RESPONSE FROM ILPA TO THE LEGAL SERVICES' COMMISSION DRAFT SPECIFICATION (SECOND PUBLISHED VERSION JULY 2009)

Due to the shortage of time available we have concentrated our comments on the immigration specification.

However, from the general arrangements we make the following remarks:-

1. Although the reduction in the minimum new matter starts (NMS) is welcome, in our opinion (without sight of the detailed procurement plans and any variations to the minimum contained in those) it does not go far enough. There are a significant number of well established, very high quality, providers who will not be able to meet a minimum requirement of 70 asylum and 30 immigration cases. We have already explained reasons why expansion cannot be expected from most of those suppliers currently carrying out fewer new cases. We expect some of them to decline to bid as a result. Others may put in bids that are unrealistic perhaps with the hope of keeping going for the first year of the next contract. Existing suppliers will be disadvantaged in this compared to new entrants who do not carry existing and usually long lasting caseloads. None of the possible results are to the advantage of the Legal Services Commission, to clients and potential clients or to those suppliers. We urge the Legal Services Commission to reconsider and reduce the minimum numbers.

We are also very concerned at the lack of certainty for immigration suppliers from the combined effects of :-

Paragraph 1.16 - the power to limit licensed work volumes after 1st April 2011.

Paragraph 1.27 – the significant power of the Legal Services Commission to reduce Matter Starts.

Paragraph 1.37 - Schedules do not last the same length as the Contract. There is a guarantee of 80% New Matter Starts in a new schedule but not in Immigration/asylum.

The contract is extremely one sided. It places all the risk on the supplier (who could find themselves at the apparent unilateral decision of the Legal Services Commission, with their contract slashed). The contract appears to us to be unfair and uncertain. It is certainly not a good basis on which a small supplier should be expected to plan to expand.

Stage Claims

In respect of the improvements to claiming arrangements in the immigration category, the draft specification states:-

LSC CURRENTLY REVIEWING CLAUSES 8.64 & 8.86 – BILLING ARRANGEMENTS IN LIGHT OF CONSULTATION RESPONSES – DRAFTING THEREFORE REFLECTS CURRENT CLAIMING PROVISIONS

However, we have heard (but have not been informed by you) that the LSC is actually considering going back on the proposals set out "in the light of consultation responses" and is reviewing them in the light of the Legal Services Commission's cash flow.

If that is correct it is unacceptable that the document is misleading in that way and that we have not been informed, given that ILPA has been one of the main bodies considering stage claims with the Commission.

We will not repeat all our arguments here about why additional claim points are required. Those have been amply demonstrated to the Commission. However, if the Commission is in effect asking suppliers to undertake more services than it can fund on the basis of those suppliers receiving significantly delayed payments, that is an unacceptable burden on suppliers. Where is the money eventually expected to come from to pay for those services?

Immigration Specification

8.6 (b) There is an issue with a suppliers existing clients who are in detention other than under fast track that the specification here does not seem to allow for the supplier to carry on representing them despite the apparent intention for this at un-numbered paragraph at page 21.

8.10 (d); A concern has been raised about the justification for the frequency of the enhanced Criminal Record Board check for Level 2 caseworkers who work with unaccompanied children seeking asylum. The checks may take 6 weeks or more to come through. The point has been made that this frequency is much greater than that considered good practice for some others working with children. Can you explain the basis for the frequency? Is it based on some best practice guideline as we are not aware of any that sets this frequency? We do not wish to undermine good practice in child protection but there is a point at which the only effect of additional measures is an increase in the bureaucratic burden. We would suggest that perhaps three yearly was more reasonable but with the caveat that there must be a new check on change of employer.

8.15; "Conduct of Legal Help" - the word "conduct" needs to be defined to avoid any doubt This can be done in the definitions in 8.1 if not required in other categories. We understand it to mean having overall responsibility for the client's matter - so probationers can work on Legal Help and Controlled Legal Representation matters under the supervision of and for the Level1/2 caseworker with conduct of the matter.

Also we understood that the Legal Services Commission had accepted that restrictions on work with unaccompanied children seeking asylum and Immigration Removal Centre work were to be that although conduct would be by a level 2 caseworker, that work ancillary to the case could be delegated. Why has this not been changed?

8.16; There is a significant time lag between caseworkers passing their Level1/2 accreditation exams and receiving confirmation of their registration at the new level from the Solicitors Regulation Authority (6 weeks +). Fiona Hannan at the Legal Services Commission recently agreed with Wilson and Co. that a person who passes Level 2 exams can start Level 2 work immediately and as long as the Solicitors Regulation Authority did not reject the registration for any reason they would be able to claim for the Level 2 work done prior to receiving the registration from the Solicitors Regulation Authority. We think this should be put in the specification; i.e. "you can claim for contract work which is carried out by a caseworker who has passed the required assessments for the level of accreditation (so long as they are not subsequently refused registration by the Solicitors Regulation Authority at that level for any reason)".

The other point to make is that the Law Society is now once again responsible for accreditation so all reference in the spec to the Solicitors Regulation Authority possibly should be changed to the Law Society?

8.19 We are disappointed that our submissions in respect of proposed restrictions on clients from outside the procurement area have apparently been ignored.

8.20 – 8.23 As drafted these imply that a sponsor may only sign a Legal Help form but not a Controlled Legal Representation form. We did not understand that to be the Commission's intention. This can be remedied by amending 8.20 to say "may sign the legal help or Controlled Legal Representation form…" and in 8.22 starting "The Legal Help form or CLR form cannot…".

8.31 We are somewhat surprised that the Legal Services Commission want every pre-action protocol letter done in a separate matter. However, if that is what is wanted we do not object but the paragraph is inaccurate when it refers to "complying with the pre-action protocol" as being part of "preparation and consideration for a Certificate for Licensed Work". It may be termed "steps preparatory to judicial review proceedings including complying with the pre-action protocol".

Also as drafted every appeal to the Court of Appeal would also entail a separate matter for completion of the funding certificate application. We do not think that is intended.

8.33 and 8.34; We find these two paragraphs contradictory. We cannot see the difference between applying to switch status whilst the first application remains pending (8.33) and not withdrawing an application but making another one on different legal grounds (8.34). The first constitutes one matter, the latter a separate matter. There is room for confusion here. Could the Legal Services Commission be asked to make it clearer as to what they mean?

8.51 We are disappointed by the apparent rejection of the request for there to be a discretion to apply for funding to attend with the advocate. May we please have your reasons for this?

8.54 We are disappointed by the apparent rejection of our request for there to be a discretion to uplift the rate paid to the supplier as opposed to just the advocate.

8.88(a); We are astonished by the apparent rejection of the request that the £100 maximum limit should be exclusive of interpreters disbursements - why should a supplier get paid less for taking on a client who needs an interpreter? The Legal Services Commission previously acceded to the unanswerable arguments that making financial limits inclusive of disbursements was racially discriminatory against those whose first language is not English. Its re-introduction here has not be explained and is wholly unjustified. The Legal Services Commission have offered no explanation for this. This must be changed. Disbursements (almost invariably in such circumstances interpreter's fees) must be remunerated separately.

We are very disappointed by the apparent rejection of our submissions that pre asylum claim advice should be properly remunerated. The only responses put forward by the Legal Services Commission (that one was a restriction already in place and we could not expect any improvements on the current situation, and that all the work would have to be duplicated by a second adviser after dispersal) do not address the point that the Legal Services Commission is by these restrictions encouraging bad practice (i.e. advising a client to go to the Asylum Screening Unit to claim asylum without adequately exploring the merits of the case in advance). And neither Legal Services Commission response is relevant to pre-claim advice to someone who as a result decides not to claim asylum. If the LSC is not prepared to fund this important work properly then the limit must at least be raised. We believe a limit of £200 would be more appropriate - approximately 3.5 hours to take instructions, apply the law, consider the objective material and then advise the client in person and in writing. That work must be done pre claim and will not be duplicated by any subsequent adviser. The Legal Services Commission's payment schemes must not encourage bad practice.

8.97 The arguments about fees for interpreters being remunerated separately from funding limits (set out at 8.88a above) apply also to consideration of the merits of an appeal to the Upper Tribunal.

Page 21 (unnumbered) The final paragraph states that a client advised under the Graduated Fees Scheme who is detained can continue to be advised until the end of the stage when a decision should be made as to whether to that supplier should continue to represent them. It is not clear how this fits with the exclusive contracts at 8.6. and the schedules at 8.103 onwards. We presume it is not the intention that the exclusive contract will cover detainees with ongoing cases with existing representatives. However, as drafted this is unclear. Also there is no mention of existing clients who are detained who are not under the Graduated Fees Scheme.

8.106; Presumably only one nominated supervisor per organisation needs to attend the events and group meetings - not all supervisors in the organisation (which would not be cost effective for larger organisations). The one who attends can cascade the

knowledge to the others. We also believe it would be appropriate for a claim to be made at Legal Help hourly rates for the time spent attending these training events and user group meetings (including travel costs) as they are compulsory.

8.110; We believe the Immigration Removal Centre Rota should not operate on Bank and Public Holidays. You cannot expect staff to have to work Christmas Day etc. It is not an emergency service. We propose the Immigration Removal Centre Rota should "exclude" Bank and Public Holidays. The reality of practice is that if you do require staff to work on these days then they expect to be paid extra so if the Legal Services Commission wishes to insist on this then it should be at enhanced rates.

8.112; You simply cannot properly advise in 30 minutes including advising on temporary release or bail - particularly where an interpreter is required. We suggest this should be at least 45 minutes. There should be a longer time allowed where an interpreter is required (say double the limit for other consultations). We would also suggest that the Legal Services Commission arrange a special Language Line account to be used for those conducting the On Site Surgery whereby Language Line bills the Legal Services Commission direct.

8.122; We propose the standby day commences at 9am and finishes at 3pm rather than 6pm. This is because the caseworker will have to travel to the IRC the next day which is likely to be the Attendance Day. They need to do various things before attending the Immigration Removal Centres including telephoning the Client to prepare for the Attendance Day (8.126). In the ILPA Best Practice Guide various pre attendance tasks are set out which include getting documents from the Immigration Service, taking instructions over the phone, conducting initial objective evidence research, contacting potential country experts etc. Caseworkers must at the latest know that they have to do this work by 3pm in order for it to be done properly. They can then do it between 3pm and 6pm. If they get the call at 5.59pm it is all too late.

We would also observe that the Legal Services Commission has always agreed with ILPA that representatives should be given 24 hours notice of a substantive interview in fast track - i.e. the substantive interview should not be timetabled earlier than 24 hours from when the representative is first called and asked to take the case on. What has happened to this?

8.126; The specification should confirm that you will be paid for necessary work carried out on the Standby Day prior to the client signing the Legal Help form on the Attendance Day (the current practice)

8.129; We believe that at the end this should include the following - "You are reminded that CLR should be granted when the prospects of success are unclear or borderline". This counter balances the reminder in the text that Controlled Legal Representation should not be granted to preserve an appeal right. It is also in line with the view the Legal Services Commission has taken in the past and the letters it has written to fast track practitioners.

We also think that it should state; " Where you refuse CLR you must provide the Client in person with a CW4 and confirm in writing on the file whether or not they

wish to appeal to the IFA. If they do wish to appeal you must assist them in completing the CW4 unless they decline that assistance and you must fax it to the LSC on their behalf by close of business on the next business day". It is vital that where refused these vulnerable people have that decision reviewed by an Independent Funding Adjudicator.

8.133(d); We do not know why there is a reference to "reasons for emergency advice" - the on-site surgery, and fast track is not predicated on the need for emergency advice. May we have an explanation?

8.135; Should the specification not specify the maximum number of clients you can be expected to see at an on-site surgery? As the specification stands a supplier could be required to see 30 clients on Christmas Day for the fixed fee. We would suggest that there should be a maximum of 10 clients booked for the surgery in any one day (and an expectation that if they all turn up you can only effectively advise 8 in one day).

8.139 and 8.140; Why have these been deleted? Standby rate should still be paid because when you are on standby you will have set aside the following day at least for the possible Attendance Day. The standby rate is some compensation for the disruption that occurs when you do not in fact get a call.

8.144 As with 8.106 above, presumably only one nominated supervisor per organisation needs to attend the events and group meetings - not all supervisors in the organisation (which would not be cost effective for larger organisations). The one who attends can cascade the knowledge to the others. We also believe it would be appropriate for a claim to be made at Legal Help hourly rates for the time spent attending these training events and user group meetings (including travel costs)as they are compulsory.

Clients' travel to attend to give instructions should also include client's with no income (there are plenty of tests for destitution that can be applied to ascertain this) or any (not just unaccompanied children seeking asylum's) supported by Social Services/Community Mental Health Services. Such clients are no less deserving and no more able to pay for their own journeys.

Also, as drafted, the final criterion appears to require that each time there is an attendance the provider/client must check that there is no more local provider who is able to take the case. This cannot be the intention as that would be a nonsensical waste of time. The Legal Services Commission would not want a client forced to transfer to "a more local provider" for example when the stage their case was at was near to concluding. This should presumably say something like "there is at the point where the matter is started, no other more local provider who was able to take on the case and it continues to be reasonable in all the circumstances of the case for the supplier to continue to represent them".

Also the client should be able to claim the cheapest "reasonable" not cheapest available public transport (for example a train that takes 1/3 of the time is probably more reasonable than a slightly cheaper journey by bus).

Alasdair Mackenize,

Acting Chair, ILPA

27 July 2009