ILPA's Response to LSC Consultation on Devolved Powers

Introduction

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ILPA cannot let this consultation pass without reminding the LSC that the trust of immigration practitioners in the LSC's work in this field and in its commitment to deliver quality immigration work has never been lower. As members spend more and more time doing unremunerated administration, just to get to the point where they can start to perform their primary function – the giving of good quality legal advice to vulnerable people – the sense of despondency for the future is palpable. We warned the LSC that their proposals would see the haemorrhaging of quality advisors from the field, and we think we were right. Will the return of devolved powers prefigured by this consultation do anything to reverse matters? Certainly a proposal to return devolved powers to some more suppliers is welcome. However we note that the proposals will also allow for the withdrawal of those powers on similar criteria. Nevertheless, ILPA shares with the LSC the desire for practitioners to be confident that the procedures which are put in place are fair and equitable. It is vital that they will be implemented in a trustworthy manner by the LSC. It is for the LSC to now win that trust, which means showing that its commitment to quality is independent of the demands of short term political expediency.

In terms of winning that trust, we note with concern that the independence of the LSC is even an issue for central government, as shown by the comment by Lord Falconer below, and that the Commission appears not to have not been trusted by the DCA to deal with the grant of funding in the case of reviews from the proposed single tier Asylum and Immigration Tribunal. He stated that the body granting funding in those appeals

"*will not be the Legal Services Commission – some body that is in some way related to the government – but independent judges who will determine where the line is to be drawn*".

1. The removal of devolved powers from immigration suppliers has caused considerable inconvenience to ILPA members and has helped prevent them from giving the service to their clients that they need. The removal was an unwelcome retreat from the 'partnership relationship' once championed by the LSC. ILPA argued strongly against the removal in their response to the previous LSC consultation on CLR and Fast Track processes dated 26th January 2004. Nothing has happened since then to cause us to alter our position. Indeed, the departure of more competent suppliers from the field, and of more young case-workers and solicitors into other areas of law, supplies further evidence of the dire consequences of LSC policy. The irony is of course that ILPA agrees with the LSC that there are poor practitioners in the field whom we would wish to see leave it- but these measures are not targeted at them.

2. The contents of the LSC consultation paper are of concern both to those members who currently do not have devolved powers and also to those few members who were given them back, but who would be subject to twice yearly review under the proposed criteria. ILPA is very keen to see appropriate measures taken by the Commission to extend

devolved powers to more suppliers as a matter of priority. However, we are not convinced that the statistical approach proposed here is appropriate either in theory or in practice.

3. It is a great disappointment to ILPA that once again the LSC have begun a consultation paper with a broadly negative statement about those whom it is funding :-

"*A significant majority of appeals continue to be dismissed at the IAA and we remain concerned about the number of unmeritorious appeals being pursued under public funding.*" (Paragraph 2).

4. ILPA notes that this assertion is almost the same as that made in paragraph 3 of the previous consultation paper (although at least in the previous paper we were given the percentages of cases dismissed, whereas in the current consultation paper we were merely told that it is "*a significant majority*"]. It is not even clear whether the term "*a significant majority*" is in fact the same figure referred to in the previous consultation paper or a new figure based on new statistics. In a paper which is advocating the use of statistics drawn from suppliers to decide on the allocation of devolved powers, it seems insensitive to say the least that the Commission does not see fit to provide the statistics justifying its own assertions.

5. ILPA is concerned that this type of argument [i.e. "*your appeal has been dismissed, therefore your case is unmeritorious*"] has become a kind of mantra for the Commission and the Government and that it underpins all of their decision-making in this area. If one was to replace the word "*meritorious*" with the word "*bogus*" (that is, "*your appeal has been dismissed therefore it was bogus*") then the position of the Commission is not far removed from that which one finds in certain sections of the tabloid media and in ministers when playing to the gallery – [Tony Blair's mention of the 'gravy train' comes to mind]. ILPA would like to reiterate, once again, that the fact that an appeal has been dismissed does <u>not</u> mean that it was unmeritorious; and certainly the fact that an appeal has been dismissed does not mean that the application of the merits test and exercise of the devolved power to grant CLR was incorrect.

6. ILPA must reiterate the point they made in their response to the previous consultation paper of 26th January 2004 regarding the statement that a "*significant majority*" or "*76 to 77 per cent*" of appeals are being dismissed. These are figures of little value unless one is comparing like with like. In our view, the appeals being compared must be only those funded under CLR. We also anticipate that as the new financial thresholds bite, and as we start to have to prepare appeals where we have not been present at interviews, it will be harder generally to win appeals. Yet they will not have become less meritorious.

7. ILPA is profoundly disappointed to find itself once again having to explain why the dismissal rate on appeals is not the appropriate indicator as to whether a case has merits or whether a devolved power was properly exercised. The difficulties that practitioners face in making a decision on CLR have been set out before but, to summarise them once again, they include the following:-

i. the burden of proof on the Appellant – this burden is not the criminal standard, nor the civil standard, but the " *real risk*" standard. It is a lower standard because of the recognised difficulties that the Appellant has in proving his or her case and also the significant issues of life and liberty that are at stake. We would refer you to the recent comments of Sedley LJ in the case of Bayatav (2003) EWCA CIV 1489, where on considering the standard of proof he states:

"*If a type of car has a defect which causes one vehicle in ten to crash, most people would say that it presents a real risk to anyone who drives it, albeit crashes are not generally or consistently happening*."

ii. The CLR merits test which allows for funding where the prospects of success are on the border line or are unclear. The test does not require certainty that an appeal will succeed and no sensible practitioner could ever be certain that an appeal will succeed. At the same time, no practitioner could ever be certain that an appeal would not succeed, for at least some or all of the following reasons:-

a.the chance of success on appeal is, unfortunately, still highly influenced by the identity of the Adjudicator hearing the appeal.

b.credibility – many if not most appeals revolve around the issue of whether credibility is accepted. This is extraordinarily difficult to predict. ILPA members can give numerous examples of this problem. For example, one ILPA member had a client who alleged that she had been raped at the hands at security forces and had a medical report from the Medical Foundation to support this allegation. How could they possibly have predicted that the Adjudicator would find their client not credible and say in his determination that "……*if the Appellant had suffered the indignity of being raped she could have screamed*".

These are just some of the reasons why it is extremely difficult for even the most experienced practitioner to predict the outcome of an appeal. Therefore, ILPA believe it is both morally and intellectually wrong for the Commission to say that because an appeal has been dismissed, that appeal was not meritorious and that the practitioner applying the merits test did so incorrectly. Each exercise of the power to grant CLR must be looked at on its merits, without the benefit of hindsight.

8 As set out above, practitioners who no longer have devolved powers have experienced real inconvenience in assisting their clients. In ILPA's previous response, we set out our concerns that appeals which should have been funded under CLR would not be funded. Since the restriction on the granting of CLR, ILPA members report being consulted by new clients who have wrongly been refused funding on the merits by their previous representatives and who in some cases have not been advised of their appeal rights. We accept that some ILPA members will be to blame in this. We also accept that this is not a new problem, but it is one which is

encouraged by the removal of the power to grant CLR. The huge significance of this devolved power to the way suppliers can represent their clients means that the process of assessing who can have the devolved power is extremely important, both in terms of fairness to practitioners and to avoid it negatively impacting on clients.

9 Turning to the proposed criteria, ILPA considers that generally there is an overarching problem with the proposals that they mean that there will be pressure on representatives to alter their practices to meet the new criteria, which we fear will be to the detriment of clients.

10 Dealing with the proposed criteria as in the order as in the consultation paper, we have the following comments:

A. Success rates on application to the LSC (costs extensions) – it is difficult without further explication, to see how this criterion could be used in any meaningful way by the LSC in deciding whether a supplier should or should not have devolved powers. For example, if one supplier requests three hours for an attendance and is only granted two hours, then is that seen as a success or as a failure or, as a part success (or part failure)? Then, there are also the significant variations that ILPA members have experienced in the decision-making of different members of the LSC Immigration Team. This has always been the case to an extent, but the recent rapid expansion of the Team has noticeably exacerbated the problem. Just as an example, some caseworkers are much more likely than others to refuse an extension for a conference with Counsel.

We therefore have concerns about this criterion, especially when there is no appeal right against a decision to refuse an extension

Further, how would the Commission measure or even know about the situation where a caseworker has refused to grant an extension but the supplier has gone ahead and done that work on a pro bono basis, and that work has contributed to a success outcome? That work may be fundamentally important to the "*success*" of the Appeal, but the refusal of the extension will remain on the record.

There is clearly inconsistent [not to say unhelpful] decision-making taking place on extensions and, until the profession has confidence in the process, we have great concerns about this criterion being used for the return or the removal of devolved powers.

B. Success rates on applications to the LSC (CLR)

The issue as to consistency between caseworkers set out under A above, is also relevant to this proposed criterion.

C. Success rates at the IAA

Before one can deal with this criterion, one must consider the fundamental question of "what is success?". The following factors need to be considered:

i. is it a success if you win on Article 3 grounds but not on asylum grounds?

ii. is it a success if you win on Article 8 grounds but not on Articles 3/Asylum grounds?

iii. is it a success if you have managed to deal successfully with the Reasons for Refusal Letter of the Home Office, but the Adjudicator dismisses your Appeal for other reasons ?

iv. will there be a concept of a "*near miss*" as we have seen mentioned by Lord Falconer in his comments on the new Asylum and Immigration Bill?

iv. What about a case that does not succeed initially but then succeeds later on (outside the period of review), either at the Tribunal or on statutory review or in the Court of Appeal, several months or even years later? ILPA members have numerous examples of such cases.

D No merit certificate - ILPA has no objection in principle to this being considered as a criterion, but points out that there is no appeal right against such a certificate. There must therefore be no automatic loss of the devolved power on the basis of the issue of such certificates alone.

E Contract compliance and category status - ILPA would refer to the concerns that it raised about the audit process in the past, and the fact that the category of a supplier on a cost compliance audit is not necessarily a proxy for whether the appeals with which that supplier proceeded were, or were not, meritorious; indeed as the poorer quality suppliers are deprived of contracts this becomes more and more true.

F The volume of CLR matters – ILPA is concerned that this criterion will work against sole practitioners, or those in small immigration departments, where the number of appeals was low, but the quality may be high. Against this, ILPA agrees that the volume of appeals is a relevant factor, as it clearly affects the statistical validity of the other measures, since the smaller the number of appeals, the less their outcomes can be taken as indicating a trend.

G Accreditation levels – while this criterion may be relevant, it is clear that many good and experienced practitioners will not obtain the highest accreditation level. Also, insofar as the accreditation process impacts on quality within a supplier, it is not a question just of the levels of accreditation within that supplier, but how many people are at each level and what type of supervision exists there;

H Any other outcome data – we look forward to hearing to what this refers, and for a further consultation, once this is made clear.

11 We note that the Commission intends to consider applications twice a year based on a review of their data over the previous six months. But cases last well beyond a six months . Interestingly, the first review date is July 2004 which would therefore suggest that the first period

would be January to June 2004. This seems a strange period to choose, considering that significant changes have occurred in that period - in particular, the fact that the LSC took over making decision on grants of CLR from 1st April 2004., Not many of those appeals would have been finally determined in the period in question. We welcome the early reconsideration of the distribution of devolved powers but think that the wrong criteria are being introduced here.

12 ILPA notes the contents of paragraph 12 and has significant concerns that suppliers have refused and will refuse to take on certain cases as a result, and that they will continue to apply the merits test too harshly. ILPA believes that there is no question but that this has been happening already, and that, given the importance of the return of devolved powers, it will continue to happen as a result of either conscious or unconscious decisions by suppliers. It is difficult to see how the LSC would be able to measure this in any way. Certainly, the LSC cannot measure those cases where CLR has been refused by practitioners or by themselves, and where those cases have gone on to be successful when the clients were represented on a pro bono or private basis or where the cases have merit themselves but have not succeeded because of the various factors as set out above.

13 Regarding paragraph 16, ILPA has the following comments to make:

a. We do not agree with the proposed criteria as we believe that they are based on the false starting point, that final success in an appeal is a definitive or meaningful guide as to the merit of the appeal or of the decision to grant funding.

b. Given our response to (a), we do not wish to add any further criteria.

c. We do not wish to offer a benchmark for each of the criteria. One needs to examine each and every decision on its individual facts. However, if there are to be benchmarks imposed upon us, we believe it is important that the LSC set out their proposed benchmarks as soon as possible and how you justify them.

d. The decision as to whether a supplier obtains devolved powers or loses them is extremely important to suppliers.. We believe, contrary to the Commission's naivety expressed in paragraph 12 [although recognised in paragraph 15), that suppliers will consciously or subconsciously try to meet the criteria or benchmarks put forward by the Commission, and that this will result in meritorious cases not being funded or, those that are being funded not being worked on to the advisors full ability. As to the effect on charities in the voluntary sector, as ILPA has stated previously, they will be overwhelmed with unrepresented or under- represented applicants.

e. ILPA considers that the failure to grant powers to suppliers or a decision to remove devolved powers from suppliers, would adversely affect disadvantaged groups and particularly minority communities. ILPA considers that clients with more difficult cases and clients with special needs will particularly lose out, as the job of representing immigration clients becomes harder still. ILPA also considers

that the proposed rules will adversely impact on smaller suppliers and therefore may affect a disproportionate number of representatives from ethnic minorities, within those suppliers..

14 The loss of devolved powers for a supplier that already has them would be an extremely serious matter for the clients of that supplier and possibly threatens the viability of that supplier. Yet ILPA has serious concerns that the Commission will not be able to reach proper or well reasoned decisions using these criteria in relation to devolved funding.

15 Given the amount of time and effort that the Commission have put in recently to supposedly dealing with bad suppliers and removing them from this system, ILPA continues to express its dismay and surprise that the Commission cannot trust the suppliers with which it now contracts, with the grant of devolved powers. It is ILPA's view that if there are bad suppliers still out there, then they should not get or keep contracts with the Commission. ILPA also believes that if the Commission does not feel that they can trust a supplier with devolved powers because they do not believe that the supplier has the experience, professionalism and commitment to exercise that power properly, then it is hard to understand how it can still fund that very same supplier to represent a client at an appeal, given that the preparation of the appeal is absolutely crucial to whether it will succeed or not before the Adjudicator. ILPA asks the Commission to confirm that its aim is that all suppliers contracting with it will have devolved powers.

16 The Commission wishes to use these criteria as a measure of the quality of a supplier before they can trust them to grant CLR under devolved powers. ILPA considers these criteria are a flawed starting point. They are in no way a reliable measure of the quality of work carried out at a supplier. Given the Commission's track record in measuring the quality of work at a supplier - (one only has to look at the fact that they have now denied devolved powers to suppliers that they were more than happy to grant them to for at least the past four years, and who have passed all of the Commission's various audits and supposed "Quality" marks, etc) - then the publicly-funded profession can have very little faith in the Commission being able to deal with the quality issue now.

17 ILPA notes from paragraph 14 that suppliers will have an opportunity to challenge an assessment under the criteria and to provide alternative data. Given ILPA's concerns about the quality data held by the Commission on individual suppliers, ILPA can see that this will be a considerable area of disagreement between the Commission and those suppliers who wish to challenge an assessment. In addition, ILPA believes that on assessment and before powers are removed, suppliers should expect and demand that the Commission examine each and every grant of CLR, and whether the individual decision on those individual cases was a correct decision, as measured by their peers and not by some analysis of the final "*success*" rate. Regrettably these disputes will inevitably add another time consuming layer of non-remunerative work to the burden suppliers are already shouldering.