

## **ILPA's response to the Legal Services Commission's consultation on the future of the Specialist Support Service.**

The Immigration Law Practitioners' Association (ILPA) is a professional association with some 950 members (individuals and organisations), the majority of whom are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law 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, official and other consultative and advisory groups including the Legal Services Commission and The Law Society's Civil Contracts Consultative Group and the Ministry of Justice.

### **Question 1 – Do you agree with the proposal to discontinue funding for the Special Support Service? If not, why not?**

The basis of this proposal seems to be several fundamental propositions from the Legal Services Commission:

1. We have to live within our financial settlement.
2. The quality of advice has improved.
3. People are using the Specialist Support Service where they should be able to deal with matters themselves or with appropriate (in-house) supervision.

Propositions 2 & 3 appear to contradict one another and the Legal Services Commission does not call any specific evidence in support of proposition 2.

The evidence in support of proposition 3 is said to be that the majority of calls to the Specialist Support Service come from Legal Services Commission contracted providers with a contract in the area of law to which the call relates, but this is an average taken across all areas in which the Specialist Support Service is provided. In immigration, Legal Services Commission contracted providers with a contract in immigration make up the clear minority of callers to the immigration Specialist Support Service. Immigration is relevant in very many areas of the law, from entitlements to welfare benefits to family law.

Termination of the Specialist Support Service is not the only possible answer to propositions 1 & 3 and is not the best or the most appropriate response in either case.

If there is evidence that callers are seeking Specialist Support Service advice on 'routine' matters which should be within their expertise and / or resolved in-house with appropriate supervision – again, bearing in mind that callers with an immigration contract make up a clear minority of callers to the immigration Specialist Support

Service - then the imperative must be to look at what is occurring with supervision, most urgently in those areas of law in which this has been identified as a particular problem. If there appear to the Legal Services Commission to be problems with supervision standards then there would need to be proper enquiry into the precise nature of, and reasons for, the problems. The Legal Services Commission would need to bear in mind the possibility that the financial pressures under which providers operate, and the financial disincentives deterring solicitors from instructing Counsel as described below, militate against making adequate time for supervision. The Specialist Support Service should, and in many cases does, complement supervision.

The Legal Services Commission notes its supervisor to caseworker ratio stipulation for the last bid round, but if the problem (proposition 3) is real, this goes to demonstrate the risk inherent in assuming that having a minimum of one supervisor to six caseworkers will maintain adequate standards of supervision and will maintain adequate quality.

The Legal Services Commission cannot and should not assume that if the Specialist Support Service is withdrawn, those 'routine' callers who it believes should have been able to resolve the problem themselves or with appropriate supervision, will find the answer elsewhere (in-house). There may be some for whom a quick call to the Specialist Support Service is simply a shortcut to what they could and should have been able to achieve without making that call, but it would be very dangerous to assume that this is invariably the case.

If the Legal Services Commission has, through its evaluation of the Specialist Support Service, identified a problem with the way supervision is happening (or not) in practice then the Legal Services Commission should investigate and address the problems with supervision. It must not confuse / conflate cause with effect as appears to be the danger here.

The Legal Services Commission states that concerns about competence have been addressed 'by other means' (paragraph 5.5). Assuming this is a reference to accreditation, accreditation provides at best a floor, not a ceiling, as regards the quality of advice delivered by accredited advisors. This is a significant point in relation to the Specialist Support Service. The providers of that service are accredited, but they are much more than accredited; they have built up a stock of knowledge based on experience in practice on a wide range of cases. Most are Level 3 accredited. All have supervisor status.

The Legal Services Commission would presumably not seek to argue that accreditation has eradicated all instances of poor quality and ill-informed advice. Immigration, asylum and nationality are substantial and complex areas of law as judges have repeatedly observed:

*"...The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires"* E B Kosovo v SSSHD [2008] UKHL 4. House of Lords

*"I do not propose to dwell on this in view of the common ground that, under it, the appellant was not entitled to income support at the material time. The provisions*

*are labyrinthine but, to cut a convoluted story short, she was a "person from abroad" pursuant to paragraph 17 of Schedule 7 to the Income Support (General) Regulations 1987 and, although her presence in this country was lawful – unless and until removal pursuant to regulation 21(3) of the Immigration (European Economic Area) Regulations 2000 – she did not enjoy the right to reside here at the material time because she was not a "qualified person" as defined by regulation 5 of the 2000 Regulations. To be qualified, she would have had to be, for example, a worker, a self-employed person, a self-sufficient person or a student at the material time and she was not. In short, her lack of a right to reside (which is not the same as lawful presence) disqualified her from access to income support. Essentially, domestic legislation confined qualification to EEA nationals who are economically or educationally active or otherwise self-sufficient. Those who do not qualify are able to remain here lawfully but subject to removal. A more comprehensive tour of the labyrinth can be found in *Abdirahman Kaczmarek v Secretary of State for Work & Pensions* [2008] EWCA Civ 1310, Court of Appeal.*

See also *Lekpo-Bozua v London Borough of Hackney & ors* [2010] EWCA Civ 909 where the Court of Appeal again described the provisions of domestic legislation pertaining to European free movement law as 'labyrinthine.'

Fundamentally, a Level 2 accredited advisor can achieve that qualification even if they get 40% of their answers in an accreditation examination wrong.

The Legal Services Commission lets contracts for the Specialist Support Service in April 2008 by which time the accreditation requirements in immigration had been in place for at least four years. The existence of accreditation was not seen in 2008 as a reason not to let specialist support contracts. It is hard to see why it should be seen as a reason to discontinue the service now.

The Legal Services Commission points to the alternative of instructing counsel to resolve particularly complex problems on Legal Help matters. This could be done under Investigative Help if there is adequate time in the circumstances to go through the application process or Legal Help. The cost to the Legal Services Commission of counsel advising under Investigative Help is greater than counsel advising under Legal Help, but the Legal Services Commission will be aware of the problems which seeking counsel's advice under Legal Help presents.

Firstly, the provider has to be clear that this is justified. Paragraph 3.77(a) of the 2010 Standard Civil Contract provides that the problem must be complex or there must be other exceptional circumstances to justify the use of particular counsel with the relevant expertise at Legal Help stage.

There is nothing objectionable about this provision as it stands, but there will be case work issues which arise from time to time which do not necessarily meet what is and presumably is intended to be the relatively high threshold at paragraph 3.77(a) for instructing counsel on Legal Help, but which are nevertheless outside the expertise and day-to-day experience of the caseworker and his / her supervisor. Here, the Specialist Support Service provides an invaluable and very efficient solution, far less time-consuming and administratively burdensome to providers than instructing counsel.

The service provides excellent value for money; it is not a costly service to provide relative to the substantial benefits it produces for clients. In the 20 days service up to 10<sup>th</sup> April 2012 the average time spent advising per day on the immigration Specialist Support Service was 3 hours 18 minutes. The cost to the Legal Services Commission of those calls was £198, plus the £60 per day stand-by fee, thus £258 per day, or not much over £65,000 per year. In return a national service of experts is available to a large and diverse range of advisors.

The majority of calls received on the immigration Specialist Support Service are from Not for Profit organisations and Citizens' Advice Bureaux, who do not have immigration specialists in their offices or do not have access to other immigration specialists of whom to ask questions. The advisers on the immigration Specialist Support Service are capable within a very short period of time of getting to the crux of the issue in question and of pointing the caller in the right direction. Without the service there will be no-one else to whom these organisations can turn for the appropriate advice. The Legal Services Commission, we consider, gets very good value for money from this service, which enables many other smaller community based organisations to function.

Secondly, as observed above, the payment arrangements for the use of counsel at Legal Help stage are very unfavourable to providers. This may serve as a disincentive to some to use counsel if the Specialist Support Service is withdrawn.

Counsel's fees for advising under Legal Help only count as a disbursement if the case escapes the fixed fee, but the time spent by counsel on advising does not count towards the calculation of whether the case escapes the fixed fee.

If the case does not escape the fixed fee counsel will be entitled only to a pre-agreed share of the fixed fee. Fixed fee cases are generally so unprofitable for providers, indeed in many cases no profit is made even without the use of counsel, that there may be a real disincentive to permit case workers to seek counsel's input, as this will reduce profits further. In these circumstances it is particularly important for clients that the Specialist Support Service should be preserved to maximise the chances of the correct advice being given.

It is incumbent on the Legal Services Commission to establish to what extent advice from counsel would be used as an alternative to the Specialist Support Service in practice, and with what cost implications for the Legal Services Commission. It would seem inevitable that there would be replacement costs involved in using Investigative Help to deal with a matter which might otherwise have been resolved by the Specialist Support Service for about £40.

The clear majority of calls to the immigration Specialist Support Service come from non-contracted Legal Services Commission providers. Quick and accurate advice about an individual's immigration status will often provide the key information required to address a whole host of other legal problems. It is impossible to give accurate advice about an individual's rights in relation to housing, community care, welfare benefits and employment without being absolutely clear about that individual's immigration status. Whilst the Legal Aid, Sentencing and Punishment of Offenders Act 2012, subject to the outcome of any legal challenges, contains provisions to remove much non-asylum immigration work from scope, to the extent

that advice in housing, community care, welfare benefits and employment remains in scope, providers of advice in those areas will continue to need access to prompt and accurate advice about their clients' immigration status. That need will increase because the clients in question will no longer have direct access to specialist, publicly-funded immigration advice.

As has been explained in ILPA's consultation response to the Green paper that preceded the Legal Aid Sentencing and Punishment of Offenders Act 2012 and briefings on the Bill, because of the regulation and control of immigration advice, there is a unique problem in immigration in terms of the lack of any alternative to the provision of publicly funded immigration advice by appropriately qualified and regulated advisors in what is acknowledged to be a highly complex and frequently developing area of law. There is also the problem that no exceptional funding will be available in immigration cases. See for example ILPA's briefing note on 'Complexity in Immigration Cases'<sup>1</sup> which refers not only to the complexity of this area of law, but to the complex regulatory requirements imposed by the Office of the Immigration Services Commissioner:

*"The Immigration Services Commissioner's scheme to regulate immigration advice and services regards work on family reunion, removals and deportation, cases of illegal entrants and overstayers, Article 8 applications, lodging notices of appeal and applications outside the rules as too complex to be done by those who have attained competence at only Level 1 of her scheme. Very few not-for-profits have attained competence beyond Level 1".*

And from ILPA's general briefing:

*"The general exclusion of immigration from legal aid provision will cause particular injustice because of two aggravating features, which do not apply to other areas from which legal aid is being withdrawn:*

- Immigration is subject to regulation such that general advice by non-legal professionals (e.g. solicitors) is prohibited unless an advice agency is within the Immigration Services Commissioner's scheme;*
- The Government has made explicit its view that no immigration case can qualify for exceptional funding (under clause 9)".<sup>2</sup>*

### **Alternatives to termination of the Specialist Support Service:**

There are alternatives to termination.

The hours during which the service is provided could be reduced, for example from five to four days per week, and from 10 am to 3 pm on those days instead of the current 10 am to 5 pm. This would provide a saving on the stand-by hours and it is anticipated that it would also provide a saving on advice hours. A reduction in the

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<sup>1</sup> ILPA briefing prepared for House of Lords Report stage of the Legal Aid Sentencing and Punishment of Offenders Bill – March 2012

<http://www.ilpa.org.uk/data/resources/14300/12.03.05-ILPA-complexity-briefing-note.pdf>

<sup>2</sup> ILPA briefing prepared for House of Lords Report stage of the Legal Aid sentencing and Punishment of Offenders Bill – March 2012

<http://www.ilpa.org.uk/data/resources/14297/12.03.02-ILPA-General-Briefing.pdf>

hours of service provision would not be welcome but it would be far better than terminating the service. The service is not designed / unlikely to be used for real emergencies in which there is a greater likelihood of counsels' involvement and to that extent reduced hours would have a lesser adverse impact on clients than removing the service altogether.

There could be a requirement that the case worker calling the Specialist Support Service gives details of the attempts that have been made to address the problem through supervision. If no such attempts have been made then the Specialist Support Service advisor could ask the caller to revert after having attempted to resolve the problem through supervision, if supervision does not resolve the problem.

There could be restricted access to the Specialist Support Service, e.g. access for those with supervisor status only if the call comes from a provider with an immigration contract. This approach could be applied across all areas, thereby helping to address the problem the Legal Services Commission believes it has identified of a majority of calls to the Specialist Support Service coming from providers holding a contract in the area of law about which they are calling. Alternatively, supervisors could be the gateway to the service, i.e. the initial call would need to come from a supervisor if the call were coming from a provider with a contract in the area of law about which they are calling.

This approach would of course compel the case worker for whom the problem has arisen to seek supervision, i.e. because the problem would have to be described to the supervisor for him / her to phone the Specialist Support Service in the first place. It has the potential to reduce the number of advice hours whilst encouraging the use of appropriate supervision by providers. This approach provides an answer to the Legal Services Commission's propositions 1 & 3, above. We consider that this merits further investigation, although we are concerned that one strength of the current service lies in supporting those staff who for whatever reason may not be adequately supervised. They may be calling because they have concerns about the response their supervisor has given them and without a second opinion may be reluctant to conclude that their supervisor's response is inaccurate.

**Question 2 – Do you believe that providing support services for specialist legal advisors is a priority for legal aid funding? If so, please explain why.**

This is an unsubtle question, the subtext of which is, in keeping with the purported rationale for the very damaging scope cuts set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, that there is a significantly reduced budget for legal aid and so limited resources have to be deployed 'where they are most needed'. In that context, we are asked, should resources be allocated for 'specialist legal advisors' as a priority compared with, it is implied, the provision of advice to clients. This sets up a false dichotomy between the interests of clients and the interests of those advising them. The Specialist Support Service provides a substantial benefit to clients by providing expert, strategic and timely input into the resolution of their problems as identified by the specialist legal advisors.

Question 2 adds nothing to the debate called for by Question 1 about whether the Specialist Support Service should be maintained or terminated.

**Question 3 – Are there particular elements of the Specialist Support Service which you think should be retained even if other elements are discontinued? If so, which elements and why?**

We do not agree with the proposal to terminate any element of the Specialist Support Service. As to the reasons for which it is particularly important to retain the immigration Specialist Support Service, we have already set these out above. If most non-asylum immigration work is removed from the scope of public funding, it will be critically important for advisers in other areas of social welfare law, as well as criminal defence lawyers, to have access to a service which can provide competent and timely advice about a person's immigration status. Knowing what a person's immigration status is, is often central to being able to give accurate and timely advice in relation to a whole host of other legal problems. We refer you to the above citations from the ILPA briefings of particular relevance.

If most non-asylum immigration work is removed from scope as envisaged, there would presumably need to be further consultation on the appropriate form of the immigration Specialist Support Service after 1<sup>st</sup> April 2013 (or when the new contracts start) but until then the service should be retained, ideally in its present form.

**Question 4 – The evaluation report**

The majority of calls to the immigration Specialist Support Service come from Legal Services Commission contracted providers who do not hold a contract in this category of law. In the experience of those who operate the service, some of the calls are 'routine' but very many are not. Complex issues often arise in nationality and European law for example. On numerous calls the operators of the Specialist Support Service find that they have to conduct legal research and return the call having done so. Immigration and asylum are fast-moving and highly complex areas of law. We do not agree, for reasons set out above, with the proposition at 4.11 of the evaluation report that the requirement to provide specialist advice and to employ specialist supervisors has negated the need for the Specialist Support Service.

The percentage of calls to the Specialist Support Service from General Help with Casework (GHCW) organisations may well be indicative of difficulties those organisations experience in referring clients to appropriate specialist providers, and this is a matter the Legal Services Commission should investigate, before considering closing off this important channel of support to such organisations.

**Question 5 – The Equality Impact Assessment ('EIA')**

We question whether the Legal Services Commission has understood its equality duties. The information in the Equality Impact Assessment is in our view wholly inadequate. It assesses the impact upon providers of terminating the service, not the impact on clients, who are the real end-users and the people who the service is intended to benefit and has benefitted. The Legal Services Commission admits to having gaps in the information it needs properly to conduct the Equality Impact Assessment but the only proposal as to how these gaps might be plugged is a reference to a survey of providers. The real concern is – or ought to be – how the proposed termination of the service will impact upon clients.

The comments at 6B of the Equality Impact Assessment are mere assertions and we see no evidence in support of them. To the extent that clients have been considered at all, the Legal Services Commission accepts that in immigration there will be disadvantage to BME clients but there is no consideration of how this might be addressed. Overall, there is no consideration of whether those with protected characteristics have more complex problems and may therefore have a greater need for the kind of specialist support services the Legal Services Commission proposes to terminate. For example, people who are elderly or disabled may be less able to travel the distance which may be required for them to have direct access to a specialist provider, and may be reliant on a local General Help with Casework provider being able to access specialist advice.

To the extent that potential adverse impacts are identified and acknowledged in the Equality Impact Assessment, these are then merely dismissed.

Sophie Barrett-Brown  
Chair  
ILPA  
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