ILPA RESPONSE TO AND COMMENTS ON "REFORMING THE CIVIL ADVICE AND ASSISTANCE SCHEME" -Immigration related aspects

INTRODUCTION

ILPA is the UK's professional association of lawyers and academics practicing in, or concerned about immigration, asylum and nationality law. It's aims are:-

To promote and improve the advising and representation of immigrants

To provide information to members on the law and practice relating to immigration

To secure a non-racist, non-sexist, just and equitable system of immigration and nationality law

The organization currently has 700 members including many of the major providers of immigration advice under the Legal Aid scheme, in the public and private sectors. Our members include those who have practices who are in the block contract pilot, those who have franchises and those who do not. As such ILPA is in a strong position to comment on the consultation paper.

Our document will concentrate principally on the proposals as they effect the provision of immigration advice. However, this should not be taken necessarily as an acceptance of the other proposals in the consultation, which we know will be commented upon by other organizations with a wider remit.

In the first instance however, there are some more general points ILPA wishes to make about the proposals.
ILPA does not think that a cash-limited civil advice and assistance scheme is likely to improve the quality of the advice delivered. We find our fears echoed in the paper itself where, at para 4.3 it states that

"....downward pressure on costs will result in a reduction in the quality of service provided..."

Unlike the LAB, ILPA does not think that franchising alone will balance the risk of this happening, principally because of the problems which will arise over access to immigration advice in the scheme as proposed.

Indeed it is the effect of the scheme on access to advice that most worries us. ILPA takes the view that the new scheme will actually make it harder for most migrants to get advice, not easier, since the paper clearly envisages a reduction in the numbers of suppliers, and in the funds available to them to do the job.

This problem of access has a number of aspects.

Firstly, access is a problem where there is a fixed budget. ILPA considers that the paper is unconvincing about what will happen if available funds do run out before the end of the relevant financial year. A migrant's knowledge that if her immigration problem had arisen earlier in the year she would have had a better chance of getting good advice, will not lead her to conclude that she is receiving "a quality service". Incidentally, ILPA also considers that the related problems about the professional implications of advising clients with long-running problems on yearly fixed budgets are not properly explored in the paper either.

Secondly, access is also a problem in terms of the paper's acknowledgement that there will not be enough franchised firms, (or alternative sources) to meet the demand for immigration advice [para 3.33]

Finally, access is a problem in that the paper fails to recognize that just because the provision of advice is concentrated in fewer larger providers, demand will not necessarily follow it there. Indeed ILPA takes the view that a good quality small firm with roots in its community may be far more efficient in identifying and satisfying unmet need. In contrast the report treats the level of demand for advice as entirely unaffected by the way it is serviced. Indeed, there is an assumption running through the paper, to which ILPA takes exception, that good quality advice can only be provided by large suppliers.

ILPA finds it astonishing that the LAB's response to the access gap in immigration is to propose spending resources which can't be channeled through franchised firms to other areas of law, rather than seeking to address the problems of supply within the particular field. We ask how this approach can possibly be reconciled with the already anticipated reduction of supply arising from the probable introduction of compulsory registration, which ILPA highlighted in it's recent submission on the government consultation paper on the regulation of immigration advisers.

A separate but related issue is whether the proposed scheme is likely to provide better value for money. Here, ILPA accepts that within the provision of immigration advice as currently funded by the public sector, there are value for money issues, which we would like to see addressed. Specifically, there is some

very poor work being funded by the LAB, some of it through franchised firms, but most of it not. As a result, ILPA welcomes some of the quality assurance innovations suggested in part 4 of the paper which may assist in taking further those already beneficial aspects of franchise standards. But ILPA takes the view and explains below how these standards do not have to be imposed by an exclusive contract regime to be effective and do not have to be restricted to franchised firms.

It must also be remembered that most of the immigration green form spend is on asylum cases. These cases are peculiarly sensitive to international developments, and domestic policy imperatives, (matters which are not only entirely beyond the control of individual practitioners but are also not predictable). In ILPA's view, life at the "coal face" is far too complex for it to be successfully argued that an approach which superimposes these franchise standards on a crude cash limited budget, is the key to providing better value for money.

Finally ILPA has to place on record at the outset our great concern at the failure of the LAB to come out unequivocally in favour of extending cover to include representation before the Immigration Appellate Authority (IAA) in the scheme. For a document to so reiterate the need for quality in the immigration field and yet to duck the issue of one of the most important single causes of poor quality work, raises critical questions for us about the bona fides of the whole exercise. To add insult to injury, the list of those who may have special needs for representation astonishingly ignores both asylum-seekers and those who do not speak English [para 3.61].

ILPA, along with other organizations, set out its views as to the future of the asylum determination system in a report entitled " Providing Protection " published in 1997. The provision of high quality legal advice played an important role in the reformed determination system proposed in the report. We are not at all sure that the scheme which is likely to result from this paper would satisfy the requirements which were identified in the report.

ILPA is of course aware of the ongoing block contract pilots and is of the view that the LAB would have been much better advised to have awaited the outcome of that research before writing this paper, particularly its immigration aspect. We sense an unspoken criticism by the LAB of the LCD imposed time constraints in the paper from time to time. We feel that they should have been made explicit by the LAB.

A. The Allocation of funds to the regions to Support Advice and Assistance Contracts

In this section ILPA is limiting its comments to para 1.43 – 1.48.

We wish to set out some basic principles in the first instance;-

1 ILPA is as concerned as the LAB is that immigration clients should receive high standard advice, particularly where that advice is being paid for by public money.

2 ILPA is as concerned as the LAB is to eliminate any fraud from the system. We see the daily consequences of such fraud in the misery of vulnerable people who have had their cases mishandled and their lives put at risk as a result.

3 ILPA is as concerned as the LAB about the proper distribution of Immigration advice around the country.

The quality of existing provision

We note that the immigration spend is concentrated in London but that as at 27.03.98 only 27 firms have a franchise in Immigration. We understand that one of those firms has had its franchise suspended and is in the appeal process. ILPA does not think that there is any one reason for the strikingly low take up rate for franchises in immigration although we try to give some reasons below. But we urge the LAB to conduct serious research into why there has been such a poor uptake of franchising in immigration before taking the kind of decisions advocated later in their paper.

The paper shows that in the London Area about £18,720,000 of public money goes to non-franchised firms. ILPA feels that it is very important to establish what this sum of money represents and requests that the LAB discloses how this sum is broken down. We feel that it may be particularly helpful to identify the quality of this work, the numbers of clients assisted for this sum, and the grade of fee earner who did the work. The case of ex parte Rafina suggests that the LAB is able to conduct analysis of this nature. Again, we would have thought that such an extensive general analysis between franchised and unfranchised firms would have been conducted as a basis for the paper.

We urge the LAB to consider disclosing information about the projected number of clients whose need for advice will go unmet if contracts are made exclusive. ILPA is concerned that the scale of the problem be properly investigated before funding is restricted in the manner proposed

ILPA will explain below that it feels that the LAB should be exploring ways of persuading non-franchised firms to come into the franchise scheme or to meet the quality standard referred to in 1.45. In the short term, we are very concerned about the large number of relatively small firms, some with specific roots in communities and connections with their client base that would simply be forced out following the approach advocated in this section. This would be a tragic mistake and the LAB may find it very hard to fill the gap. Some of the £18 million is wasted in fraud, some wasted in incompetence, some represents mediocre work, but some represents excellent work. Where the balance lies requires serious further investigation, which should have been done already. ILPA considers that, in relation to unfranchised firms, the LAB should be focusing on how to raise the standard of the mediocre work, retain the contribution of the excellent work and to eliminate at that point the fraudulent or worthless claim.

ILPA members have some experience of receiving files from other firms containing poor quality work, that have been the subject of a claim under the green form scheme. We do not know whether the claim is eventually met. We feel that the LAB should be in a much better position to provide analysis of the quality of work submitted by all firms. In this way quality assurance could be imposed across the LAB rather than being asserted to exist by virtue of franchising, and to be absent by virtue of there being no franchise.

The basis for the future distribution of funds for immigration work

In response to para 1.48 ILPA agrees that the criteria suggested for the distribution of funds between area offices for family and other civil work is **inappropriate** for the immigration category.

Clearly the 1996 Income Support figures will not be a valid indicator of the geographical distribution of immigration clients because since February 1996 (save for a short period of time following the JCWI case in July 1996 until September 1996) a large proportion of those with an immigration problem (including most refused asylum seekers) are no longer eligible for income support.

The future geographical demand for immigration advice

It is understandable that the London area has a much higher share of the demand for immigration advice and assistance. The bulk of the advice is asylum related. Most asylum seekers will arrive at Heathrow, Gatwick, and Waterloo or at the channel ports. London is a centre for refugee community organisations. Fewer asylum seekers gravitate to the older more established communities from the Indian sub- continent in the Midlands and the North. These communities will continue to want to be united with relatives and/or spouses from abroad. One reason why they have less need for immigration advice could be the decline in the importance of the primary purpose rule (which had begun even before the abolition of the rule last year). The very fact that these are communities which have been established for longer, may make it more likely that the financial criteria for green form advice may disqualify them. Against this other rule changes may also affect these communities. It is understood that appeal rights for those refused entry clearance for visits may be reinstated. If that happens there may be an increase in demand outside London – although sponsors for visitors may as a class be less likely to meet the stringent means test for advice and assistance

There are other complications about predicting the geographical demand for immigration advice. For instance, asylum seekers may move out of the London area, but often stay with their London adviser and will return to London for interview or other work in connection with their case.

The detained immigration client represents a special problem as the use of particular detention centres waxes and wanes. Even clients detained in Rochester Prison, and Campsfield House are serviced by London firms. If detention policy does shift as is expected towards detention at the end of a case to facilitate removal, that will have consequences because those individuals will have well-established relationships with existing advisers. If reception centres are introduced for new applicants, demand will be concentrated wherever they are established, although even this will vary according to whether attendance there is compulsory, and if so, for how long.

ILPA thinks that it is difficult to gauge the level of demand outside London but one indicator might be the state of the lists in the appeal centres outside London. However the Immigration Appellate Authorities in Manchester and Leeds have very short lists and are short of work. Again, we recommend that a detailed analysis of the caseload of the IAA hearing centres outside London be conducted as a means of understanding the nature of the need for advice. Factors to be considered would be the type of appeal, the address of the appellant or sponsor

and the address of the representative. Again we are surprised that this did not precede the paper. Certainly we agree that on the basis of current expenditure there would appear to be only marginal existing demand outside London and no great evidence of unmet need.

ILPA has an overriding concern about access to advice and welcomes in principle the widening of access in the regions where required. However the extent of the need has not at all been quantified. We do not necessarily share the LAB expectation that "need for legal services in immigration is linked to the geographical spread of the immigrant population" (para 1.43) We wonder what the LAB understands by the term "immigrant population" or whether green form eligibility is evenly spread through it, as is postulated. In any event, ILPA strongly recommends that the LAB conducts research to establish whether there is such an eligible unmet need outside London.

Second Tier Advice

ILPA read with interest the short section relating to second tier advice. The special need for second tier advice identified by the LAB in immigration cases needs very considerable fleshing out. In the absence of further details we have found it very difficult to comment and consider that this is another example of the paper's publication being premature.

In any event, ILPA finds it hard to see where the spare capacity exists amongst suitably qualified practitioners to take up second tier contracts, although this may change ILPA presumes that telephone advice would not be available to individual clients as a substitute for attendances. Any such proposal to make telephone advice available to clients would be beset with practical difficulties and would fly in the face of the standards required by existing transaction criteria..

Complex cases

ILPA also notes the reference to complex cases in the section about second tier contracts. We feel that the problem is likely to be that there won't even be enough contracted suppliers in London to meet local need yet alone to take complex referrals from around the country. However arrangements whereby complex cases are referred on are likely to be of interest to some specialist practitioners. Indeed, there is an argument that complex cases should be funded on a case by case basis. Complex cases are in their nature time consuming and expensive and as there is no shortage of cases generally there may be a disincentive to take complex cases built into the contracting arrangements. We

feel that some more helpful criteria to define a complex immigration case need to be evolved.

Redistributing unspent monies

ILPA is highly concerned about the suggestion in para 1.45 that immigration spend which cannot be used because of the lack of franchised applicants might be distributed to other categories of work elsewhere. It is very unclear to ILPA whether these funds would ever come back to immigration work in future. For a report that is about access to justice this proposal is extraordinary. Furthermore, to further restrict the supply in this fashion lies ill with the Home Office concern over the quality of advice provided in the private sector that will surely boom as a result, even if a registration scheme for these types of providers [which ILPA has advocated] is introduced. ILPA considers that the quality of provision by registered immigration advisers under such a scheme will be far less assured than under the LABs regime. Yet it is to those advisers [and worse, to their unregistered colleagues working underground] that the LAB is condemning a significant number of its most vulnerable clients.

We are astonished at the thinking behind that last sentence in para 1.45. The LAB is in terms proposing that the underspend in immigration be compensated by spending on "other **areas** of law, including in areas with ethnic minority population" We regard such an approach to be utterly patronising to the ethnic minorities. It bears the hallmarks of racism and condescension. Funds are to be withdrawn from advice in connection with a life and death issue such as asylum and in an effort to make that travesty palatable, funds will be made available to other areas [of law ?] "with an ethnic minority population". The suggestion clearly confuses legal and geographical provision. In any event, people with an immigration or an asylum problem want good quality advice in connection with **that issue.** The suggestion that in the absence of the desired advice clients would somehow be placated by the availability of funds for advice to other members of ethnic minorities in connection with a housing dispute or a debt problem is ludicrous. Again the paper shows evidence of under-preparation, and an unsteady hand.

B Regional Legal Services Committees (RLSCs)

ILPA considers that the LAB has rather abdicated its responsibility in devolving its powers to RLSCs in relation to the provision of immigration advice. How they will actually work in practice is therefore a major concern. Until this is clear there must be a cloud of uncertainty above those providers who might otherwise be considering expansion. To have to wait until February 1999 to get the RLSC's recommendations, for a scheme which is due to be in place by the end of 1999, seems bizarre, particularly since it seems that bids will be required by July 1999. It seems immigration practitioners will have at most 5 months to react to the offers of contracts, which may well disadvantage them in relation to other types of practitioners who are in the end in competition for the same funds. The LAB and the RLSCs need to explain how this outcome will be avoided, particularly if they are keen on the expansion of existing franchisees.

Other matters which will be of obvious concern to ILPA will be:-

(i) the extent to which the RLSC will be independent of the LAB
(ii) the extent to which the LAB will bound by the advice of the RLSC
(iii) the extent to which debate between the two bodies will be made public

ILPA also feels that considerable care will have to be taken in selecting the external members on the RLSC. It will be important that there is an external member with experience of immigration **law**, but not tied to any vested community interest.

ILPA's view is that the external members who are practitioners must be adequately remunerated for their attendance at the RLSC. Unless there is sensible and adequate remuneration we doubt there will be many takers from an already beleaguered group. The LAB should appreciate that practitioners in immigration and asylum already do considerable pro bono work and are working in perhaps the lowest remunerated of any area of legal aid work.

C The Contracting Process

In this section ILPA is commenting on paras 3.35, 3.55, 3.62 and 3.75.

ILPA does have criticism of the exclusive contracting proposals but we are not addressing in detail those concerns in these comments. We are aware that other bodies are submitting comments on the technical detail of the proposed contracts. However, by taking this approach, we are certainly not acquiescing in the structure of the contract as outlined in the Consultation document.

The Access Gap (para 3.35)

The gap refers to the shortfall of immigration provision that is likely to occur when exclusive contracting is introduced.

Unlike the LAB, ILPA believes that it would be wrong to assume that the access gap will necessarily go away after the early years. Indeed it is ILPA's concern that the gap may increase as a result of exclusive contracts.

ILPA considers that the gap has 2 different elements:-

1 The reluctance of franchised firms to expand
2 The low-take up of franchises by immigration firms

In relation to the first element, we note the LAB's proposal at para 3.32 to

" give priority to franchised organisations that can meet the new quality requirements .....and which wish to expand their current business"

However it is ILPA's concern that as matters stand the private sector is not going to fill the unmet need. ILPA does not see existing franchised firms as able and/or willing to expand to allow any very significant uptake of the £18million spend, in the fixed contract environment that is being suggested. The reasons for this include the following:

- The wide distribution even of franchised immigration advice amongst providers as compared with the total spend
- The managerial burden of expansion
- The heightened supervisory burden
- The risks
- The inadequate reward promised by long depressed rates of pay for green form work and cash limited contracts
- Uncertainty about the future arising from 2 sources;

(i) of the withdrawal of funding because of a lack of commitment by the LAB to the current providers

(ii) from the nature of immigration work itself. The unpredictable nature of immigration work leads to an inability to accurately forecast costs. Yet to do this is a vital part of the contracting process. Merely by way of example, just in the last 12 months there have been significant changes in policy, practice and procedure to which practitioners have had to adapt.

- Home Office reviews currently underway into every aspect of the system
- Changes in the Appellate system
- Changes in procedures at the ports of entry
- Human Rights Bill and preparing for implementation
- Changes in same sex policy
- Changes in country of origin conditions e.g. the Democratic Republic of the Congo replacing Zaire, the developments in Kosova.

Such changes have a direct bearing on the amount and nature of work that may be required in individual cases and so make predicting costs exceedingly difficult. As a result firms are likely to limit their risk by broadly maintaining their size, even if other variables are changing. We note that elsewhere the paper requires more sophisticated business plans from exclusive contractees. But if predicting the costs of future immigration cases is a lottery, contracting to do them at a fixed price will seem to many franchisees just plain foolish.

The rising cost of immigration cases

Because of the particular expertise of ILPA in the field of immigration we think it is worth descending to a little more detail as quite why costs of properly prepared cases have risen in the past and why they will be hard to predict in the future.

Interpreters

Clients may need an interpreter. But some clients speak perfect English. Some asylum generating countries are have English as a language of business. Some nationalities are better linguists than others. A firm that takes on Somalis and says Ghanaian asylum seekers is likely to have a far lower disbursement cost per case than a firm that has a large number of Kurdish clients. Indeed a firm with a block contract would have every incentive to discriminate against non-English speaking clients. Alternatively, the expenditure on interpreter's fees may be the first to go at the end of the financial year; or corners may be cut by using friends and

relatives to interpret instead. The potential problems are obvious, but are particularly acute because of great reliance placed on discrepancies between accounts given by an applicant on different occasions. Where the erroneous account has been prepared by the applicants own solicitor, it will be particularly hard to explain.

Translation of statements and interview notes

Not so long ago the LAB criticised an ILPA member wanting to provide a translation of a statement for providing a "Rolls Royce service". Now it is standard. Today, adjudicators are increasingly requiring that an appellant be provided with written translations of their interviews. This is very expensive, but failure to do so exposes practitioners to criticism.

Medical Reports

Medical reports are often crucial to the proper presentation of a case. They can have a great impact on the result. Psychiatric evidence is often decisive in establishing the case for a torture victim even where the physical evidence of torture has faded.

The frequency of the need to obtain medical evidence has been greatly increased by the effect of the 1996 Asylum and Immigration Act and the new provisions therein enabling certification by the Home Office of refused claims, but governed by a torture proviso. What could not have been predicted is the ridiculous extent to which the Home Office has used the certification procedure, thus requiring in many cases a pre-emptive medical report proving torture to trump it. If this development had happened during a new exclusive contract and funding of the reports had to come out of a fixed budget, we fear that fewer would have been submitted or the income of firms slashed. We do not think it is reasonable that a firm's profitability should become a factor in determining whether or not it is appropriate in a particular case to seek medical evidence.

Institutional Changes

The Home Office refusal rate increased dramatically after 26.07.93 which is when the 1993 Act came into force This was not because of any improvement in the human rights situation in the countries of origin or because of any deterioration in the merits of an in individual claimant. It was an unpredictable change in policy. As Home Office resources have increased, to win an appeal before the Appellate Authorities an ever-increasing amount of work has to be put into gathering evidence and preparation. This is particularly highlighted by the greater demands made in directions from the court from 1997.

Experts Reports

Additionally, in earlier years the submission of expert opinions in appeals was quite rare. Now increasingly adjudicators expect to see expert opinions and it is clear that they are becoming another requirement of many properly prepared cases.

Transfers

For many reasons transfer requests are a significant feature of most practitioners' caseloads. Has the LAB looked into the amount of public money expended as a result of transfers and the consequent signing of a second Green Form ? We stress that the reasons for the transfer are very often factors beyond the control of the lawyer. For example, in a system of decision making that has endemic delay built into it as a matter of policy it is hardly surprising that the applicant in bewilderment after waiting 5, 6, 7 and more years for a decision might wish to seek a second opinion from another lawyer. There is also an active rumour mill at work in the communities. Many decisions at the Home Office involve the exercise of discretion and the actual manner in which that discretion is exercised is often unfathomable even to experienced practitioners - how much more so for the asylum seeker. The general point is well illustrated by the experience of one ILPA member who in an administrative error sent the Home Office the same asylum statement on behalf of 2 different clients from the same country of origin: one application was successful but the other refused. The point is that transfers waste time and duplicate work.

To help fill the access gap through the expansion of existing franchisees, in ILPA's view the LAB needs to give further consideration to incentives to contracted firms to expand. In our view the currently proposed contracting arrangements actually inhibit expansion through their uncertainty.

There are some steps that the LAB could consider taking in order to stimulate growth to bridge the gap:-

- Assistance with IT in terms of advice and investment
- Funding of premises – the LAB accepts responsibility for rent or mortgage repayments for a period of time
- Interest free loans.
- Payment of overdraft interest.
- Extend funding to representation in IAA.
- Establishing a procedure which takes disbursements out of the contract, as in the pilot scheme

- Having a contingency fund to deal with unforseeable developments in the course of a contract
- Separate funding for complex cases

We turn to the second element of the access gap, the low franchise take-up in immigration. As the proposals stand, a large number of small firms are faced with the prospect of franchising quickly or ceasing to be legal aid providers. In considering their future, they will be faced with the same fears about unpredictability as existing franchisees. Equally, some of the above suggestions would also act as incentives to small firms to franchise, and thereby maintain their contribution to meeting the need for immigration advice without losing their particular access to unmet need.

Certainly some of the factors which we identified above as inhibiting expansion of franchised firms will also apply, as do some of our suggested solutions. ILPA repeats its surprise that there is no analysis in the document as to why there has been a low uptake of immigration franchises. We think that this research should have been a prerequisite for the paper, not it's aftermath.

Contractors and referrals (para 3.55)

ILPA is concerned about what would happen to provision for migrant communities if contractors did not have capacity to take on more cases in a particular financial year in a particular area. The paper does not deal with this.Indeed immigration is an area beset with uniquely short time limits, which do not allow for a client to be advised that they should come back next month. Another problem is that the range of immigration work is so varied that a contractor could remain within the terms of a contract by identifying a category of work with a low risk of escalating costs and fulfilling its contract obligations by carrying out that one narrow band of work.

ILPA thinks that there will be a risk that providers will cherry pick communities with "low cost risk" immigration problems. The way in which migrant communities are organised could make this a relatively easy practice and a real possibility as compared with other categories of work.

ILPA recognises that there will be a temptation to the LAB to look to bulk providers to fill the gap. ILPA wishes to be sure that there will be sufficient quality assurance in any bulk provision as well. We would warn the LAB against getting into a situation where it is dealing with a monopoly supplier, if it is concerned over the issue of value for money, and if it does not wish to find its own

independence and integrity impugned if and when government, for political reasons, takes against another category of legally aided migrant.

ILPA also considers that those providers in the private sector who are to be encouraged to expand would be more likely to do so if the Consultation contained a more ringing endorsement of the high quality provision that many providers do currently provide.

ILPA notes the requirement for a referral to an "approved contractor" at para 3.56. We wonder whether the LAB will take any responsibility for identifying alternative providers where cases are transferred by contracted providers (transfers being fairly frequent in long drawn out proceedings like immigration for reasons which we set out above). It is certainly difficult to see how an immigration contractor can ensure that a case that needs to be referred [e.g. for an appeal] will be referred to an appropriate contractor in the absence of funding for appeals. Furthermore, any transfer in an exclusive contract scheme is going to be difficult to effect in the light of the proposals effectively to reduce the numbers of contracted firms to well below the market requirement.

Many ILPA members at present give considerable assistance to asylum seekers that they are unable to take on and endeavour to locate another reputable advisor for them. Failed asylum seekers have additional problems because they have no access to State Benefits and are often dependent on complicated and hostile procedures at social services to get the cost of a bus ticket to visit an adviser.

Representation (para 3.62)

In ILPA's view the extension of funding to representation before the Appellate Authorities is a vital and long overdue step. Some adjudicators, already, anecdotally express the view that the funding arrangements are of no concern to them and are happy to give considerable leeway to Mackenzie friends. The absence of funding for representation perpetuates the perception that Immigration is an unimportant or easy area of law, or that migrants don't really matter. There are a number of practitioners who do not make proper arrangements for representation by themselves or others at present. We have yet to see what impact if any will be made by the recent Practice Direction in this respect, but it will not of itself resolve the problem of no or poor representation.

Immigration law is a complex area involving at least 6 Acts of Parliament, an the interpretation of several international treaties. There exists 2 specialist law reports in the field. 40% of judicial review applications are immigration related.

Since September 1997 alone, there have been 700 determinations from the Immigration Appeal Tribunal. The Immigration Rules have been recast 6 times since 1971 and there are almost monthly amendments to them. Knowledge of a wide range of extra-statutory concessions, policies and practices is also essential. The Human Right Bill when enacted will have a massive impact. In the asylum context a knowledge of the clients country of origin its history and politics is vital. In contrast to the accepted view, this is a massive area and the notion that the appeal structure is user friendly and unintimidating is quite wrong. Furthermore research has shown that good quality representation at a hearing significantly increases the chance of success.

The LAB now has an opportunity to look at extending funding to cover representation. ILPA is firmly of the view that this would provide a major incentive to firms to get franchised. It would also eliminate current duplication and waste of public funds and lead to a rise in standards.

Existing franchisees and would-be franchisees need assurance in broad terms that the funding for immigration work will remain available to it. There are good historical reasons for this. The previous government announced the abolition of Green Form for immigration in July 1991 with no prior consultation (Kenneth Baker) when the original Asylum and Immigration Appeals Bill was published. There remains a widespread caution amongst immigration practitioners and concern that the funding be completely withdrawn inhibits commitment to long term investment and breeds a culture of short termism. There has been recurring criticism of immigration practitioners at ministerial level in the new administration – see Jack Straw's criticism of lawyers daring to advise Romany asylum seekers. There is a perceived threat of prosecution amongst practitioners arising from s.5 of the Asylum and Immigration Act 1996. Against this background it is perhaps understandable that it is difficult to secure investment and long term commitment from private practice. The LAB and the Lord Chancellor are in a unique position to deal with many of these concerns but will need to do more to do so.

At para 3.49, ILPA notes the absence of an appeal process against a refusal of a contract. Whilst we understand the attraction of such a provision we doubt that it will prevent an aggrieved firm going to law about a decision of the Board not to give them a contract.

At para 3.71, ILPA thinks rather more thought is required about how long-running green form cases will be integrated with the new contracts, particularly where there are interim bills.

D The Development of Franchising – the Approach to Quality Assurance

We refer to the Points for Comment at para 4.25

ILPA is concerned generally that the implementation of the improvements in quality assurance systems are time consuming and costly. This should be recognised by the LAB in terms of funding.

a) ILPA agrees that there has to be a continued reliance on objective criteria. At least some of its members are inclined to think that the current assessment and supervision requirements have led to an increase in standards.
Our problem with external peer review is one of confidentiality and of who is an appropriate peer.

b) ILPA agrees that internal file review is an important ingredient in supervision and that it inevitably involves internal peer review. It is certainly time consuming if done rigorously. For this reason the amount of time devoted to securing procedural compliance with wholly unnecessary requirements is frustrating. Much of transaction criteria and the current specification are worthwhile, but ILPA still cannot understand why costs information must be given in cases where the Solicitors charge will never arise. The LAB argument that the client is the recipient of public money and so should know how much is being spent seems to us petty. The practice causes needless distress and confusion to clients whilst the provision of the information is itself an expense, as is dealing with the clients reaction to it. Rather, ILPA thinks that the process of supervision, if it is to be developed, should be developed so that the supervisor can concentrate on the legal and important procedural issues in the case. That is the way to raise standards.

c) ILPA has no objection in principle to more detailed qualifying standards for supervisors. ILPA supports the proposed establishment of a specialist Law Society panel.

d) ILPA seeks further information in connection with this point. In particular ILPA is concerned about the impact that this requirement may have on the sole practitioner or the department of one immigration practitioner in a larger practice

e) ILPA agrees that supervisor's files should be reviewed but to a degree that reflects their level of experience. ILPA does not have an immediate answer to the difficulty in making supervisory arrangements for sole practitioners. We have pointed out the problems with external peer review above.

f) ILPA sees no reason why these should not be incorporated. We would also commend incorporation of ILPA's own professional standards.

g) ILPA agrees that it would be helpful for there to be standards for training in methods of supervision. We would welcome more detail on this point.

ILPA considers that care will need to be taken in devising enhanced supervisor requirements. We note that advocacy is a key factor in the enhanced supervision standards in Mental Health. But advocacy is not **necessarily** a feature of mainstream immigration work. In fact successful immigration (as opposed to asylum) work may well be measured by the success in the initial application. There is in effect a large non-contentious element in immigration law that should not be forgotten. Clearly however it would be quite wrong to make advocacy a requirement if the LAB won't fund it. That said, ILPA's view is that some experience of advocacy in **asylum appeals** may be a feature of enhanced supervisor standards provided there is funding for advocacy within the scheme.

Technology (para 4.28)

ILPA is still not convinced that IT systems are yet a necessary element for all high quality, value for money providers, although they are clearly becoming more and more important. ILPA feels that it is unrealistic of the LAB to expect firms, especially small firms and sole practitioners, to invest heavily in IT for the purpose of contracting when the future is so uncertain. In any event ILPA is also not sure whether the IT required by the LAB is itself sufficiently well developed to represent value for money at this time.

ILPA would feel more sympathetic to the LAB if it had costed the IT requirements it is now proposing. ILPA is particularly concerned about the high cost of investment in relation to firms doing what is the worst remunerated work.

Business plans (para 4.33)

ILPA has no objection in principal to the requirement that a more detailed business plan be devised and mandatory features incorporated. It should

however remain entirely confidential to the firm, given that it is the firm that is making all the investment and taking all risks associated with the business.

External Peer Review (para 4.38)

ILPA is concerned about practical issues and issues of confidentiality raised by external peer review. We do not think that academics and/or counsel would be sufficiently experienced in the practical running of cases to be qualified to carry out peer review. The number of solicitors with franchises is currently very small in the immigration area and is heavily concentrated in London. There would be inevitable conflicts of interests. The peer reviewers are bound to come from what are in fact business competitors.

Outcome measures and Predictions (para 4.44)

We repeat the observations made above about the particularly unpredictable nature of immigration and asylum work. We feel that this problem very much undermines the usefulness of assessing case outcomes against earlier predictions. In personal injury work it is possible to have a fairly good idea after the first meeting as to the chances of succeeding on liability. This is clearly not the case in immigration work.

ILPA points to the following factors which present difficulty in measuring quality by outcome: -

- Unpredictable nature of immigration work

- Home Office Policy can change – and quite often does. This can radically alter up or down the amount of work to be done on a file. Examples of recent changes in Policy, include the abolition of the primary purpose rule, the resumption of removals to Algeria, decision to recognise minority clan Somalis as refugees, the resumption of removals of Somalis to most European countries,

- In asylum the circumstances in the country of origin can change with significant repercussions on the claim.

- The Home Office approach to how the asylum claim will be considered is totally unpredictable – a person may be interviewed a the asylum screening unit say 3 times but some one else on the same facts be issued with a SAL after one interview only.

- Detention is quite arbitrary. It probably boils down to something as crude as whether there is a detention place available. In budgeting terms it would be very significant to know how many detained clients you would be acting for – but it is in practice impossible to predict

- What will happen to the 50,000 or backlog in the Home Office asylum queue? If all those cases are to be really fought through the courts it represents a massive amount of work.

In some types of immigration cases, it may be possible to predict some outcomes. But these cases are very much at the cheaper end of the costs scale. An experienced practitioner could reasonably be expected to predict the outcome of for example an application for indefinite leave to remain as a refugee, an application for renewal of ELR, an application for naturalisation and even an applications for settlement on the basis of marriage.

One of the most peculiar features of immigration and refugee work is the number of similar fact cases that lead to different decisions. Different special adjudicators have entrenched views on particular issues and nationalities and the outcome of many appeals very much depends on the name of the adjudicator. This is of course an anecdotal observation. It is however striking the number of cases remitted for hearing de novo which lead to a different result. The IAT itself has not succeeded in achieving consistency. The right of appeal to it has lacunae, its grants of leave to appeal to itself are arbitrary, and the IAT itself is divided on vital issues.

As far as substantive asylum applications are concerned the recognition rates are so low and the success rates in the appellate authorities so low that it would be hard to predict anything above 50% as a chance of success. There are from time to time especially strong cases that will obviously succeed but they are rare.

The definition of a successful outcome will need some care. The key issue of concern to a client may be a collateral one to the substantive application – a good example is an asylum seeker in the UK who has been granted ELR is separated from his/her family and wants to achieve family reunion via an upgrade application. The upgrade application may fail, yet the client may achieve the desired end through other means. Is that a successful outcome? The definition of a successful outcome may be unclear, and may change in the course of a long case.

Finally predictions are not at all scientific. They are based on experience, knowledge of concessions, hunches, developing the correct type of evidence for a particular case [e.g. dealing with internal flight if the claimant comes from a country where this is regularly raised as a ground for refusal]. A bleak asylum case may be transformed by the delivery of some knock out evidence or the claimant may acquire some entirely different type of application to make to the Home Office through for example, marriage, health, reliance on a EU association agreement. All the above indicate that one should be cautious as to the importance attached to outcome measures.

Our view is that some outcomes could be measured against some predictions, but that we have very severe reservations as to how useful a guide such an exercise would be.

Conclusion

We hope that we have made our detailed points, both positive and negative as we have worked through the paper. We do not propose to repeat them here.

Our broad response to the consultation is;

that this report is premature. As a result it has made proposals for the future of immigration advice which are ill-thought out and based on inadequate research;

to argue for a wholesale rejection of cash limiting, in order to prevent a fall in standards which will follow the effect of these proposals on access to immigration advice;

to welcome critically some of the new management requirements in order to raise standards;

but to argue that a cash limited franchise regime is not the only or the best way to achieve this end.