

Immigration Law Practitioners' Association) ILPA response to the Ministry of Justice Consultation on the *Community Legal Service (Funding) (Amendment No 2) Order 2011*.

INTRODUCTION

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 900 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics and non-governmental organisations are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous Government, and other, advisory groups. ILPA is a member of the Civil Contracts Consultative Group set up following the litigation between the Law Society and the Legal Services Commission.

SCOPE OF THIS RESPONSE

This response addresses only the draft *Community Legal Service (Funding) (Amendment No2) Order 2011* which was sent to the Law Society of England and Wales and the Bar Council on 13th July 2011, not the draft Criminal Defence Service Order sent on the same date. Further, whilst it appears that the draft Community Legal Service Order is apt to achieve what it sets out to achieve (namely, imposing a 10% fee cut across civil legal aid at every level and prescribing rates payable to experts) it is what the order sets out to achieve which remains the focus of ILPA's concern and therefore the focus of this response.

A SUPPLIER BASE UNDER THREAT

ILPA has repeatedly called attention to the financially precarious nature of publicly funded immigration and asylum work.¹ The proposal to cut fees by 10% at every level of work represents a grave threat to what remains of the supplier base, and to the quality of work. This threat which cannot be considered in isolation from the proposed cuts to scope or in isolation from the current funding arrangements. The following points have already been raised by ILPA in our response to the Green Paper and in evidence to the public bill committee but bear repetition here.

ILPA said in its response to the consultation on the Green Paper

“The fixed fee for advising in an immigration case is £260; £459 in an asylum case. The nominal hourly rate for preparation is £58.50. That hourly rate is paid if the value of the case exceeds three times the fixed fee. If the case were to take just less than three times the fixed fee then only the fixed fee would be paid and the payment per hour would work out to just over one third of the nominal rate or around £19.50 per hour. Rates are

¹ See, *inter alia*, minutes of the Legal Services Commission Civil Contracts Consultative Group, *passim*; minutes of the Immigration Representative Bodies Group that sat under that group, ILPA's witness statements in *CMX et ors v SSHD* [2010] EWHC 1896 and ILPA's response to the Ministry of Justice consultation on the legal aid Green Paper of 14 February 2011.

ILPA Lindsey House, 40/42 Charterhouse Street London EC1M 6JN Tel: 020 7251 8383 Fax: 020 7251 8384

email: info@ilpa.org.uk website: www.ilpa.org.uk

essentially unchanged since 2001. Yet these are the rates that it is proposed to cut. For comparison Her Majesty's Court Services current Guideline Hourly Rates for 2010 for a Grade B solicitor (over four years post qualification experience) would be £242 and for Outer London for a Grade C (less than four years post qualification experience) £165.² We provide further details of fees in **Annexe 3**.

The Legal Services Commission has said that it considers that across a caseload there will be 'swings and roundabouts': that legal aid fixed fees will not cover the costs of all cases, but would more than cover the costs of others.³ We have seen nothing from the Legal Services Commission that examines the effect of removing legal aid from immigration and asylum support cases; it has not made any proposals to reassess whether it still considers that there will be 'swings and roundabouts' if practitioners are restricted to undertaking asylum and detention cases. At the same time it is proposed that more of the simpler cases (the "swings") will be taken out of the face to face contract and dealt with instead by a telephone service, leaving a disproportionate number of "roundabouts" in which suppliers will do more work than the fee pays for.

ILPA has also long argued for the improvement of payments arrangements as suppliers carry very large amounts of unpaid work in progress (WIP) and disbursements for the Legal Services Commission. Under the current contract, disbursements can be billed every six months (often months after payment has become due as a matter of professional ethics and then only on new cases, not the thousands of ongoing cases providers already have open) but profit costs cannot be billed until a case reaches a particular stage; the timing of which is in the control not of the Legal Service Commission or of representatives, but of the UK Border Agency. This already causes tremendous problems, not least for private providers who pay partnership tax on money they have never seen, and for the Legal Services Commission which does not know, beyond the broadest brush calculations, what it owes. Asylum cases generally take longer than immigration cases (and both take longer than cases in other categories of civil law) and the problems will be exacerbated if only asylum remains in scope and if shorter cases are diverted to the telephone service. The Government's intention to preserve asylum cases within scope will be thwarted if there are not lawyers of high quality willing and able to continue doing such work. There is an urgent need, both for providers and for the Legal Services Commission's proper accounting to address the question of work in progress and the urgency can only be increased by the proposals in the consultation paper.

The cumulative effect of the difficulties of the current funding regime and the proposals renders the supplier base for asylum and immigration casework at risk. The combined impacts and level of risk have been largely ignored in the consultation paper.

Cases before the Special Immigration Appeals Commission are funded on full certificates but there are relatively few of these cases and they are undertaken by the very few practitioners with experience in these complex cases.

It is clear from the above that strategies for financial survival may include firms seeking to specialise either in cases of exceptional complexity that will take three times the fixed fee, or identifying a sufficient number of cases sufficiently straightforward to be brought within the fixed fee or reducing the proportion of legal aid work they undertake. From the outset many organisations, including ILPA, have repeatedly expressed concerns that fixed fees will lead to 'cherry-picking' of cases. The evidence that those concerns were well founded is admirably summarised in the report *Review of quality issues in legal advice: measuring and costing asylum work (June 2010)* produced by the Information Centre for Asylum Seekers

²See http://www.hmcourts-service.gov.uk/publications/guidance/scco/previous_rates.htm

³ *Legal aid: the way forward* Cm 6993, Legal Services Commission and Department for Constitutional Affairs.

and Refugees (ICAR) for Refugee and Migrant Justice, the Immigration Advisory Service and Asylum Aid and the sources cited therein.

Legal aid work can only survive while there are firms not only willing, but also able, to deliver it. Following the latest tender, there is no publicly funded legal advice in immigration and asylum in some parts of the country. Devon Law Centre has closed, and many seeking help in the Plymouth area now have to go as far afield as Bristol to find legal representation. In the Dover ports area no contracts have been signed in asylum and immigration. In both areas, the Legal Services Commission has invited expressions of interest for new tenders.

If providers are lost to the legal aid scheme, those providers will be lost for good. The risk is that there will not be providers for the asylum cases which it is intended to retain in scope.

There is a need for the Ministry of Justice to look at how it can best support the best lawyers and advisors doing legal aid work. The more they are able to flourish, the better value the Government gets from the legal aid budget.

...

The years particularly since 2004 have seen many widely respected firms give up the unequal struggle and leave the field of legal aid immigration work. Winstanley Burgess closed its doors in 2004, while firms such as Wesley Gryk solicitors and Bates Wells and Braithwaite left legal aid work. When Wilkin Chapman closed its legal aid immigration and asylum work in Hull this left the area without legal aid advice in immigration and asylum. Dexter Montague closed its immigration and asylum legal aid in Reading. Both firms continue to do private work. In June 2010 Refugee and Migrant Justice, which, at the time of its closure had 13 offices in England, some 336 staff and a caseload of c. 10,000 live cases, entered into administration. Deighton Guedalla closed its immigration department in 2010 and Glazer Delmar ceased to do legal aid work in immigration, while retaining a private immigration department, in the same year. ILPA doubts that the exodus is over.

Immigration and asylum work is financially precarious. There is no cushion to protect firms and organisations against the effects of uncertainty or to allow for contingency planning. Unlike some other areas of civil work such as housing or family very few immigration or asylum cases proceed onto the more highly remunerated public funding certificates. Many legal aid providers, by dint of many hours of work that is done without pay, for all that is rarely recognised as pro bono work, strive to make up the difference between what the Commission will pay for and the service to which they consider that their clients are entitled and that their professional ethics oblige them to provide. There comes a point at which these efforts cannot make up the shortfall in payment. ILPA's concern is that as income in the sector is diminished further still, provision will continue to decline and a critical point will be reached at which the number of providers who remain in the sector simply cannot meet even the level of demand for their services that the Legal Services Commission is prepared to fund.

The Ministry of Justice intends that asylum work remain within scope, recognising
“...the immediacy and severity of the risk to the individual...they could suffer persecution, torture or death...applicants may recently have fled persecution or torture. In these circumstances it may be difficult for them to navigate their way through the asylum process without legal assistance. In addition, applicants for asylum may be traumatised and so find it more difficult to represent themselves without legal assistance”⁴

⁴ Paragraph 4.30 of the Ministry of Justice Consultation paper.

The notion that it suffices to leave asylum work within scope to protect it should be regarded with scepticism in the circumstances described. In these circumstances, the additional cost of regulatory oversight cannot be allowed to fall back on legal representatives. It is the best, striving to provide the highest standards of service, who are stretched the furthest; to impose burdens that will drive them from the field will have the opposite effect from that intended; which is to raise the standards of advice.”

Since that time, the firm of Fisher Meredith has closed its legal aid immigration department. The Immigration Advisory Service – a national supplier with some 8000 active cases – entered into administration in July, just a year after the other large national not-for-profit provider, Refugee and Migrant Justice, has done the same.

We are aware that in answer to our concerns the Legal Services Commission and Ministry of Justice may point to numbers of offers to take over legal aid cases when the Immigration Advisory Service went into administration in July, with demand for these cases apparently (they have not all been allocated to new providers yet) exceeding supply. However, we point out that these will be cases at the old, and not the new rate; there is every incentive for a firm or organisation to sign up clients before the rates are cut. We also draw attention to the concerns relating to ‘cherry-picking’ voiced in our response, and to our concerns about quality.

Following the tender in 2010, no contract was let in the City of Plymouth for asylum or in the Kent ports. A retender produced a supplier in Kent, starting in June 2011; some eight months after the new contracts had started. It remains the case that no contract has been let in Plymouth and interim measures are still in place. Following the closure of the Immigration Advisory Service, although the overall number of expressions of interest exceeded the matter starts available, there are areas where there is a shortfall. At the time of writing (10 August 2011) the Legal Services Commission is asking for expressions of interest to take over Immigration Advisory Service Work in the City of Bristol, South Gloucestershire and North Somerset, Suffolk and Norfolk and the Commission has also highlighted to ILPA in meetings other areas where there is a shortfall including Merseyside. Thus advice deserts are a reality.

It is impossible at this stage to predict with any certainty how many providers intend to continue providing immigration legal aid in the medium to long term and how many are simply managing their exit or their transfer to private work.

The Government has no evidence to support what we take to be its assumption that a viable and adequate supplier base will remain after a 10% cut in fees. ILPA is aware from the experiences of members that there is already significant unmet need; that there are too few suppliers remaining to meet the demand for their services. The proposed fee cut is a further significant threat to the capacity of the sector. We recall that in her evidence to the Public Bill Committee on the Legal Aid, Sentencing and Punishment of Offenders Bill on 12 July 2011, Carolyn Downs, Chief Executive of the Legal Services Commission answered as follows:

Q 158 Mr Slaughter: *On a related point, I was just looking at your response to the Green Paper. The annex to that raises practical issues and concerns you had. It is admirably brief but I should like to ask you to amplify one or two of those points.*

You say, on provider sustainability, that

“we have concerns that fee cuts may result in market failure and premature exits from the market where, for example, a firm or Not for Profit organisation becomes insolvent.”

From your knowledge of the market, do you think that is a serious concern? As well as the fee cuts, will it be affected by the scope changes?

Carolyn Downs: *The issue around market sustainability is not one or the other; on civil, it is also about the single gateway. It is the impact of the three different budget reductions in relation to the single gateway, the fee reductions and the changes in scope. The area where we have had some concerns is about the large reductions in scope and the ability of certain parts of the legal services market to adapt to that, particularly the not for profit sector, which the Government absolutely accept in their impact assessments, and in the immigration and asylum field.* ⁵

There is a real danger that the imposition of a 10% fee cut will lead many in the sector who have shown many years of commitment to legal aid work to the conclusion that legal aid simply is not worth the candle.

The effects of the cuts are compounded by the problems of payment for work in progress (WIP). The smaller the profit margins, the more acute problems of cashflow. The questions of billing for work in progress, including the limitation of the ability to bill to disbursements, and to only some disbursements must be addressed and the Ministry of Justice must rapidly put in place arrangements to allow billing of profit costs as well as all disbursements.

To address the question of cash flow, it should be possible to bill exceptional cases on completion of the relevant stage. As far as we can identify, exceptional cases are not taken into account in calculating standard monthly payments and become a notional payment which remains notional unless and until it is offset against a debt to the Commission. Where there is no debt, we cannot see where payment for these cases is made. The delays in paying for exceptional cases are unacceptable.

The Legal Services Commission's bureaucratic procedures place an enormous burden on firms. This needs also rapidly to be addressed.

SCHEDULE 6: EXPERTS' FEES

The presentation of the Schedule is confusing, leaving it unclear whether the figures set out are hourly rates or fixed fees. This could be improved.

In certain immigration cases a DNA test is required to prove a relationship. The draft order proposes "£315" per test. We seek clarification of what is meant by 'per test.' We assume that it means 'per sample' (to evidence a relationship, two samples will be required). Members' experience suggests that it is possible to obtain a test for £315 per sample, but that this sum for two samples would be extremely problematic and it may be more difficult in any event when an applicant is outside the UK.

THE ALTERNATIVE

ILPA has repeatedly advocated the 'polluter pays' approach, urging the Government to tackle the drivers of costs in the system, in this case the UK Border Agency and its historically poor record of getting decisions right first time. The historical impulse to legislate frequently and badly in this field has also been a major cost driver, as has the Agency's approach to and conduct of litigation. The costs generated by these factors (e.g. to Court time and resources) will not disappear even when suppliers do. This is explored in more detail in ILPA's response to the consultation on the Green Paper. As we have explained, we do not advocate shifting of costs from one department of Government to

⁵ Cols 70-71

another; the aspiration is that if the UK Border Agency is made to bear the costs of its action (and, very often, its inaction) it will endeavour to make improvements which will reduce whole system costs. Any spending review which purports to be 'comprehensive' must surely take account of the true and significant costs drivers and tackle those, whereas the Government's approach in immigration and asylum smacks entirely of cutting costs by reducing access to justice for a disenfranchised and marginalised client group. Unless this is done, not only will individuals be deprived of access to justice, but an environment where there is encouragement or opportunity to maintain these costs drivers, which affect all cases, not only those within the scope of legal aid, will be maintained.

Sophie Barrett-Brown
Chair, ILPA
10 August 2011