advice services alliance

legal aid

policy response

Civil Bid Rounds for 2010 Contracts

The Advice Services Alliance's response to the Legal Services Commission's consultation paper

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advice services alliance

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1 About Advice Services Alliance

1.1 The Advice Services Alliance (ASA) is the umbrella organisation for independent advice networks in the U.K. Our aims are to:

- champion the development of high quality information, advice and legal services
- ensure that people are not denied access to such services on account of lack of means, discrimination or other disadvantage
- encourage co-operation between organisations providing such services
- provide a forum for the discussion of issues of common interest or concern to advice organisation.

1.2 Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members include:

- Advice UK
- Age Concern England
- Citizens Advice
- DIAL UK (the disability information and advice service)
- Law Centres Federation
- Shelter
- Shelter Cymru
- Youth Access

1.3 Our members represent some 1,700 organisations which provide a range of services, including advice, to diverse groups throughout the U.K. Most of these organisations offer services within a local area, but some of them are regional or national in scope. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. debt, welfare benefits, discrimination, housing, employment, immigration, education and community care.

1.4 A draft of this response was sent to those of our members representing organisations with LSC contracts, and their comments have been taken into account in preparing this final document. These members will also be responding separately. We have had the benefit of seeing some of their draft responses, which we have drawn on in this response. There are some areas in which our members do not agree with us, and we refer to their separate responses. In some cases, where there is significant disagreement, we have noted this in our response.

2 Introduction

2.1 We welcome the opportunity to respond to the consultation paper. We welcome the more pragmatic approach adopted and in particular the willingness to allow consortia bids in social welfare law (SWL). We appreciate that many of the proposals are still at an early stage and need considerable development. We have a number of major concerns.

3 Major concerns

Quality

3.1 We are extremely concerned that proposals concerning the future procurement of publicly funded legal services make scant reference to quality. As we have stated on several occasions, we consider that the LSC's withdrawal of its Preferred Supplier proposals was a fundamentally retrograde step. The issue of how to select between providers would have been much more straightforward if it were possible to take peer review scores into account.

The danger of a "big bang" approach

3.2 The proposal to procure SWL services in all procurement areas at the same time ("a big bang") holds significant risks for the LSC and, more importantly, for potential users of the service.

3.3 Some providers may submit multiple applications in different procurement areas in order to test the market, with the intention of only accepting a contract in the one or two areas where they get the best "offer".

3.4 We suggest that an incremental approach or rolling programme should be considered, perhaps over a period of three years. This would have the advantages of:

- making the process more manageable (and less disruptive) for providers and the LSC
- giving the LSC a more realistic sense of the market
- giving the LSC (and providers) the opportunity to learn from experience.

The timetable is quite unrealistic

3.5 We see serious problems with the timetable proposed, and urge that implementation be delayed for two reasons.

3.6 Providers will be unable to realistically consider bidding until the LSC has published its procurement plans for each area. These need to be published as soon as possible, but we are not clear how soon the LSC will be able to do this. The plans need to specify a number of matters, which we set out in paragraph 45 below.

3.7 These plans will need to be consulted on. Providers will then need to establish whether consortia are necessary and/or desirable and/or practicable before they can engage in the discussions necessary to bring them about. We have experience of partnership working in the NfP sector being very successful, but NfP agencies and solicitors' firms will need time to develop relationships. The relationships between providers in consortia have to be durable and sustainable. Time will be needed to develop contracts between providers that are fit for purpose.

3.8 At the moment, the consortia proposals are unclear, and require considerable clarification, as discussed below. However, as pointed out by the Cabinet Office / Office of the Third Sector in their recent report "Working in a consortium",[1] forming

[1] http://www.cabinetoffice.gov.uk/media/107235/consortium%20guide%20final.pdf

consortia involves a considerable amount of work, and takes a considerable amount of time – several months at least. The consultation paper itself points out that there are a number of issues that need to be resolved with the Solicitors Regulation Authority. Both of these considerations need to be factored into the timetable for implementation of the proposed changes.

The number of SWL contracts in each area

3.9 The paper is silent on the question of the number of SWL contracts that the LSC wishes to procure in each procurement area. The selection criteria suggest that, in a competitive bidding situation, the bidder that scores highest could bid for and receive all the NMS available.

3.10 We believe that the disadvantages to clients of this approach will greatly outweigh the benefits. While we acknowledge that there are possible benefits to some clients in having a range of services provided by each supplier, or by a closely linked network of providers, we strongly disapprove of monopoly contracts for social welfare law services in each procurement area. The issue of whether consortia should count for these purposes as monopoly contracts will need to be resolved. This is a complex issue. Much is likely to depend on the consortia arrangements that are allowed.

3.11 We propose that, in the procurement plans, the LSC should set out the minimum number of contracts they are seeking to let, as is proposed for family contracts, and that this number should be more than one. This would:

- preserve an element of competition between providers (which we consider to be desirable in principle) and ensure that there is still a range of providers available for further procurement exercises
- help to ensure geographical coverage in the larger, or more diverse, procurement areas
- preserve at least some element of client choice
- help cope with conflicts of interest, which can arise in almost all areas of law.

3.12 For the same reasons, it is also essential that the LSC limits the proportion of the contracts granted to one provider within each procurement area. For example, in an area with a minimum of four contracts, no one supplier should gain more then 50% of the value of the contracts in that area. [Shelter do not agree with the last sentence – please see their own response.]

3.13 There is a range of views amongst our members on this issue, but it is our view that there should be a minimum of at least four providers within each region, and also in Wales.

"Social welfare law"

3.14 We have concerns about the LSC's definition of SWL. In particular, we are concerned that services in housing, employment, welfare benefits, debt and community care have been artificially separated from services in immigration, education and mental health. It is our view that it would be preferable to have a less rigid approach where providers could advise in a range of legal areas to meet the needs of their clients.

3.15 Whilst it is true that housing, welfare benefits and debt problems often go together, there are other clusters of problems that affect different groups of clients. For example, disabled and older people are more likely to suffer community care problems in conjunction with either benefits or housing problems. Similarly, there is a

large number of people, disproportionately represented among the clients of NfPs and solicitors firms practising in large urban centres, whose entitlement to housing, benefits and other services is dependent on their immigration status. To require such clients to seek help separately from immigration specialists and from SWL specialists cannot be regarded as an “integrated service”.

3.16 We are not proposing that immigration should be added to the five other categories within the definition of SWL. We are suggesting that other combinations of categories should be considered in addition to those proposed in the consultation paper.

4 The Consultation Questions

Section 4: Types of services we want to buy

Q.3. Do you agree with the types of services we intend to procure in each category of law? If not, how should services be structured to ensure more integrated advice?

Q.4. Do you agree with the types of civil legal aid service we will no longer procure? If not, why?

4.1 Subject to the views expressed above, the combinations proposed are acceptable, as far as they go, provided that the final proposals in relation to consortia are reasonable.

4.2 We are particularly concerned about the exclusion of immigration, as stated above. This is likely to be an issue particularly in London and some other metropolitan areas.

4.3 We think that the LSC should consider alternative combinations, such as

- Housing and immigration
- Housing, immigration and benefits
- Other combinations of the SWL categories, e.g. any three of the five categories

4.4 We trust that the LSC will set out its procurement plans for each area in the near future. Depending on the nature of need in different areas, different combinations could be appropriate in different areas.

4.5 Consideration of the nature of supply may also be necessary. There may be some (most likely rural) areas where no bid for debt, benefits and housing together is received, but where existing suppliers presently cover e.g. debt and benefits (and possibly also housing and family). Some awards may have to be made which are outside the proposed combinations, in order to preserve supply.

4.6 We note the proposal to divide NMS within SWL using the current division nationally as a starting point, but subject to sense checking by LSC Account and Relationship Managers [para 5.61]. We would urge the LSC to consult providers and other interested parties on the proposed allocation and division of NMS in SWL, when it publishes its proposals for each procurement area (which we hope will be soon). Providers, and others, have a strong sense of the nature of local demand and of the factors influencing it, such as the performance and practices of local landlords and benefit authorities.

[Please see Shelter’s response for their view to this question.]

Q.5. Is it reasonable that, in order to maintain integrated services, where contracts have been awarded on the basis of multiple categories (e.g. debt, housing and welfare benefits), work in all categories usually lapses where the minimum new matter start size per contract year has not been met?

4.7 We appreciate the LSC's concern that providers may bid for and receive contracts to deliver NMS in categories of law that they do not subsequently deliver.

4.8 From the clients' point of view, it is very unlikely that it would be in the best interest of clients for providers to lose their contracts for this reason. We believe that stability of supply and continuity of adviser is very important for clients.

4.9 As far as providers are concerned, we note the LSC's intention to retain the discretion to allow contracts to continue in exceptional circumstances where the minimum target has not been met due to circumstances beyond the provider's control, or where the LSC still wishes to purchase services due to potential access issues.

4.10 There are a number of factors that affect the levels of demand in different areas in the SWL categories of law. This may affect smaller providers, in particular, who may be less able to adapt to fluctuations in demand, or to accommodate factors such as staff absences.

4.11 We are concerned that the proposed rule (or presumption) could inhibit some NfP providers from adopting an expansionist strategy – of seeking to take on new categories of law, especially where there are no other current providers and local demand is latent.

4.12 There are a number of circumstances, which, in our view, should trigger the exercise of such discretion, e.g. where the provider can demonstrate that they have the capacity, and the necessary arrangements in place (such as a supervisor), but have had problems in generating sufficient demand from eligible clients. Other examples could include staff vacancies, staff illness or staff taking maternity (or paternity) leave.

4.13 In principle we prefer the contractual concept of "good reason" to that of "exceptional circumstances". [2]

4.14 Where the failure to meet the minimum is attributable to one member of a consortium, thereby putting the other members at risk, we would suggest that the other members could be given a right of first refusal to make good the deficit by taking over responsibility for the category of law in question.

Q.6. Are the minimum new matter start sizes required set at the right level in each category? If not, why – for example, is there a case for setting lower new matter start sizes in rural areas?

4.15 We consider that the proposed minimum figures are acceptable in normal circumstances. However, there may be access reasons for exercising discretion on these figures, where an organisation conducts cases in the category of law using other funding (such as grants or fees), or is located in rural areas, or is taking on a category of law for the first time.

[2] See the examples of "good reason" for underperformance referred to in the General Civil Contract (Not for Profit), Annex C, paras 22-23

Q.7. Is the minimum supervisor to caseworker ratio set at the correct level or are there, for example, some categories where processes are simpler, and as such require less supervision?

4.16 We welcome the proposal for a maximum supervisor to caseworker ratio of 1:4.

4.17 Our primary concern is about quality. There is a real risk that this will be threatened where there are high numbers of unqualified staff with little experience working on LSC contracts.

4.18 We appreciate that there may be organisations where there are a number of staff who are supervised and who only fail to qualify as supervisors by not having taken a supervision course. We would be happy for such staff to be excluded from the calculation of the supervisor/caseworker ratio, provided that there is proper evidence of their length and breadth of experience.

[Please see Shelter's response for their view to this question, as they do not agree with us on this point.]

Q.8. Are there any practical impacts on debt providers that will make the requirement to have an Approved Intermediary for Debt Relief Orders unachievable?

4.19 We agree with Citizens Advice that this requirement is achievable and desirable.

Q.10. Do you agree that requiring immigration providers to have at least one Level 2 to every two Level 1 caseworkers employed will help ensure that providers are structured to represent clients through the appeal stages of their case?

4.20 We think this is a good idea.

4.21 However, given that the accreditation scheme has been in operation for over three years and that the LSC is proposing to require ratios in this way, we would like to see an evaluation of the scheme. This should consider whether it has improved quality as a whole and the extent to which different ratios are an indicator that work is likely to be of good quality.

Q.11. Is the Integrated Services A requirement to undertake Legal Representation in community care, housing, mental health and immigration and asylum the most suitable way to ensure that clients can access all levels of advice? If not, what would be a better approach?

4.22 We are concerned to note that the LSC is not asking respondents whether they agree to the idea of having two types of service specification.

4.23 While we do not object in principle, the proposal adds a further level of uncertainty. Agencies that do not currently do housing work, or that do housing work currently without a solicitor, need to know as soon as possible whether their area is likely to be designated as A or B.

4.24 We would urge the LSC to publish proposals for consultation for each procurement area as soon as possible. These proposals should specify

- Whether the area is likely to be designated as A or B
- The key locations specified in A areas
- Details of the NMS currently awarded to providers in the area (and neighbouring areas)
- The proposed NMS allocation for each category of law in that area

- The minimum number of SWL contracts that the LSC is looking to award
- How the LSC propose to deal with areas where a high proportion of clients come from outside the procurement area.

4.25 In principle we agree with the suggestion that it is preferable for housing, immigration and community care services to be provided by providers who have solicitors in house enabling them to provide an end-to-end service.

4.26 We are somewhat concerned about the proposal that the LSC may require suppliers in A areas to deliver a service in specified key locations [para 5.57]. We appreciate the thinking behind this proposal but it seems to us more likely that the areas needing such attention will in fact be classified as B areas. The proposal is also unclear as to the type of service that may be required in the specified locations. We assume that outreach proposals will be acceptable but the paper only rules out the need for a permanent presence (without also ruling out the need for a part time presence).

4.27 In relation to immigration, we are concerned that the requirement may adversely impact on smaller BME led groups whose immigration service provision has grown in response to need in a particular community or communities. There are a number of organisations in the NfP sector for whom this is the case and who do not employ solicitors. Employing a solicitor would mean incurring significant extra cost and would enhance the service to clients in relatively few cases as most of the work does not involve legal representation.

4.28 We feel that the LSC should look closely at the potential impact of this policy on supplier diversity and should consider alternatives to mitigate this impact. These could be allowing consortia arrangements as is proposed for SWL or letting contracts to non-solicitor organisations so long as they can demonstrate that they have properly functioning referral arrangements with solicitor organisations for any case that requires legal representation.

Section 5: Where services will be delivered

Q.15. Do you agree with the approach in immigration and asylum to identifying areas of high demand (access points) and letting matter starts on this basis?

4.29 We agree that it is preferable for clients to be able to access advice services without having to travel long distances.

4.30 However, we are concerned that the LSC does not have accurate information about where clients are located. This is particularly true of asylum clients because of their high mobility.

4.31 Unless the LSC is able to develop a method of tracing where asylum clients really are that is not based on CMRF data (which will only give an indication of where clients were when they signed the Legal Help form), we do not think this is a sensible approach.

4.32 It is likely that providers have better information about where clients are and also about local transport links. We suggest, therefore, that the LSC publishes and consults on a procurement plan for each region before deciding finally where the access points are.

4.33 Furthermore, there needs to be flexibility built into any system that is developed. Situations can change during the life of a three-year contract and the Home Office may change its dispersal practices.

Q.16. Do you agree that a different approach to setting access points for London in immigration and asylum is necessary?

4.34 We agree that arrangements in London should be different because it is an area of high demand throughout.

4.35 However, we are not sure that dividing London into North, South, East and West is the best way to achieve comprehensive coverage. Firstly, we are not clear about how the division would be done.

4.36 Secondly, geographical access is less of a problem in London compared to other areas because transport links, particularly into Central London, are very good and immigration clients, in our experience, are prepared to travel to a trusted provider.

4.37 As stated above, it is our view that the LSC should publish and consult on a procurement plan for London. In the plan, it might be more practical to divide London into a Central zone and four peripheral zones. For each of the zones the LSC should indicate the likely number of matter starts and the minimum number of contracts they will award.

Q.17. Do you foresee any issues with the proposed definition of permanent and part time presence?

Q.18. Does the type of presence proposed in a procurement area for family and social welfare law advice achieve the right balance of ensuring client access to service whilst being practical for providers?

4.38 We appreciate what the LSC is trying to achieve by these proposals, and we are in general agreement with the principle behind the proposals. We do have a number of concerns however, and consider that these proposals need to be reconsidered.

4.39 Firstly, we find the proposals somewhat ambiguous. For example, the degree or extent of access required for clients to be able to arrange appointments "from Monday to Friday" is unclear. The extent to which advisers are expected to deliver face-to-face advice on different days of the week in permanent "suitable offices" is also unclear. We refer also to the particular concerns raised by Citizens Advice. We agree with Citizens Advice that there is a risk that "that the current wording will result in widely different interpretations by potential bidders and make it difficult for the LSC to make decisions between bids on a fair and consistent basis that are not open to challenge."

4.40 We are not convinced that a rigid distinction between the two types of presence is appropriate, for a number of reasons. We note Shelter's comments that the LSC's requirements can be summarised as locations where advice can be delivered that:

- Comply with quality assurance standards and health and safety requirements;
- Cater for client needs;
- Are suitable for face-to-face advice;
- Have telephone numbers that are accessible Monday-Friday;
- Are accessible Monday-Friday for clients to go in face-to-face to make appointments.

4.41 Shelter comment that:

"The LSC could label this requirement simply as 'locations complying with the above conditions' and get rid of the distinction between part time and permanent offices as

it adds nothing. All of the above could be provided by way of (a) permanent office locations; and/or (b) arrangements with other organisations to use their reception / premises as necessary [which] may well be the best scenario in a consortium."

4.42 It is important that there is flexibility of supply and that suppliers are not tied down to specific locations determined rigidly in advance. Major changes can occur in an area, such as mass redundancies in a particular location, an influx of asylum seekers, or a benefit take-up campaign, and suppliers need to be able to respond flexibly to these.

4.43 We agree strongly with Citizens Advice that greater flexibility is required particularly in rural areas. As they point out:

"Delivery models which work in urban areas are often not suitable for the delivery of services across rural areas.

Delivering services across a dispersed geographical area whilst ensuring reasonable access for clients requires flexible service delivery models. An inflexible emphasis on a full time office base is likely to have a damaging effect on the spread of suppliers and outlets across the area.

Currently Integrated Service B requirements propose that 'Where providing Debt, Housing and Welfare Benefits advice must be delivered from at least one permanent presence within the procurement area bid for'. In rural areas, services are often delivered through a number of part time offices which ensures that most people have regular access to advice within reasonable travelling distance. Replacing multiple access points with a single 'permanent presence' (if this were to mean, for example, an office open to people walking in off the street and telephone callers Mon-Friday 10 - 4) would seriously reduce access for a large proportion of the population. Many suppliers, even grouped together in consortia, would not have the resources both to provide one 'permanent presence' as well as maintain multiple access points.

In addition, if the 'majority of contract work' has to be delivered from the permanent suitable office, in rural areas this will result in clients having to travel long distances to access services and/or caseworkers having to spend a lot of time travelling instead of doing casework. The proposals claim that journey time on public transport to a provider will be 'less than 45 minutes for the vast majority of clients' (5.42) The displacement of multiple access points in favour of a single permanent presence will significantly reduce the number of clients who can access services within a reasonable travelling time."

4.44 There is a related issue about telephone access. The arrangements should accept that access by telephone for clients to be able to arrange appointments could in appropriate circumstances be provided by a regional or national telephone service that had direct links with the providers concerned.

4.45 As Shelter point out:

" Even very basic telephony systems allow for diverting of calls to any location. A 'service' could have a telephone number as opposed to each office having a telephone number. Calls could route through to wherever there were the staff on any particular day to answer the calls. This is in fact what the LSC funded CLA line does and the same principles can be used for these types of services."

4.46 There are a number of issues about consortia as they relate to the presence requirements.

4.47 One solution could be that a permanent presence can be provided by one member of a consortium on behalf of other members. For example, if one agency (the host agency) provided debt and benefits advice while housing advice was provided by another agency, which came to the host agency once a week to provide face-to-face housing advice (as envisaged in the consortium proposals at para 8.14) then the permanent presence requirements could be met if the host agency is accessible to clients from Monday to Friday to make appointments in debt, benefits and housing.

4.48 Another solution, as suggested by Citizens Advice, is that different days of the week could be covered by different members of the consortium, so that agency A was open Monday and Tuesday, agency B open on Wednesday and agency C on Thursday and Friday.

4.49 There is an issue about location of services. As Citizens Advice point out:

" The LSC proposes stipulating the location of services in Service Level A areas. We suggest this is done in discussion with current providers. Whilst we agree that this is important in order to protect access to services for clients, we would like to see this incorporated into service level B areas as well. Without this there is nothing to ensure that services are located where clients need them. We suggest locations are kept under review as providers may need to relocate a service or outreach in response to changing circumstances e.g. current spatial strategies will see new towns emerging, and small communities becoming larger."

4.50 Finally, there is an issue about outreach. As Citizens Advice also point out

"We are also concerned that the emphasis on 'permanent presence' will divert resources away from outreach services which can contribute to client access. The consultation paper says that decisions on the location of outreach services will be made by Account Managers after the conclusion of the bidding process. We feel this underestimates the importance of outreach services in rural locations, as it will not enable the LSC to take the provision of outreach services into account as part of the competitive process. The benefits of multiple if part time offices should be considered in order to best allocate limited resources across a large procurement area."

Q.20. Is requiring a permanent presence in at least one immigration and asylum access point, and a permanent or part time presence in each access point bid for, the best way to ensure access across procurement areas (Home Office regions) whilst maintaining a level of flexibility for providers?

4.51 Not necessarily. Please see our answers to questions 17 and 18.

4.52 Furthermore, as we have said in our answer to question 15, we are not convinced that the LSC has the information to choose its access points. Unless these are correctly chosen to reflect where demand will be, requiring presence in them will not guarantee access.

4.53 We believe that presence is defined too rigidly and that greater flexibility should be allowed in relation to the location from which services are delivered.

Q.21. In the award of UASC work, do you agree that we should favour providers with the shortest travel time to the Home Office Interview in the specialist local authority for which they are bidding? If not, why not?

4.54 Given the particularly vulnerable nature of this client group, selection should be based on peer review (1 or 2 only) and not something as unrelated to quality as

travel time. Encouraging providers to bid with short travel times may mean they cut corners in other areas of their work as a way of making up their losses.

Q.24. Do you believe that mental health, and immigration and asylum providers should be restricted to undertaking most of their work for clients from within the procurement area(s) bid for?

4.55 As far as immigration and asylum providers are concerned, this proposal is most likely to have an impact on agencies in London. Many of our members have significant numbers of clients who travel from outside their procurement area. This may be for a number of reasons, for example the provider may have expertise in relation to a particular country or type of case, or the provider may have acted for the client's friends or relatives and have been recommended.

4.56 We therefore believe that the client should have the right to choose their provider even if they are outside the procurement area in which they live. This right to choose is important in itself but is also a way of driving up quality.

4.57 Given that the current figure for work undertaken by providers in the South East for clients outside the region is over 20% we think that this should provide the benchmark and that there should be an allowance of around 25% for both immigration and asylum work from outside the procurement area.

Q.26. Bearing in mind the limits on the legal aid budget, is the initial 30% ceiling the most suitable way to calculate the HPCDS budget for 2010 onwards?

4.58 We do not object to the proposal that only providers with LSC housing contracts will be able to deliver the schemes [para 4.21]. We note the proposal to award contracts to an individual provider, which may include consortia arrangements albeit without a management fee. [para 5.58]

4.59 It is important here, as elsewhere, that preference is not given to single providers over consortia arrangements.

4.60 There are several advantages of having groups of providers providing housing possession duty schemes in certain areas:

- providers with housing contracts gain practical experience of what is happening in their local courts and this can enhance the quality of their advice
- taking part in a duty scheme can enhance a provider's awareness of local developments
- joint working encourages providers to get to know each other and promotes trust in making referrals
- groups of providers ensure a range of providers with experience for future bidding rounds and avoid a monopoly situation

4.61 As far as the "initial 30% ceiling" is concerned, we endorse the concern expressed by Citizens Advice that using historic figures may not be appropriate in the current economic client, and the concern expressed by Shelter as to the proposed calculations.

Q.27. Do you agree that in mental health, immigration and asylum and low volume categories we should move towards distributing new matter starts more closely to where clients are located?

4.62 In relation to immigration, please see our answer to question 15 above. We are not convinced that the LSC has accurate information about the historical location of clients. Furthermore, clients move and dispersal patterns are likely to change and therefore historical location is unlikely to tell you much about the location of future need.

Q.28. Do you agree with the proposed approach of holding back 10% of asylum new matter starts within London and the South East to facilitate the changing dispersal patterns?

4.63 We agree that it is sensible to plan on the basis of what the Home Office says it intends to do. However, these plans must remain flexible.

4.64 We therefore agree with the proposal to hold back 10% of matter starts so long as they are definitely allocated during the life of the contract and so long as they may be allocated to the South East if demand here remains high.

Section 6: How we will procure services

Q.36. Do you agree that the LSC needs to guard against bids to deliver services that will not have the capacity to do the work bid for? Do you think applying a maximum number of matter starts bid per FTE will assist in that?

4.65 The paper seems to suggest that the proposed maxima would only be applied in relation to new entrants or existing providers seeking to expand capacity by 20% or more [para 6.34]. This would appear to allow existing providers with high "productivity" exemption from the proposed maxima, and subject, presumably, only to the application of the fixed fee margin if they are in fact doing large numbers of short cases. This may be reasonable, but we are concerned at the number and proportion of providers, including NfP agencies, that are doing few if any exceptional cases. We do not want the message to be sent out that it is good to do large numbers of relatively simple cases or not do complex cases properly.

4.66 We assume that the proposed maxima are intended to be averages across all the supervisors and caseworkers proposed in the bids concerned.

4.67 Having said that, the maxima proposed may be too low.

4.68 In previous discussions in relation to the NfP contract it was assumed that a FTE caseworker, with appropriate support, and an 1100 hours contract, would cost in the range of £50,000 - £65,000, depending on the location of the service and the skills of the caseworker.

4.69 On this basis, given the levels of fixed fees in SWL, the maxima proposed seem low, even allowing for the expectation that providers would be doing a number of exceptional cases.

4.70 It is important that the contracts are financially viable, particularly for NfPs, which tend to derive a significantly higher proportion of their legal aid income from Legal Help, compared to private practice.

4.71 We would suggest the following figures, which would allow for a reasonable proportion of exceptional cases:

- Debt – 350 or 375 cases
- Welfare benefits – 375 cases
- Housing – 400 cases

- Employment – 300 cases
- Community care – 250 cases

[Please see Shelter's response to this question, as they do not agree in full with the views expressed above].

Q.38. Do you think the proposed selection criteria for each category are the best way to differentiate between bids?

4.72 As we have stated above, we strongly disapprove of monopoly contracts for SWL services and consider that there should be limits on the proportion of contracts granted to one provider within each procurement area, each government region, within Wales, and within the whole of England and Wales.

4.73 We also consider that multiple contracts are likely to be necessary in many procurement areas in order to ensure the geographical coverage necessary to preserve a reasonable degree of access for clients.

4.74 In relation to immigration, as the proposals currently stand, a single organisation bidding for all the access points in a region will be preferred. This will have an impact on diversity of provision and will limit client choice.

4.75 We are therefore opposed to any selection process that would allow the winner to take all the NMS available. We suggest that the LSC should, in each procurement area, specify the number of contracts that it would like to have in SWL, (and specifically in debt, welfare benefits and housing), with a stated minimum of at least two (although it may be that in some areas the number of NMS available is so small that it may only be practicable and/or possible to grant one contract).

4.76 This would give a strong indication to bidders of the likely maximum size of contracts in SWL (and specifically in debt, welfare benefits and housing). Bidders should, as the paper suggests, be asked to detail both the minimum and maximum NMS that they would be willing to accept, along with the number of FTE staff they have to undertake that work. [para 6.34]

4.77 It may also be appropriate to ask bidders to state whether they are bidding in any other procurement areas, and whether their capacity to deliver the NMS bid for would be affected by their success or failure in relation to bids in other areas. We are not suggesting that the existence of other bids should count against a bidder, but it would flag up the possibility that a second allocation may prove necessary if the contract offered is not in fact taken up.

4.78 When bids are received, the LSC can then consider whether bids meeting the essential criteria enable them to grant the number of contracts they have specified as their intention, and to provide the necessary coverage both in geographical terms and in terms of the five categories of SWL. There will need to be flexibility at this stage. Where bids are, on the face of it, evenly matched, the LSC should see if it can accommodate them all, even if that leads to the grant of more contracts than previously indicated.

4.79 If there are too many bids then selection criteria may have to be applied.

4.80 It seems to us that the paper is somewhat ambiguous as to the selection criteria. It appears to contain “preferences” within the essential criteria, followed by selection criteria which are described as tiebreakers.

4.81 In principle it seems to us that any factor used to distinguish between competing bids should be described as one of the selection criteria, rather than a "preference".

4.82 The paper states that preference will be given where arrangements are in place, for example named supervisors, but it is not clear whether "named supervisors" means supervisors already in post, supervisors already acting as such under existing LSC contracts, or supervisors who will be in post if the contract is granted.

4.83 We do not see why a bidder's "track record" should not be taken into account if a choice has to be made between bids that meet the essential criteria. This is relevant to the first proposed tiebreaker in SWL – the number of SWL categories covered by a bid. Some weight should be placed on a bidder's demonstrated ability to deliver what they are bidding for. Any selection must be based on reality and not just promises. Any choice between providers must be based on comparing like with like. Where a bidder (including a consortium) is bidding to do debt, welfare benefits and housing, and is already providing such services under an LSC contract (or a number of LSC contracts) it should not be at a disadvantage compared to another bidder offering four or even five SWL categories that does not currently do so within the procurement area.

4.84 In addition to track record we would like to see some recognition of the added value and/or social outcomes that some bidders can bring. The importance of such factors is highlighted in the recent Office of Government Commerce publication "Buy and make a difference: How to address Social Issues in Procurement". [3]

4.85 Our members have varying views on the kind of matters that should be considered, but this could include matters such as

- Experience of doing outreach targeting particular disadvantaged client groups
- Fluency in languages other than English
- Strong links to organisations providing advice at the General Help level
- Demonstrable ability to provide services to a wide range of clients
- Involvement in pro bono work
- Complementary advice services – e.g. the provision of debt advice funded by the Financial Inclusion Fund
- Additional advice services – e.g. immigration in addition to a SWL bid
- The ability to bring in other funding to supplement the LSC funded work
- The provision of training contracts in legal aid work
- Social policy work

4.86 We appreciate that such factors cannot be easily scored or weighted as between bidders. However, bidders that are able to establish that they meet a given number of such factors could receive a fixed number of additional or bonus points. We would welcome the opportunity to discuss this proposal further with the Commission.

4.87 In any sensible world, one would like to be able to choose between providers based on a proper assessment of their quality. We deeply regret the LSC's decision to drop its "preferred supplier" project, which would have enabled choices to be made on quality grounds.

[3] Available at http://www.ogc.gov.uk/documents/Social_Issues_in_Public_Procurement.pdf

4.88 Choices could still be based on peer review scores if the resources and time were available to carry out the reviews required. One advantage of a staggered or incremental approach might be to allow this to happen in specified areas.

4.89 If this cannot be done and if everything else is equal, e.g. if bidders have comparable track records and provide comparable added value, then it may be reasonable to allow preference to organisations or consortia offering a higher number of SWL categories.

4.90 We are less sure about the second proposed tiebreaker – the ratio of supervisors to fee earners. This could be done and might have some value. It is unlikely that bidders will have the same ratio across the different SWL categories in which they are bidding. An average figure would have to be calculated that is weighted, presumably in terms of the NMS bid for in each category.

4.91 We appreciate, and agree that new entrants have to be considered, as well as "expansion bids" – bids from organisations (including consortia) wishing to bid for more categories, or significantly more NMS than they currently deliver. One problem experienced by some NfPs at the moment is that they have the expertise to carry out certain categories of work but do not have an LSC contract, as the category is not considered a priority.

4.92 Whatever system is adopted, a transparent scoring system will have to be developed, **and consulted upon**.

4.93 It seems to us that considerable time, and resources, may have to be allocated to deal with a potentially large number of appeals from disappointed applicants. There will need to be complete transparency in each procurement area in relation to all the bids, how they were scored, and any other factors that were taken into account (such as the need to ensure geographical access and/or access to advice in all five SWL categories). It seems to us that any appeal is likely to throw into question the whole allocation of NMS in the area concerned. It may be necessary to allow all other bidders in the area to take part in the appeal process.

[Please see Shelter's response to this question, as they do not agree in full with the views expressed above.]

Section 7: Changes to the scope of funding

Q.40. Do you agree with the proposal to remove experts' cancellation and administration fees from the scope of public funding in all civil cases and to cap rates for experts' travel and waiting time?

4.94 There is a real risk that this could have an impact on the availability of experts. Access to justice issues obviously arise where one party to litigation has a cap on its experts' fees (or part of them) but the other party does not.

4.95 As Shelter have pointed out:

"There needs to be equality of arms between legally aided and non legally aided clients. Legal aid lawyers often at short notice need good medical or surveyor evidence. Already many experts have stopped doing legal aid work. In the short term such measures are likely to inhibit the instruction of particular experts. It will add some costs as lawyers try to find and negotiate terms acceptable to the LSC with other experts. If lawyers cannot instruct the best experts then this will be counter productive. It is absurd for the commission to be happy to pay a high hourly rate but

for an expert not to be instructed because he insists on a cancellation fee in the event of a hearing not proceeding. That is probably going to be counter productive.

Cancellation fees should be chargeable if outside the expert's control, since situations do arise where events overtake and an appointment has to be cancelled, or vulnerable or chaotic clients forget appointments, but the expert has made time and turned away other work to take the appointment.

Ultimately, surveyors and medical experts in the real commercial world do charge for their time and we think they are entitled to do so. If there is a reduction in the fees they can take in one way all that will happen is that hourly rates will increase to compensate.

A case which wins and where therefore costs are generally recovered cost the LSC a lot less than one which loses. We would like to see lawyers being able to instruct the most appropriate expert and believe the current system, with its provision for advance approval of fees where there might be doubt or uncertainty as to whether those fees will be met on detailed assessment, is adequate in terms of cost control.

The real issue with experts, which the LSC has regrettably failed to grapple with once again, is the hourly rates charged for their work – rates which can reach or even exceed £200 per hour."

Section 8: Other contract changes

Q.42. Section 8 sets out our key proposals for changes to the Standard Terms for the Civil Contract 2010 [and the Crime Contract 2010]. Do you think that we should make any other changes to the current Unified Contract (Civil and Crime) Standard Terms?

4.96 Certain contractual matters need to be clarified in relation to consortia

- If contact with the relevant specialist is made by telephone initially, either by the first organisation or by the client, this would need to be covered by the rules on telephone advice, which may need amplification as a result.
- That the client can complete a CW1 on making contact with the first provider, who can do this effectively as agent for the relevant specialist.
- Who is responsible for the client / who has the retainer / whose client it is if there is any significant gap between the initial contact with the consortium and the client making contact with the relevant specialist (either in person or by some other means). There are important issues of professional ethics here that will require discussion with the SRA.

4.97 We note the suggestion by Citizens Advice that guidance should be provided in relation to acting as a Mackenzie friend. This seems desirable. Such guidance was previously provided under the NfP contract.

4.98 We refer also to the points raised by Shelter in their response.

Q.43. Do you agree with the consortia arrangements we propose? Are there other categories of law e.g. family or immigration where we should allow consortia?

4.99 We welcome the proposal to allow consortia arrangements in SWL.

4.100 We have set out above our proposals as to other combinations of categories that should be considered. Consortia arrangements should also be allowed in respect of such combinations.

4.101 It is also our view that consortia should be allowed in immigration to allow asylum-only organisations to consort with immigration-only providers and non-solicitor organisations to consort with solicitor organisations. This will ensure that the LSC achieves its goal of "end-to-end" services whilst maintaining diversity of provision.

4.102 We appreciate that the consortia proposals are still at an early stage and need further refinement following this consultation and further discussions between the LSC and the representative bodies, involving also the SRA.

4.103 The form of consortia contracts remains to be resolved. The consultation paper is unclear on this point. It seems to us that there are essentially two options

- The consortia members have individual contracts with the LSC, incorporating or referring to a separate agreement as to the access arrangements. (In any event, consortium members will need to agree a contract between themselves.)
- There is one contract granted to a lead member on behalf of the consortium, with separate agreements between the lead member and other members of the consortium, incorporating the access arrangements and other issues.

4.104 However, it is hard to see how the latter option could be set up without involving subcontracting. The paper states that providers would not be allowed to subcontract, but gives no reasons for this, while noting that subcontracting is allowed within CLACs [n20 on p.72].

4.105 As stated earlier, we welcome the proposal to allow consortia. However, there may be circumstances where groups of providers would prefer a sub-contracting arrangement and, subject to the resolution of regulatory constraints, we propose that this should be allowed. It is potentially cleaner and clearer than having linked individual contracts. It appears to work well in other contexts, such as the FIF contracts.

4.106 On the other hand, some providers may prefer to have separate linked contracts, feeling that the reduction in the risk involved in being a lead provider outweighs the lack of contractual control or sanctions over other consortia members who fail to perform.

4.107 We would therefore urge the LSC to reconsider its objection to subcontracting. We are not suggesting it as the only model. There could be two or more acceptable models of consortia. Providers should be able to choose the model best suited to their needs and circumstances.

4.108 We have benefited greatly from reading the recent paper "Working in a consortium" published by the Cabinet Office / Office of the Third Sector. This highlights the amount of work involved and time needed in developing consortia, which must be allowed for within the timetable for implementation of the changes proposed. It suggests that there are three main models for working as a consortium, which it describes as

- Steering Group – albeit incorporating a Lead Contractor
- Lead Contractor
- Prime Contractor

4.109 The Prime Contractor model does not seem to be appropriate, as it is unusual for the Prime Contractor to itself deliver services.

4.110 The paper sets out in detail the advantages and disadvantages of the different models. We would welcome the opportunity to discuss the whole question of consortia with the Commission and other stakeholders as soon as possible, so that greater clarity can be achieved as to how consortia can be developed.

4.111 As far as clients are concerned, we believe that the LSC has consistently over estimated the problems of referral between advice organisations, based on a misreading of the findings in *Causes of Action.*[4]

4.112 However, we agree in principle that a client contacting any member of the consortium should be able to access all the services provided by the consortium, and that this may require arrangements that go beyond simply arranging appointments at another organisation's office [paras 8.14-15]. We note the specific suggestions outlined in para 8.14 of the paper and the proposal to allow bidders to put forward their own arrangements.

4.113 What must be avoided however is any suggestion that consortia arrangements will be treated less favourably than bids from single providers and any possibility that different criteria for assessing consortia arrangements are employed in relation to bids in different procurement areas. That would turn the bidding process into something of a postcode lottery, and would be likely to discriminate against consortia arrangements generally and the NfP sector in particular, in breach of the LSC's obligations under the Voluntary Sector Compact and the MoJ's Third Sector Strategy.

4.114 This is arguably another drawback of the "big bang" approach. If the LSC were to agree to a staggered or incremental approach, as we have suggested above, the position could be different, with different models of access arrangements being piloted.

4.115 In relation to access arrangements, one option may be to agree that certain models of access arrangements will be acceptable, so that bids incorporating one of these models will be accepted as meeting the access requirements.

4.116 The key point of the access arrangements, in our view, is that clients should be able to access the consortium easily (as stipulated in the "presence" requirements) and that, once they have got their "foot in the door", they should receive a service that is equivalent to the service that they would expect to receive from a single provider.

4.117 It seems to us that, rather than adopting one model, consortia will need to have a package of arrangements in place, which will ensure, as far as possible, that clients have access to the specialist services they need in a manner that is appropriate to their needs, and that any referrals are effective.

4.118 Consortia will have to consider carefully how this can be achieved. Much is likely to depend on the geography involved, the level of demand, and how easy it is for clients to get from one office within the consortium to another. If the two organisations are in close proximity, then simple arrangements may suffice. If they are some distance apart, then more complex arrangements may be necessary.

4.119 As noted above, in response to Question 42, there are certain contractual matters that would need to be clarified.

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[4] See Griffith, A "The CLS Strategy – is this really evidence based policy making?" available at http://www.asauk.org.uk/fileLibrary/pdf/clsstrategy.pdf

Q.44. Do you agree that these proposals allowing providers to apply for extra new matter starts without going through a bid round gives a reasonable amount of flexibility for providers while maintaining the principle of open competition for new work?

4.120 We are concerned that the proposals could be anti competitive, and could mean that large providers have a greater potential for growth that is free from competition. We suggest therefore that the number of NMS in a procurement area that could be subject to these proposals should be subject to a specified maximum, depending on the size of the procurement area.

Q.45. Do you agree that contractual KPIs focusing on delivery of quality of work, value for money and access to clients are appropriate?

4.121 We agree with Citizens Advice that:

"We think more information regarding the proposed sanctions is needed.

Outcome measures need further review and adjustment before they become a reasonable measure of the success of the service delivered. There are a number of significant anomalies inherent in the current system which have a negative impact on providers and undermine the usefulness of the KPI. For example, outcome codes where a case is closed in order to open under the next level of legal aid are recorded as negative outcomes. Such outcomes should be considered neutral and excluded from the calculation."

Initial Impact Assessment

Q.50. Do you consider that the impacts on experts are justifiable in ensuring sustainable access to legal services for clients?

4.122 Please see our answer to question 40.

Q.51. Do you have any comments on any prospective impacts of these proposals on clients or providers?

4.123 In general terms, the move to fewer, larger providers is likely to make it more difficult for some people to access face-to-face advice, due to mobility issues and transport problems. This is likely to affect, in particular, older people, people with disabilities and people living in rural areas.

4.124 It is difficult to comment on the Impact Assessment at this stage as the conclusions are based on a number of assumptions about how organisations will respond to the proposals, and in particular their ability and desire to expand and/or consort.

4.125 Any analysis at this stage of the probable impact on client or provider diversity is likely to be inaccurate, as no one really knows how providers will react.

4.126 This is therefore a situation that the LSC will have to monitor carefully as the procurement process unfolds, so as to ensure that any possible adverse impact is identified.

4.127 This difficulty in predicting likely impacts on clients and providers is another reason why we think the LSC should take an incremental approach to the introduction of the new procurement process.

Q.52. Do you have any comments on any prospective impacts on clients or providers resulting from the introduction of a tolerance bar in actions against the police, education and public law?

4.128 We do not agree to the proposal to remove education entirely from the scope of tolerance work. Some NfP agencies do education work that is funded from sources other than the LSC. This is particularly important for agencies that target services towards young people.

4.129 We believe that providers should be able to do education work under tolerance if they can demonstrate the necessary expertise. This could be demonstrated by reference to the casework requirements of the supervisor standard in education, or possibly by peer review, as was previously carried out by the LSC for some providers in Wales.

4.130 We would propose therefore that individual providers should be allowed to apply for a dispensation from any general tolerance bar in relation to education work.