts are to be paid. We suggest that it would have to be on an hours worked basis rather than a fixed fee, and that suppliers would have to be able to approach the LSC for increased payments if the demand for their services in the detention centre they work in cannot be met. They would need to be able to make a case to the LSC for increased payments to assist in the recruiting of more staff where demand is so high that they cannot presently do the job properly.

12.10 Whether the DCA elects to go forward with exclusive contracting or not, now is an opportune moment to review the appropriateness of a merits test for those detained in the "fast track" in Harmondsworth and Yarl's Wood. ILPA has for some time now been concerned at the number of detainees who have no representative at their fast-track appeals before the AIT. This is primarily because suppliers are applying the CLR merits test too strictly, or, concerned about the 40% success rate target, are not granting CLR in borderline cases when they should. The problems caused for unrepresented detainees have been well documented in the report from Bail for Immigration Detainees entitled *"Working against the Clock"* [25].

12.11 ILPA's view is that given the rapid speed of fast-track, the complexity of refugee and human rights law, and the fact that the Home Office will always be represented in an adversarial system, then a detained appellant should be entitled to publicly funded representation subject only to a means test. This will have benefits for the courts, both at AIT level and in the higher courts, who have observed in the past that their function is more efficiently discharged if appellants are represented.

12.12 It is shocking that the success rates for fast-track appeals determined at Harmondsworth and Yarl's Wood are only 3% and 1% respectively whereas for those having their appeals heard outside of fast-track the success rate ranges from 14% to 28% depending on the hearing centre. In ILPA's view this discrepancy is directly related to the speed of fast-track and the difficulties this causes in terms of preparation as well as very many fast-track appellants being unrepresented.

12.13 Article 13 of the International Covenant on Civil and Political Rights requires that an appellant facing expulsion be allowed to be represented on an appeal. International human rights law requires that any tribunal must ensure respect for the principle of procedural equality and there should be a reasonable opportunity to present ones case under conditions that do not place the individual concerned at a substantial disadvantage vis a vis his opponent and

[25] *Op. cit.* BID July 2006

to be represented by counsel for that purpose[26]. In the case of the fast track, to comply with these international obligations, impecunious detainees should have a right to free legal aid without a merits test. It should be remembered that fast-track detainees are cases that are considered straightforward, not cases considered frivolous, vexatious or clearly unfounded. If they were any of the latter the Home Office has the power to certify them and thus deny an in-country appeal. The fact that there is going to be an appeal in-country should lead to these cases being granted public funding.

[26] See Hathaway J, *The Rights of Refugees,* at 654

Q8.13Do you have any suggestions about how legal services could be provided to immigration clients held in prison?

13.1 They should be provided outside the graduated fee scheme, on an hourly rate with travel and waiting time remunerated separately as at present.

13.2 Members comments on their work in prisons covered a wide spectrum of experiences:

> Two cases with strong human rights and asylum cases were referred from pastors in prisons…all on suicide watch and all fallen through the net – had no access to advice until they saw us. We have many letters from prisons asking for assistance with immigration-related queries and referrals from our criminal department. Private Provider, London.

> We have received a lot of encouragement from the LSC to set up outreach advice sessions in local prisons, education centres and other locations. We were intending to ask for our prisons outreach to be extended to fund immigration advice. However, given that the new contract makes no mention of outreach it is not clear whether this will be possible. Through our work in prisons we do receive a considerable number of referrals of immigration clients held in prison…Usually we are their only means of obtaining information and/or referrals to private practitioners where we don't have the capacity to take on more work. The clients we have taken on from prison include victims of trafficking for sexual exploitation, minors, people with serious mental health problems and victims of torture. They will have no access to representation if we are unable to carry on with this type of work for economic reasons…[we] provide a fortnightly advice surgery in HMP…The feedback we get from the prison is that they are desperate for inmates to get immigration advice, and our sessions are always hugely oversubscribed. …Due to the overwhelming demand for immigration advice in prisons are advice session often works largely as a "triage" session which allows us to take initial instructions and provide specialist one-off advice and then make referrals to private practice to whom clients would otherwise have no effective access. Funding outreach advice sessions to prisons would actually be more cost effective for the LSC since by developing links with prisons, and building relationships, we can often get more work done in less time (because we can see clients outside legal visits time, because we have relationships with staff and departments...and can operate in a more efficient way in terms of seeing more than one client for the same amount of travel and waiting...In the course of our sessions we have identified a number of girls held in the Young Offenders part...who are victims of trafficking of minors for sexual exploitation and/or labour. Without our involvement they may not have been identified and would have been at risk on release. Prison staff don't have the time or training at present to make these identifications *Not For Profit,* London.

> …the firm has contracts in crime, prison law, family , childcare, housing, mental health, actions against the police…We find a lot of cross-over work comes to us, eg from serving prisoners, new criminal clients. We are concerned over the LSC's stated aim to contract with "national and regional suppliers" only – our matters starts are relatively low – and would anticipate pushing for...work with detainees in our local prisons (of which there are many) *Private Provider, Outside London.*

> In our experience prisoners are very much at the mercy of friends and relatives paying private for immigration advice when the client would have been eligible for LSC funding. The private advisors are not accredited…and are often disreputable. This can completely destroy cases...It also leaves clients in debt to family and friends so that if they do get out of prison they have considerable pressure on them to fund (possibly illegal) ways of paying the money back. *Not for profit, London*

> Although cases start in HMP…they don't always remain there and travel and waiting time would eat up most of the funds available for cases *[under fixed fee proposals] Not for Profit London*

> Have represented clients at London area prisons and outside London where no other provider is available i.e. Oakington up to 7 hours travel and waiting minimum *Private Provider, London*

13.3 Prisoners may seek advice at many stages of their sentences and immigration history. The Section 2[27] offender will characteristically seek advice on his asylum claim at a relatively early stage. Some resident offenders with limited leave to remain may seek early advice on the impact on their immigration status after sentencing, regardless of whether deportation was recommended. The largest group of cases, however, comprise those for whom deportation was recommended, or who are being considered for deportation by the Home Office in the absence of a court recommendation. These are complex cases, often involving asylum, Article 3 and other human rights issues, and there is no substitute for a supplier visiting the detainee in prison as many times as necessary, bearing in mind the strictly limited time available for prison visits in contrast to the more relaxed regime in immigration detention centres.

13.4 Prisoners may be held in any prison, anywhere in the country. It is unrealistic to expect immigration practitioners to be found locally to every prison, and in any event prisoners are subject to being moved at the sole discretion of the Prison Service for a variety of reasons, among which the local availability of immigration advice does not figure. Neither do the funding limitations of advisors figure in the decisions of prison staff to produce one's client late for a legal visit, which must nevertheless end on the dot of lockup time regardless of how far one must travel to continue the appointment another day.

[27] Of the Asylum and Immigration (Treatment of Claimants, etc. Act 2004)

13.5 This work should be outside the graduated fee scheme. It speaks for itself that travel and waiting time must be remunerated separately. But the point about the variation in the nature of cases and in the work to be done, which makes any graduated scheme in immigration difficult to devise, has immeasurably more force in these cases. Furthermore, the impact on one's work load of the travelling time to various different prisons (as opposed to dealing with several clients on one visit to a detention centre) is such that there is a limit to the number of such cases that any organisation can take on, so there is unlikely to be a large enough pool for the necessary "swings and roundabouts" effect to work.

13.6 The LSC should provide to all prisons an up to date list of specialist immigration suppliers within a reasonable radius of the prison to ensure prisoners have a choice of suitable suppliers. These lists should be made available to all foreign national detainees. Prisoners should be given help from prison staff to access representation from these suppliers, and if this does not prove possible there should be an arrangement whereby the prison informs the LSC, who then contacts a national panel of suppliers to ensure that the prisoner is represented. This is not to suggest exclusivity. Prisoners who chose to instruct other willing suppliers as a result of recommendation from family, other prisoners or an NGO such as the Prisoners Advisory Service, or on the recommendation of their criminal solicitor, should be enabled to do so.

Q8.14 Do you agree with our suggested approach to provide legal services to this group of clients [Unaccompanied Asylum Seeking Children]? If not, do you have any other suggestions about how we can ensure that providers delivering services to this client group have the necessary experience and expertise?

14.1 ILPA would need more detail of the criteria the LSC intends to set for being a member of the specialist panel before replying substantively.

14.2 In principle ILPA is not opposed to a specialist panel for unrepresented UASC provided criteria for membership are appropriate and its members are suitably remunerated on a par with child care specialists in family cases, not on the basis of lowest bidder takes all.

14.3 We do not believe that there are any asylum cases that would be more appropriately dealt with by a child care specialist rather than an immigration practitioner, but there are many cases in which the involvement of a child care specialist in addition to the immigration practitioner is appropriate. This is not work than can properly be done on the cheap.

14.4 As already indicated, we do not believe that any special provision for children should include only with the cases of asylum seekers whom the Home Office accepts to be under 18. Age-disputed cases raise the same issues (and more), require the same expertise and are characteristically even more difficult to resolve properly. Applications for further discretionary leave to remain for children as they approach their 18th birthdays, and all manner of applications for non-asylum seeking children being looked after by local authorities should also be included.

Q8.15 Do you agree with our proposed approach for remunerating these [cases excluded from the graduated fee scheme] services? If not, what suggestions do you have?

15.1 Any competitive bidding should be on the basis of quality criteria and not cost.

15.2 There is inadequate detail in the consultation for ILPA to comment much further at this time – see our response to question 2. We would need to see fully worked out figures based on adequate research and analysis to be able to answer this question.

15.3 The timetable proposed is clearly impracticable for the Block Contracts. It does not allow for the detailed figures we ask for to be produced, for the consultation on those to be concluded, for the bids to be invited and then for suppliers to have the time to decide if it makes business sense to bid and to put that bid together.

15.4 We have reservations about the funds allocated to services at the ASU which we suspect would be better deployed in increased fixed fees and/or continued funding of Level 1 Not for Profit services. Please refer to our answers to Question 10 above.

15.5 It seems to us that the SIAC budget is the least predictable, being rightly based on hourly rates and, unlike USAC, not subject to assessment on the basis of numbers of expected applicants but subject largely to government action in response to perceived threats, with each case being as expensive as the government's chosen conduct of it necessitates. We welcome the notion that SIAC funding is ring-fenced to encroachment on other client services, but would also welcome information about how the £9 million figure was arrived at, and how any surplus might be utilised.

15.6 We have already explained in our response to question 2 that we consider that SIAC should continue to be funded on a non-exclusive basis as certificated work under the aegis of the Special cases Unit.

15.7 We would also be interested to know what assumptions have been made about budget for other certificated immigration and asylum work, how this factors into the planning of the graduated scheme, and whether any changes to this class of work are in the pipeline. We note that it is not listed with the other exceptions to the scheme at 8.67 of Consultation paper. Indeed that the paper is silent about it, but we have gleaned from the LSC's response to our FOI request that it accounts for about 5% of budget.

15.8 We have already commented on the remuneration proposals for unaccompanied children's cases in our responses to Question 14.

15.9 We raise here Level 3 Accreditation. This was always held out by the LSC to be a way of keeping the most senior and experienced practitioners in the legal aid field. There are only a very few practitioners who have applied for Level 3 Accreditation. ILPA believes that this is because the 5% increment to the rates is so low as to provide no incentive to incur the expense in time and money of applying for accreditation. Level 3 should continue to be rewarded by an increment but it should be at 15% and thus be equal to the increment enjoyed historically by Children Panel members in family law and Grade A fee earners in criminal law.

Q8.16 Do you agree with our rationale for selecting reduced numbers of providers to provide these [cases excluded from the graduated scheme] services?
If not, do you have any suggestions about how to minimise the administrative cost to the LSC?

16.1 We cannot identify any rationale from 8.69-8.71 of the consultation paper, but assume from the wording of this question that it is to reduce the administrative cost to the LSC.

16.2 Please see our responses to questions 8.2, 8.14 and 8.15. Questions of scale and numbers of matter starts are relevant. It is desirable that the specialist niche practitioners in this area are able to continue doing this work, giving clients and the LSC the benefit of their expertise. We cited in our introduction an out of London organization which already gets "*all the child cases"* in its region, but notes that this is not enough to keep the department going and make it viable. Other providers have made similar points. Another out of London provider with a particular interest in unaccompanied children and detained work in local prisons noted that its matter starts are relatively few. One London private provider noted:

> We would not like to think that we could never do detention work again, simply because our unit has a small turnover, we provide quality work and good results *Private Provider London*

16.3 We have already highlighted elsewhere in this response the fact that all experience suggests that people in the categories excluded from the scheme, for example people in detention, have great difficulty in accessing legal advice. Faced with this, the LSC should consider carefully at what price it is purchasing administrative convenience. We fear that the price it is currently offering is access to justice for vulnerable people.

16.4 The only relevant rationale should be quality and access to justice at a reasonable remuneration rate. This can be supplied by both large and small providers. The assumption that if you only contract with a few large suppliers it will somehow dramatically reduce costs is not one we can share on the basis of the limited analysis in the consultation paper, and in the absence of any figures to support the assumption or to show that any savings from economies of scale will be anything other than marginal.

16.5 The likelihood is that the result of these proposals would be that access to legal aid will decline, and those refused exclusive contracts will simply charge for their services and turn to private paying work, or give up immigration law entirely and move into a different area of law. All the indications we have received are that these are much more likely outcomes than that suppliers will

choose to amalgamate, or move to work for the few firms that have contracts, as the LSC seems to assume, based on what we do not know. We base our views on the copious feed-back we have received from our members at meetings and by e-mail.

16.6 If firms have to grow to win contracts they will have to incur additional expenses in acquiring larger office space, recruiting and training more staff, expanding IT capacity and so on, while amalgamation will carry its own administrative costs and burdens. There is nothing in the remuneration rates contemplated in these proposals to make any of this seem an attractive prospect to suppliers.

Q8.17 Do you agree with our approach of extending the exclusive contracting arrangement for fast-track clients to other services and client groups?
If not, what other proposals do you have to help reduce duplication of advice?

17.1 We are unpersuaded that there is duplication of advice to the degree implied by this question. We request the figures and analysis upon which this proposition is based.

17.2 Some duplication is unavoidable and justified. For example, ILPA is concerned at the number of suppliers who refuse CLR and the often poor reasoning given for so doing. Other firms who take a different view on the merits and are prepared to grant CLR sometimes take on (and not infrequently win) these cases. This leads unavoidably to some justifiable duplication. Fresh claims for asylum are often made by a supplier different from the first supplier. This is often because the first supplier refused CLR so the client was unrepresented at the first appeal, but is not removed from the country and then approaches a different supplier to advise on what should be done. Dispersal and detention far from the place where the original provider is based can also lead to duplication of advice because it becomes necessary to transfer the case.

17.3 Please also refer back to our comments about duplication at points 1.35-1.37 above.

17.4 The reality is that "duplication of advice" is not so straightforward as to be something easily cured (if a cure is required) by exclusive contracting. We suspect that more often than not "duplication of advice" is either unavoidable due to force of circumstances, or simply "different and often better advice".

Q8.18
Apart from the generic criteria that we set for bid rounds, do you have any suggestions for specific criteria that we should use in bid rounds for the exclusive services to ensure
that providers have the right level of experience and expertise?

18.1 The emphasis should be on quality and experience. This could include:

- Peer Review rating
- Ratio of solicitors to non-admitted staff
- Ratio of Supervisors to supervised
- Years of experience
- Accreditation Level
- Views of NGOs, for example in detention field

18.2 The Immigration Criteria for the recent round of sponsored training contracts could be a model for some of the criteria.

Q8.19 Do you agree with our approach to develop national and regional providers? If so, are you a provider or part of a network that would be interested in becoming this type of provider?

19.1 ILPA agrees that it is beneficial to have a country-wide network of providers who are able to respond quickly and flexibly to changes in demand. This will not be achieved if the number of suppliers continues to fall as it has done over the recent years, and certainly not if this trend is accelerated by these proposals.

19.2 The LSC must surely realise that there is a finite number of accredited individuals able to deliver immigration services, and now a smaller number of firms willing to employ these individuals. The LSC should continue to work with, and encourage, all the remaining suppliers who provide a good quality service, however small or large. We hope that what will be left will collectively be sufficient to be called a "network". The best hope of achieving that depends on realistic changes to the basic fixed fee scheme proposed in this consultation paper so that an adequate number of suppliers will remain able and willing to contract with the Commission.

19.3 If the LSC identifies areas where there are not enough providers it must provide business incentives if it wants organisations to open offices in these areas. The most important business incentive is security and certainty, something that has been lacking now for many years as one "reform" follows the next. Neither the current system nor that proposed provide for sufficient profits to enable suppliers to take on a greater degree of risk. Reducing risk is an important element of keeping costs down.

19.4 The present consultation is not only the latest manifestation of the LSC's apparent lust for change in the funding of immigration and asylum work, but is also is one that in itself breeds insecurity as we face the prospect of contracting to supply services at low fixed fees with no certainty of fair compensation when we work beyond the hours putatively covered by the fee. For example, as already noted, at first stage asylum Legal Help if costs were £2,200.01 we could claim them in full under the scheme, but if they were £2,200 we could not. How many cases would have to come in at under £550 to balance the £1,650 loss on that one case alone? We cannot plan for the contract year beginning in April on the basis of this level of uncertainty. It undermines all the LSC's aspirations for the provision of a network of quality advice.

Immigration Law Practitioners' Association
October 2006

ILPA is a professional association with some 1200 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 teaching, provision of high quality resources and information. ILPA is represented on numerous government and appellate authority stakeholder and advisory groups.

Please do not hesitate to get in touch with ILPA with any questions.
Telephone: 0207 251 8383
Email: info@ilpa.org.uk
Address: ILPA, Lindsey House, 40/42 Charterhouse Street, London EC1M 6JN