

A Tailored Fixed Fee Scheme for Civil (Non Immigration) Controlled Work

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

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1 Introduction

About ASA

- 1.1 ASA is the umbrella organisation for independent advice networks in the U.K. Full membership of ASA is open to national networks of independent advice services in the U.K. Currently, our full members are:
- adviceUK
 - Age Concern England
 - Citizens Advice
 - Citizens Advice Scotland
 - DIAL UK (the disability information and advice service)
 - Law Centres Federation
 - Scottish Association of Law Centres
 - Shelter
 - Shelter Cymru
 - Youth Access
- 1.2 Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. 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. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law').
- 1.3 This response has been drafted following discussion and consultation with our full members. However, it may not reflect our members' views in their entirety and we are aware that some members will submit their own response. On some issues, our members may have differing views.
- 1.4 We have seen a draft of the response to this consultation prepared by the Legal Aid Practitioners Group. We are in agreement with them on several issues, which we have indicated below.

Introductory Comments

- 1.5 ASA has a number of serious concerns about these proposals.

Access to justice

- 1.6 Firstly, we have very strong concerns about the effect of these proposals on access to justice, which we outline below.

Quality

- 1.7 The detrimental effects on quality of fixed fees have been demonstrated by the LSC's own research, reported as *Quality and Cost*.¹

¹ Legal Services Commission 2000 *Quality and Cost. Final Report on the Contracting of Civil, Non-Family Assistance Pilot*. The Stationery Office

- 1.8 The research found that those solicitors funded to provide a fixed number of matter starts for a fixed fee performed worse in the three areas of quality (as measured by peer review), client satisfaction and outcomes.
- 1.9 We set out as an addendum to this paper a summary of the relevant findings of this research.
- 1.10 We do not believe that the checks proposed by the LSC will be sufficient to identify or deal with this problem.

The future development of fixed fees

- 1.11 Thirdly, we are concerned that the LSC sees these proposals as only an interim step, on the road to a national system, based on fixed fees or determined by competitive tendering. The present proposals already include reference to regional averages. A move towards fixed fees based on regional or national averages and/or on the basis of competitive tendering could easily follow once the basic mechanisms are in place.
- 1.12 The proposed scheme contains a number of problems, which we discuss below. In our view, these problems will be exacerbated by any further development of fixed fees along the lines suggested above. The proposed scheme itself must be carefully monitored, in order to assess the nature and extent of problems that arise, and there must be a full and proper consultation before the new scheme is developed any further.

2 Consultation Questions

1 Do you agree with the overall approach of fixing fees in advance of more fundamental changes to contracting and remuneration structures? If not, what measures would you recommend?

- 2.1 We are not opposed to moving from a system of payment based on the time spent on individual cases. We are concerned however about the likely effects of fixed fees on access to justice for those who are vulnerable, inarticulate, or most in need of assistance. We consider that a fixed fee system has to take account of these problems, and take the necessary steps to prevent them occurring.

Cherry picking

- 2.2 Our first concern is the danger of cherry picking.
- 2.3 The consultation paper suggests that solicitors will be able to increase profitability by making 'efficiency savings' under this scheme, but does not explain this except to say

"Recording actual time spent and disbursements incurred will provide suppliers with valuable contract management information, which will enable them to analyse trends and identify areas where efficiency savings could be made." [para 5.63]

- 2.4 This suggests that solicitors will be able to make 'efficiency savings' by
- Identifying cases on which more time is spent and taking appropriate action – logically by reducing the time taken on the longer types of cases and/or by adjusting their case mix so as to do fewer of them

- Identifying the cases on which disbursements, or large disbursements, are spent, and taking appropriate action – by deciding to spend less on disbursements on such cases and/or by adjusting their case mix so as to do fewer of such cases
- 2.5 Cherry picking could also involve:
- Prioritising the shorter cases and/or easier clients
 - Avoiding the longer cases and/or more difficult clients
- 2.6 In their response to the Matrix consultation, LAG said:
- “LAG is concerned that a fixed fee regime would introduce strong economic incentives for practitioners to choose articulate clients with straightforward cases that could be brought to an early conclusion. In a situation where demand exceeds supply, providers would be in a position to ‘cherry pick’ cases and would be under pressure to turn away more vulnerable clients, especially those with complex but low-level problems.” [para 32]*
- 2.7 There is a real danger that the scheme will lead to a reduction in access for clients whose cases are likely to take longer than average, for instance as a result of language or communication difficulties, or mobility problems. There is a danger that this will particularly affect members of black and minority ethnic groups and disabled people. Where clients have mobility problems and a home visit is necessary, there will also be a disincentive for a solicitor to take on their case. Firms will have to be selective in order to ensure that their average case times, and costs, are under control. There will, at the very least, be occasions (or possibly times of year) when firms will be reluctant to take on cases which are likely to cost more than the average.²
- 2.8 If clients are turned away as a result, they are likely to turn (or indeed be ‘referred’) to Nfp agencies. These agencies may be able to take on some of these cases (particularly while they themselves remain free of such contractual requirements), but many agencies are already under pressure. Some clients may be unable to obtain a proper service, or may have to accept advice from a generalist adviser, at a time when a specialist is required.
- 2.9 We believe therefore that it is necessary to make provision for cases that cost significantly more than the average. We understand that the LSC has proposed that firms can claim actual costs where they exceed £2,500 if the case is exceptional for the firm concerned. However we do not believe that this proposal goes far enough.
- 2.10 If fixed fees are to be introduced, provision has to be made to allow clients whose cases are likely to take longer or cost more than average to obtain access to publicly funded services. This could be achieved
- By having different levels of fixed fees – eg for ‘standard’ and ‘non standard cases’, or
 - By allowing suppliers to apply to the LSC for payment at an enhanced rate (eg at twice the fixed fee) in complex cases which exceed a certain threshold in terms of time spent or cost (eg where the case involves more than twice as much work as the average case for that supplier), or
 - By providing for payment at an hourly rate if a case exceeds a certain threshold in terms of the time spent or cost.

² We are indebted also to LAPG for their comments on this issue.

Disbursements

- 2.11 A second issue concerns disbursements. There is an obvious disincentive to incur disbursements, since the solicitor has to bear the cost.
- 2.12 In our view, disbursements should be dealt with separately. This could be done
- By firms having a separate annual budget for disbursements, or
 - On the basis that solicitors can 'of right' claim disbursements up to a fixed amount, either per disbursement and/or per case, and have to apply to LSC for authority to incur disbursements above that amount, and/or above an overall disbursement limit, or
 - On the basis of a separate budget for disbursements, which firms could apply to, to meet disbursements of more than a fixed amount eg £50 or £100.³

Responsiveness to needs

- 2.13 Thirdly, there is a danger that the scheme will inhibit suppliers from changing their case mix. If your fixed fees are based on past history then your client profile would have to be static. This would prevent an organisation from changing their priorities to target the most socially excluded, such as people with mental health problems, whose cases are likely to take longer than the average reflected in the fixed fees.
- 2.14 We understand that the LSC has stated that increases in disbursements will be paid if they arise out of paying increased interpreter's fees or travelling to see disabled clients, but the issue does not just concern disbursements.

External cost drivers

- 2.15 Finally, we consider that there has to be a mechanism in place to deal with increases in costs of particular types of cases, either locally or nationally. This may be necessary to deal with
- Particular changes in the law, which affect average case times⁴
 - Changes in the policies procedures or practices of major agencies, such as benefit authorities
 - Changes affecting the costs incurred by suppliers, eg in relation to overhead costs.
- 2.16 There would also need to be a system that provides for regular review of fixed fees, at least annually.

2 Do you agree with the proposed timing of the implementation of the voluntary and mandatory versions of the scheme?

- 2.17 We consider that a number of issues and problems will arise under this scheme, which will need to be properly evaluated. We consider that the voluntary scheme should run for a minimum of 18 months before the mandatory scheme starts.⁵

3 Do you agree with the proposed exclusion of mental health forensic cases from the scheme?

- 2.18 Yes

³ We note LAPG's proposal along these lines.

⁴ See our comments below in relation to mental health.

⁵ We agree with LAPG on this point.

4 Do you consider that other types or categories of work should be excluded for example all of mental health? If so, why?

- 2.19 We believe that there is a strong case that all mental health cases involving application to a mental health review tribunal by someone in detention should be excluded, in order to comply with Article 6. We do not see any principled basis for distinguishing between those who are sectioned under the 'civil' route (sections 2 and 3 of the Mental Health Act 1983) and those who are detained as a result of criminal proceedings.
- 2.20 There appears also to be a very strong likelihood that there will be significant changes in mental health work, and the caseloads of mental health practitioners as a result of the changes proposed in the mental health bill.⁶ Further changes may also occur as a result of the government's response to the decision of the European Court of Human Rights in the Bournemouth case (HL v UK). Any system of fixed fees based on practitioners' previous experience and caseload is unlikely to reflect the situation in the future.
- 2.21 We believe that there is also a strong case for taking mental health tribunal work out of controlled legal representation and recategorising it as certificated work, as has been suggested by LAPG and MHLA.
- 2.22 There may also be a case for excluding other categories of law, particularly the smaller areas, such as education, community care, public law and actions against the police, where actual costs may be more variable, and few cases are undertaken, and there is less scope for the "swings and roundabouts" principle to be acceptable to suppliers.⁷

5 Do you agree with the proposed arrangements in relation to family work done by FAlnS suppliers?

- 2.23 We do not disagree with these proposals.

6 Do you agree with the proposed methods for quantifying fixed fees for suppliers?

- 2.24 We do have concerns about the use of regional averages in relation to average fees for firms doing small numbers of cases in particular areas. It seems to us that the likely effect of this will be to reduce the use of tolerances, with a consequential impact on access. The issue has of course been highlighted by the recent report *Quality and Access*.⁸ If the use of tolerances is to be reduced, the LSC has to be satisfied that there are alternative methods of access available.

7 Do you agree with the proposed retention of current recording and reporting requirements?

- 2.25 Yes, subject to our comments below.

8 Do you agree with the proposed control measures to ensure that quality of service and outcomes are not compromised by the scheme? Can you suggest any other indicators that we should use?

- 2.26 We do not believe that control measures should be concerned only with quality of service and outcomes. We believe that measures are also necessary to ensure that access is not compromised.

⁶ We agree with LAPG on this point.

⁷ We adopt LAPG's view on this point.

⁸ R. Moorhead and R. Harding with A. Sherr: *Quality and Access*, TSO, 2004

- 2.27 As far as quality of service and outcomes are concerned, we do not believe that the proposed measures will be sufficient. We believe that there should be a role for peer review, either on a random basis or if concerns are triggered as a result of other indicators. This could identify
- whether firms are using disbursements appropriately
 - whether outcomes are achieved that are appropriate in individual cases
 - whether there appear to be any shifts in the case mix of firms in favour of or away from particular types of cases and problems.
- 2.28 We are concerned that 'light touch' audits which focus on outliers will be inadequate, particularly in a situation where the LSC has stated its wish to allow suppliers to gain the advantage of a reasonable level of efficiency savings.
- 2.29 We are also concerned that the measures proposed will fail to detect or deter subtle cherry picking by suppliers.
- 2.30 For example, if a supplier maintains the number of cases, and a reasonable spread of case types (which are fairly broad), they can quite easily make adjustments in terms of the types of cases and clients they take on, and bring their reported costs into line with fixed fees or somewhat below them. There is a danger that a 10-20% reduction in average costs could be justified as 'efficiency savings'. Even if a further investigation is triggered, it might well show however that the firm is providing a good and efficient service, and achieving good outcomes.
- 2.31 Such an investigation will not deal with the access issue however. It will not give any indication about the number and characteristics of clients who are turned away.
- 2.32 We believe that the LSC should monitor clients, and check client information against suppliers' previous client mix. This may not be easy, but suppliers do have to record, on the CMRF form:
- Gender
 - Whether the client consider himself or herself to have a disability
 - Ethnic origin
 - Age range
- 2.33 It is possible that 'disability' and ethnic origin would be the best indicators of whether providers are cherry picking.
- 2.34 An additional solution would be to monitor the proportion of clients who have any significant difficulty in using English, e.g. by adding a question to the CW1 about clients' ability to speak and/or read English.
- 2.35 We would suggest that the LSC monitor spending on disbursements, if these remain as proposed within the fixed fees.
- 2.36 We would also suggest that the LSC work with their partners in the voluntary sector (and not just the advice sector) who are likely to pick up or become aware of clients who have been turned away by solicitors' firms, on the basis that their case is not 'suitable' for dealing with under the fixed fee regime. There could also be a monitoring role here for CLSPs.

9 Do you agree with the proposed contract amendments?

- 2.37 We consider that the provisions set out as paragraph 7.3 of Annex A in relation to the compulsory scheme should also apply to the voluntary scheme.

10 Do you agree with the preliminary assessment of the impact on the promotion of equality?

- 2.38 We are surprised that the assessment assumes that a possible increase in the number of clients accessing publicly funded services is the only relevant criterion when considering the promotion of equality.
- 2.39 It is our view that the provisions are likely to reduce access to services for certain sections of the population, particularly those who are most socially excluded, who are more likely to be disabled and/or members of minority ethnic communities than the general population.

11 Do you agree with the preliminary regulatory assessment?

- 2.40 We have no view on this issue.

3 Supplementary note on Quality and Cost

- 3.1 The research used four experimental groups. The first three groups were solicitors and the fourth group was made up of NfP agencies. Group 1 were paid a piece rate for hours worked, Group 2 were paid a certain amount of money and were told to do as much advice and assistance work as possible with that amount, Group 3 were given a fixed amount of money and were asked to do a certain number of cases, Group 4 were paid for a certain number of hours irrespective of the number of cases.
- 3.2 The amount of money provided bore a strong relationship to the amounts earned in previous years by those firms. The number of cases for the third group bore a strong relationship to the number of cases dealt with by those firms in previous years.
- 3.3 This consultation paper proposes that suppliers will receive a fixed amount for each case, which will be based on average claims submitted in the calculation period (1st April 2003 to 31st March 2004). In order to achieve income at 2003-4 levels plus the 2.5% uplift, suppliers will have to take on at least the same number of cases as taken on in 2003-4. This proposed scheme is akin to the funding model used for *Quality and Cost* Group 3 in that both exert pressure to control unit costs and volume of cases simultaneously.
- 3.4 The researchers peer reviewed the work of all four groups and compared the results. They found that:

“Group 3 was significantly poorer at giving advice at the right time than Group 1 (about 10% of cases were poorer). They were also less likely to incur disbursements where disbursements were actually appropriate than Groups 1 and 2. Group 3’s failure to carry out other work was felt to be inappropriate in a greater proportion of cases than Group 2. This may provide an indication of how the constraints of contracting work against Group 3; discouraging disbursements and the carrying out of appropriate work.”[p. 112]

- 3.5 As part of the research, clients were asked about their levels of satisfaction:

“Group 3 clients were significantly more likely to report that their case was taking too long (51% compared with 34% in Group 1 and 39% in Group 2).

Group 2 received higher overall ratings of satisfaction than Group 3. Group 2 clients rated their contractees as excellent in 51% of cases compared with 36% of cases in

Group 3. Group 3 received ratings of very good in 32% of cases compared with 26% cases in Group 2. However, cases rated as excellent or very good showed Group 2 as receiving positive assessments in 77% of cases compared with 69% of cases in Group 3.” [p.133]

- 3.6 The study also compared case endpoints. Group 3 had the largest percentage of matters that ended with the outcome unknown to the adviser (39% compared with 32% for Group 1 and 30% for Group 2). Group 2’s clients were said to be better able to plan and/or manage their affairs as a result of legal intervention most frequently (26%), Group 3’s client’s least often (16%). The report concludes:

“Group 3 performed more poorly on nearly all outcome indicators than the other two solicitor groups”.

- 3.7 Therefore, in the three areas of peer review, client satisfaction and endpoints, the experimental group funded to provide a fixed number of matter starts for a fixed fee performed worst.

- 3.8 The overall conclusion to the report states:

“Contracting as structured through Group 3 in the solicitors sector has had a negative effect on quality when compared with the control (Group 1) and the group most similar to NFPs (Group 2). Part of the explanation for this is the combination of volume requirements with fixed prices for blocks of work.” [p.227]