ILPA REPONSE TO MINISTRY OF JUSTICE CONSULTATION:-

THE COMMUNITY LEGAL SERVICE (FUNDING)(AMENDMENT) ORDER 2008

1. ILPA is a professional association with some 1,000 members who are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and others working in this field are also members. ILPA exists to promote and improve the giving of advice on immigration, asylum and nationality law through training, disseminating information and providing research and evidence-based opinion. ILPA is represented on numerous government and other stakeholder and advisory groups, including the Civil Contracts Consultative Group established as part of the settlement between the Law Society and the Legal Services Commission.

2. This Consultation is expressed to be "on whether the Order met its policy objective, rather than a consultation on the policy itself (which was the subject of negotiations instead)". [1] We are very concerned at the lack of open consultation on the policy. We do not consider the negotiations conducted with The Law Society (TLS) to be an adequate or appropriate alternative to a proper consultation on the policy in line with the Code of Practice on Consultations. We appreciate that the Unified Contract only obliges the Ministry of Justice (MoJ) /Legal Services Commission (LSC) to consult with TLS and the Advice Services Alliance (the memorandum does not specify whether they have been consulted). However, it does not preclude them from consulting more widely as good practice would lead us to expect.

3. We have not raised this objection earlier as the Memorandum is the first time that it has been indicated that the consultation on the Funding Order was not to be a policy consultation.

4. TLS does not represent all stakeholders or suppliers, for example it does not represent not for profit providers, barristers or clients. No mention is made of the extent (if any) of the consultation with the Advice Services Alliance. Contrary to the requirement of the Code, that consultations be widely accessible and should make clear what the proposals were, we understand that the negotiations were expressed to be on a strictly confidential basis. This is not an acceptable way for a Ministry of government to conduct any "consultation". The Memorandum at paragraph 7.7 states "Both TLS and LSC kept in close contact with

[1] Paragraph 7.8 Explanatory Memorandum.

various other representative bodies during these discussions". ILPA received no communications from the LSC.[2]

5. We have not been provided details of the "various options" that were apparently considered during the detailed discussions between MoJ/LSC and TLS[3].

6. ILPA has significant comments to make about the policy adopted by the MoJ/LSC and reflected in this draft Funding Order (see below). Nevertheless, notwithstanding our fundamental objections to the lack of consultation ILPA proposes that the MoJ/LSC:-
    a. Implements the funding increases in this Order on 1 July as proposed, as our members need these limited increases to improve their dwindling incomes from LSC funded services.
    b. Reopens a formal consultation on the levels of funding as soon as possible.

8. ILPA in principle welcomes any increases to the funding rates of Legal Help and CLR. Legal Help and CLR rates had not been increased since April 2001. In that time the costs of suppliers have risen so that they have faced a real reduction in the rates of remuneration. Many ILPA members have struggled to continue to provide funded services in those circumstances. There has been immense pressure on them to move away from publicly-funded work and it has become increasingly difficult for suppliers to afford to keep experienced staff working in this sector. This was followed by the introduction of the fixed fee scheme, which penalises suppliers who undertake more complex cases and which contains an inherent incentive to reduce the quality of work carried out if suppliers are to avoid losing further costs.

9 With this as the background the most obvious response to the increases proposed is "too little, too late". An increase of 2% on Legal Help would be less than half the inflation rate for the last 12 months if it were across the board, which it is not. An increase of 5% on CLR is just ahead of the retail price index increase for the last 12 months but again the increase is on a limited range of cases and it has been 7 years not 1 year since the last increase. This should be of major concern to the MoJ/LSC because, unless the remuneration for providing decent quality advice to clients increases, it will become more and more difficult for them to contract for the quality services which they are obliged to provide. The increases are too small and by being limited they will produce too small an increase to suppliers' incomes to go anywhere to offsetting the effects of inflation.

10 The decision to limit the increases in hourly rates to the graduated fixed fee (GFF) regime only is also illogical. The fixed fees are certainly too low (even taking these increases into account). The increases offered are unlikely to be sufficient to change the view of many of our members that it is extremely difficult for them to avoid losing money under the scheme, or that to do so they must prioritise taking on simple cases over the more complex. Notwithstanding our complaints about the poor payments under the GFF scheme, it is not rational that the increase in hourly rates should apply only to the GFF cases and not to all cases. There can be no justification that the cases within the GFF

[2] We understand that TLS intended to invite ILPA to a meeting to brief representative bodies on the proposed settlement but the invitation was never received by ILPA. We understand that the MoJ/LSC proposals explained at that meeting we stated to be strictly confidential. We would therefore have been unable to consult members on the proposals. We believe that the onus should have remained on the MoJ/LSC to consult openly with us and others as they have routinely done in the past.

[3] Page 1, MoJ response to 3rd question of the "Summary: Intervention and Options" version 1.0 1 April 2008.

scheme are somehow more deserving of higher rates or more difficult than those caseswhich are excluded from the schemes. Excluded cases include advice and representation for:-

a. unaccompanied asylum seeking children;
b. detainees including the detained fast track;
c. appeals that continue (on the appellant's or respondent's application) beyond an initial appeal;
d. cases relating to asylum claims first made before October 2007;
e. matters started by the supplier before July 2008 but still continuing.

11 Given particularly the vulnerability and special needs of clients who are unaccompanied asylum seeking children and of detainees it seems bizarre that the MoJ/LSC have decided to fund those at a lower hourly rate rather than the reference rate for the GFF.

12 It is not rational that appeals beyond the initial AIT decision are not to be increased. Cases do not generally get simpler or easier when they go on to a reconsideration hearing or are remitted to the AIT from the Court of Appeal. Yet they are to be funded now at the lower rate.

13 Where the appellant loses at first instance any work applying for reconsideration under s103A of the Nationality Immigration and Asylum Act 2002 is subject to the need for a s.103D costs order. The payment of suppliers is "at risk". When these fees were introduced in 2005 the LSC accepted that the "risk" element justified an increase in the rates payable if a s.103D order was made of 35%[4]. No explanation has been given by the MoJ/LSC as to why that is no longer the case and that at risk rates should now be at a smaller increase over the hourly rates used in the fixed fee calculations. That linkage must be restored.

14 Our final objection to the differentiation in hourly rates between different cases is based on its adding a further complication to an already overly complicated fee scheme. Our members are already struggling with a scheme where, in addition to the contract specification and rates scheme, there are currently:-

a. 69 pages of "frequently asked questions" explaining the LSC's view of matters that have been unclear from other documents;
b. an additional 11 page guide to completing the monthly CMRF in immigration (there was already a general guide purporting to explain this, which clearly generated too many "frequently asked questions");
c. 32 pages of guidance (including 100 footnotes) in the LSC Manuel on the codes to be used when reporting immigration matters and which determine what payment the LSC makes.

15 By amending that rates for some, but not all, cases and for parts only of those cases where the rates are increased, the scheme is further considerably complicated. ILPA members

[4] LSC "the Asylum and Immigration Tribunal: Amendments to the LSC General Civil Contract: Responses to the LSC Consultation: Post Consultation Summary Report July 2005 [sic] at page 7;*"As a result of the comments received and having considered the merits test that will be applied by the Judiciary, the Commission has re-assessed the risk premium and decided that it should be increased to 35%. This will be payable when a costs order has been granted and will be claimable across both the review application and reconsideration hearing. It will only apply to profit costs and not disbursements…The uplift will apply to Counsel's fees"*

are at a loss to understand how they will be expected to use their computer systems to record the amended rates. Most systems record charging rates against the name of a particular funding scheme (e.g. Legal Help) for calculation of the value of work in progress and to generate claims to the LSC. As far as ILPA is aware nothing has been said by any of the various computer system suppliers about how suppliers should deal with the amended schemes. Have they have been consulted over how the amended schemes can be computerised?

16 We would ask the MoJ/LSC to confirm that they have been and that they have indicated that existing systems can cope. However, we have doubts as to whether that will be the case, given that some members report that they have already had to revert to largely manual billing systems to deal with the existing complexities. If amendments to systems are required them it is our members as the purchasers who will bear the costs of that. Such costs could easily outstrip the increased income from raised fixed fees. How will a computer system be expected to cope with the possibility that for example a case on CLR will go down to a lower charging rate if the Home Office apply for reconsideration against a successful decision? Or that Legal Help is to be calculated at different rates for different immigration cases?

17 The additional administrative burden for suppliers has not been factored into the cost benefit analysis of these changes and is a crucial omission by the MoJ/LSC.

18 The figures for the predicted expenditure on Legal Help and CLR for cases excluded from the GFF are not given in the explanatory statement and are not easily accessible to us in the limited time available. Increases should be provided across the board. We do not consider that such an increase would be prohibitive. It is instead essential if the MoJ/LSC is to stem the tide of quality representatives who are moving away from legal aid work (either entirely or by reducing the proportion of legal aid work they conduct) out of financial necessity.

19 We note that paragraph 7.3 of the draft explanatory statement to the Order states, of the October 2007 fee schemes, "The fees schemes had been introduced under a different amendment provision (clause 13.2) of the [Unified Contract]". We note that the settlement of the judicial review proceedings between the MoJ/LSC and TLS included at paragraph 2.1.2 that TLS would not further challenge the MoJ/LSC contention that the fee schemes had been introduced under that clause. ILPA was not a party to the proceedings or to that settlement and was not happy with that concession, as we felt it was clear that the MoJ/LSC intention had always been that the schemes were introduced under clause 13.1. However, we do not intend to take that matter any further.

20 Finally, ILPA made detailed objections to rules set out in the general and immigration specifications and the associated fee schemes in its various consultation responses[5] and in subsequent formal and informal contacts with the MoJ and LSC. This Order formally incorporates those rules. We repeat formally our objections to those rules and to their

[5] Principally "Response of ILPA to LSC Consultation on Draft Unified Contract Specification 2007" 16 April 2007; "ILPA Response to the Consultation on the draft detention advice specification" 16 April 2007; Letter ILPA to Stephen Jones, MoJ, re Legal Aid Regulations 24 July 2007; Letter ILPA to Fiona Hannan, LSC, re Advance copy of the Immigration Specification, 25 July 2007; all of which are available on the ILPA website and which can be provided on request.

incorporation into this Order (but without any expectation that any attention will be paid to this).

21 As to whether the Order has met the policy objectives set out by the MoJ/LSC, we consider that it has.

Sophie Barrett-Brown

Chair

ILPA 14 May 2008