

Contracted Advice Agencies Network 7th February 2007

ASA Update - Notes

Important note (March 2007)

This is an edited and partially updated version of the ASA presentation to the CAAN meeting.

Note that negotiations on the Standard Terms of the new Unified Contract for civil work have now ended, and the new Standard Terms will apply from 1st April. The final version of the Standard Terms can be found on the [LSC Website](#), alongside the other contract documentation. Note that this includes the all-important contract Specification, which will apply from 1st October.

The Specification is a draft for consultation. We will be negotiating with the LSC on the Specification, and would welcome your views. Please contact our Policy Director, Ann Lewis (ann.lewis@asauk.org.uk).

Introduction

There is a lot to talk about. Will try to be brief and factual, and apologies to those who know much of this already.

Go to ASA's website at asauk.org.uk to see our responses to recent consultations and announcements concerning legal aid. Website includes a timetable for proposed changes (*Legal aid reform: what is supposed to happen when*), which we will update as required. ASA's recent evidence to the Constitutional Affairs Committee is on the [Committee's Website](#).

Support from ASA

Before turning to latest developments on legal aid, a brief outline of our proposed programme of support:

- new training programme, focussing on new contract and other changes will start in April - publicity and booking forms available at end of February (see our website for details)
- ASA conference on 23 March will include workshops on legal aid issues, including one on practicalities of working in a fixed fee system
- running series of regional roadshows, probably in late April and May, again focussing on practical issues - will publicise in March
- will shortly re-launch our e-mail bulletin service to deal with coming changes - contact us if you are not already on our e-mail contact list.

Government's programme of change

DCA/LSC embarking on huge programme of change, covering both criminal and civil legal aid, and involving range of initiatives. Changes being brought about at a time when LSC seeking to reduce its administrative budget by some 30% over next four years.

The following will impact on NfP sector:

- fixed fees for Legal Help
- unified civil contract (single contract for all suppliers)
- preferred supplier
- move to e-business
- CLS Strategy (CLACs/CLANS/telephone advice)
- in longer term, 'best value' or 'managed' competition (ie competitive tendering).

Many initiatives still in development phase, relationship between them not always clear, and timetable complicated. Further consultations promised, but in some important areas, consultation is (deemed to be) over, and details will simply be announced. Many unknowns and situation is constantly changing.

Agencies will find it very hard to deal with scale and pace of change. Our view is that you need to prioritise by focussing for time being on changes to be introduced over next few months - **fixed fees and the rules relating to fixed fees set out in the new unified contract**. If you fail to cope with these changes, you are simply not going to be around when other initiatives such as preferred supplier are implemented. Will therefore concentrate on these.

Fixed fees

Background

In November, DCA and LSC published *Legal Aid Reform: The Way Ahead*, the Government's response to Carter report and LSC's accompanying consultation paper.

The Way Ahead reaffirmed Government's intention to move towards fixed and (in some categories of law) graduated fees for legal aid work, as a prelude to introducing competition. It also delayed introduction of fixed and graduated fees by six months - until 1st October 2007. Payments to NfP organisations in first half of 2007/08 will be on current basis (ie for hours), except payments monthly rather than quarterly in advance.

In relation to family, immigration and asylum and mental health, fee structure and levels yet to be settled. In relation to other categories, including social welfare law, fixed fee levels are set out in *The Way Ahead* - in other words, decision has been made, and can now only be changed as a result of some kind of further political intervention.

Compared to fee options set out in consultation paper, following should be noted:

- single national fee structure (in particular, no uplift for London)
- fee levels now take account of NfP case costs (this increases levels in some categories, notably debt)
- exceptional cases escape route now set at 3 rather than 4 times fixed fee cost (this decreases standard fixed fee levels) - will return to this later, but basically you get paid for work done if case is assessed by the LSC as exceptional
- housing and homelessness fees now merged into single fixed fee for housing cases.

Fixed fees for social welfare law

Fee levels for social welfare law are as follows:

- community care £290 (£175 tolerance cases)
- debt £196 (£121 tolerance cases)
- education £296 (£149 tolerance cases)
- employment £225 (£147 tolerance cases)
- housing £171 (£135 tolerance cases)
- welfare benefits £164 (£133 tolerance cases).

These figures exclude VAT. They also exclude disbursements. Full list of fixed fee levels decided so far is set out in Annex A of *The Way Ahead*.

Fixed fees and the NfP sector

LSC's intention is to convert nfp contracts based on hours into contracts based on matter starts and fixed fees (subject to variation, eg to take account of under-performance).

So, if you have a debt contract for £53,900 and are currently performing the full 1,100 hours required by this contract, you should get 275 matter starts (£53,900 divided by fixed fee of £196). Will use this example to show how fixed fees will impact on agencies.

Level 1 work is abolished from 1 October, but no corresponding reduction in contract prices, ie former level 1 money will be included in contract prices, to be applied to help eligible clients under fixed fee system.

Impact of fixed fees on agencies

What should you be doing now? As a matter of urgency, you need to look at how the new scheme will impact on your agency. Basically, this means you should:

- work out your hourly rate - eg, if your current contract is £53,900 exc VAT for 1,100 hours, then your hourly rate is £49 per hour (£53,900 divided by 1,100)
- on basis of your hourly rate, work out average case length provided for under fixed fee for each category of law that you cover - eg if your hourly rate is £49 per hour, then average is 4 hours for your debt work (£196 divided by £49).
- analyse your actual average case lengths for each category of law and compare these to fixed fee lengths.

Now, if your actual average exceeds fixed fee average, and you take no remedial action, you lose out. Following through the above example (and ignoring exceptional cases), if your average case length is 5 hours, you are faced with the following alternatives:

- do 275 cases at 5 hours anyway. This will take you 1,375 hours and you will be paid £53,900 (£196 x 275). As this payment is derived from your current contract for 1,100 hours work, you will be doing 275 hours unpaid work.

- work up to your current contract capacity of 1,100 hours. This will allow you to do 220 cases at 5 hours. You will be paid £43,120 (£196 x 220), a loss in income of £10,780 on your current contract price.

There are only three ways of alleviating this problem.

- claim lots of exceptional cases costing 3 times fixed fee rate. This is a very risky strategy indeed. If your exceptional claims are assessed below 3 times the fixed fee cost, you will be paid fixed fee only. Using debt as an example, exceptional case threshold is £588 (£196 x 3). If you claim £613, above the threshold, but are assessed at £563, taking you below the threshold, you will be paid only the fixed fee, ie £196. And new contract will contain specific disincentives to do exceptional cases - see below.
- reduce your average case lengths by finding efficiency savings (eg by greater use of standard letters, changes in reception and triage arrangements). This is LSC's view on how to deal with fixed fees and, to an extent, it should be possible for some agencies. We will be producing practical guidance on efficiency savings, drawing on best practice across the sector. We do not pretend to know the answers yet, and will need the help of agencies on the ground to get this right.
- reduce your average actual case lengths by changing your case profile, ie in our example by taking on more short cases to ensure that the average case length is 4 hours or less. Our view is that for many agencies, this approach will be unavoidable, even if you can make some efficiency savings.

Now, there will be winners under the new scheme. Again sticking to above debt example, if your actual average case length is 3.5 hours, then you can achieve target of 275 cases (and payment of £53,900) in about 963 hours, a "resource profit" of 137 hours on the 1,100 hours from which contract price is derived. Note this is not a cash profit unless LSC then agrees to give you additional matter starts.

You can use this "resource profit" as you see fit, eg work for non-LSC contract clients, social policy work. However, new contract will seek to discourage suppliers from taking on large numbers of very short cases, and I will come on to this.

All of this explains why ASA and others have said that fixed fees will discourage suppliers from taking on complex cases or complicated clients and encourage them to take on easy cases and easy clients ('cherry picking'). We have analysed NfP cases in detail using data supplied by LSC. Unsurprisingly, this shows that cases take longer in more complex cases (eg multiple debt, unfair dismissal, social security appeals) and for certain clients, notably BME clients.

Disincentives to do long, exceptional or very short cases

LSC has overriding political priority to maximise number of people helped. This means it wants to discourage suppliers from taking on exceptional cases or longer cases generally if the latter means that suppliers do not use full quota of matter starts. Equally, it has no interest in over-rewarding those doing short cases, because LSC will be paying more for less and is sensitive about cherry picking argument.

LSC proposing number of measures to discourage providers from taking on very long or very short cases.

Firstly, it intends to consult on setting contract sizes from 1 April 2008, with view to reducing matters starts for suppliers doing a large number of exceptional or very short cases. This subject to guarantee that contract compliant suppliers will be guaranteed 80% of their matter starts in next schedule. But it could still result in a year on year reduction of 20% if your case profile is “wrong”.

Secondly, new contract will contain a range of “Key Performance Indicators” (KPIs). Initially, KPIs will not be mandatory, ie failure to comply will not constitute a breach of contract. However, failure may trigger questions (“concerns”) from the LSC, about which they will want to talk to you. It seems likely that in future, failure to meet certain KPIs will trigger a reduction of matter starts in the following year. And if KPIs become mandatory at some stage, failure might even trigger contract sanctions during the year.

You will be monitored against KPIs from 1st April 2007. In addition, performance against KPIs will constitute key measure under preferred supplier process.

Two proposed KPIs provide disincentives to do long cases:

- suppliers should start 85% of allocated matter starts (this is the revised figure set out in the final version of the contract). Using earlier example, doing only 220 debt cases means you will only achieve 80% of allocated 275 matter starts, ie you will fail to achieve KPI of 85%.
- when exceptional claims are assessed, the overall reduction on assessed cases should not be more than 10%.

Further proposed KPI provides a disincentive to cherry pick short cases:

- there is a “fixed fee margin” of 20%, which sets limit on the profit you can make under the contract. Returning to debt example, if, on average, your cases cost less than £156.80 (ie 80% of £196), you will fail this KPI. Note this is about average not individual case costs.

Thirdly, draft contract provides for introduction of minimum level of case starts (subject to further consultation). These to be set out in annual schedule and may vary according to supplier. If this provision introduced, suppliers not starting the minimum will generally be given no new matter starts in next schedule, in effect terminating your contract.

Minimum and maximum levels may also be set for licensed work, which has previously not been capped.

Finally, draft contract term that suppliers must not refuse to undertake work because it may be to their financial disadvantage. In essence, this term is saying that you cannot turn clients away or stop doing work for them because fixed fee is not or is unlikely to be sufficient to cover costs of case. This is in effect an “incentive” for suppliers to take on work for which they will not be paid. Failure to comply will result in you being in breach of contract. Note you can still refuse services to clients on other grounds (eg legal merits of case, professional reasons, conflict of interest).

Payment for and assessment of exceptional cases

Remember, exceptional cases are those costing 3 or more times fixed fee. The exceptional case threshold for debt is £588 (£196 x 3).

Assuming LSC assesses case as exceptional, you will be paid on same basis as applies to solicitors doing exceptional cases under present tailored fixed fee system. This means:

- a national hourly “preparation” rate, which differs according to category of law and includes an uplift for London suppliers
- a separate hourly rate for travelling and waiting
- fixed payments for standard telephone calls and letters

Unclear whether all exceptional cases will be assessed or whether only a sample will be assessed. If the latter, then results may be applied across all of that agency’s exceptional cases, eg if sample is reduced on assessment by an average of 10%, this will be applied to all of your exceptional claims. Where this takes a claim below exceptional case threshold, you will be paid only the fixed fee for that case.

A question was asked in the morning’s session about whether there will be a continuing need to time record work once fixed fees are introduced. The answer is an emphatic yes. You will also need to cost each case in monetary terms to determine whether it is exceptional, and to assess whether your cases overall comply with the 20% fixed fee margin KPI.

Transitional arrangements for agencies with an NfP contract

Fixed fee regime only applies to cases started after 1st October 2007.

Should mention what will happen in relation to work started under current scheme but not completed until after 1st October. Say you take 4 hours to do the case, and do 2 hours in September and 2 hours in October. September hours will be counted against your hours target for the first half of the year. Work done after 1st October will be paid at your current hourly rate and credited to your account.

Agencies will need to manage change from system of being paid in advance (albeit with some strings attached concerning hours performance) to being paid monthly on account, with payments reconciled against completed matters reported.

This is a problem. A little slippery to explain, but linked to case duration (not length per se). Let’s return to earlier debt example. You have been allocated 275 matter starts at a price of £53,900. Your average case duration is 2 months. Ignoring seasonal fluctuations and exceptional cases, by 30th September 2008 (a year on from the start of new scheme), you will have reported about 229 closed fixed fee cases (275 divided by 12 x 10). This is worth £44,884 (£196 x 229), a shortfall of £9,016 on contract price. So, you are in trouble unless you can make up the difference by reporting £9,016 work on old cases undertaken after 1st October. The longer your case duration, the worse the problem. For example, if your average case duration is 3 months, you will only have reported about 206 closed fixed fee cases, worth £40,376, a shortfall of £13,524 before taking into account work on old cases.

LSC accepts that this is a problem and agrees that transitional arrangements necessary to allow agencies to build up work in progress under new scheme. ASA and networks are currently negotiating these arrangements with LSC.

Unified Contract

As there will no longer be two civil contracts (solicitor/NfP), there is now a two-stage negotiation process. First, ASA works with networks to agree NfP position. Second, ASA negotiates with LSC alongside Law Society and Legal Aid Practitioners Group.

Contract comprises

- contract for signature (in future by organisation not office)
- annual schedule (by office)
- standard terms plus annexes
- specification
- key information tables.

Suppliers will continue to be bound by rules set out in other documents (eg Funding Code).

LSC publicly consulted on drafts of the above documentation, a consultation that closed on 21st November. LSC response to consultation was to:

- bring in the new Standard Terms for the unified contract on 1st April, as originally planned
- defer introduction of fixed fees until 1st October
- delay new specification until 1st October (so NfPs will work to current NfP specification in relation to cases opened before this date).

Standard Terms clearly important, but remember they are primarily about what happens when things go wrong, not about day-to-day contract management. This is dealt with in the Specification, which covers the nitty-gritty issues, including category specific guidance on what constitutes a matter. This is crucial in context of fixed fee scheme, as it will determine extent to which you can “split” cases and thus claim more than one fixed fee payment for same client.

Standard Terms do set the proposed KPIs. In addition to those already mentioned, LSC proposes following additional KPIs:

- when your claims for licensed work are assessed, the overall reduction on assessed cases should not be more than 10%
- minimum of 40% of cases must provide “substantive benefit” to client.

Remember that you will need a minimum peer review score of 3 to comply with the contract and a minimum score of 2 to become a preferred supplier. Also worth mentioning two changes that LSC have agreed following public consultation:

- proposed indemnity for directors of NfP organisations dropped, provided organisation is registered charity or has applied for charitable status by 1st April 2007.
- no fault break clause extended from 3 to 6 months (this now more than a hypothetical issue about potential cuts in public expenditure resulting in slashing of legal aid budget - LSC may want to use this provision in areas where it is establishing CLACs and possibly CLANs).

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