

# Specification for the Unified Contract

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

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## **1 About the Advice Services Alliance**

- 1.1 This is the response of the Advice Services Alliance (ASA) to the Legal Services Commission's consultation on the civil specification.
- 1.2 ASA was established in 1980, and is the umbrella organisation for independent advice networks in the U.K.
- 1.3 Full membership of ASA is open to national networks of independent advice services in the U.K. Current full members are:
  - [Advice UK](#)
  - [Age Concern England](#)
  - [Citizens Advice](#)
  - [DIAL UK](#)
  - [Law Centres Federation](#)
  - [Shelter](#)
  - [Shelter Cymru](#)
  - [Youth Access](#)
- 1.4 We understand that some 470 NfP organisations now have contracts with the LSC.
- 1.5 ASA is recognised in the Unified Contract as the Consultative Body for NfP agencies.

## **2 The consultation**

- 2.1 We have serious concerns about the consultation period. We have already pointed out in response to previous consultations that a 6-week consultation period is in breach of the LSC's own Code of Practice for Consultation and the voluntary sector compact.
- 2.2 In our view, stakeholders should have been given a full 12-week period to respond to this consultation. The Specification is an important document. The terms concerning separate matter starts will have a significant impact on whether providers will be able to work under the fixed fee regime to be introduced in October 2007. Whilst we appreciate that the LSC consulted on an earlier draft, sufficient amendments have been made to justify a full consultation. In particular, the category of law specific provisions were not available during the first consultation.
- 2.3 We will respond to each section of the draft Specification in turn.

## **3 Preliminary**

- 3.1 The transitional provisions set out in clause 4 of this section do not apply to providers who previously held an NfP contract. The provisions for these have been agreed separately with Patrick Reeve and are set out in a note that has been distributed to NfP agencies.

## 4 General Rules for Suppliers

- 4.1 Paragraph 1.2 requires suppliers to provide "specified information" to Clients or other persons in a form that the LSC directs. It is not clear what this involves. However, the requirement has the potential to add burdensome and costly obligations onto suppliers. We propose that the word "reasonable" is inserted and that the requirements should be subject to consultation with the Consultative Bodies.

## 5 Applications for controlled work

- 5.1 In the interest of clarity, we suggest that paragraph 2.4 should start with the words "subject to paragraph 2.5".

- 5.2 As drafted, paragraph 2.11 is confusing. We propose that it should be amended to read as follows:

"Except as otherwise provided in paragraphs 2.4/2.5 (evidence of means) and paragraph 2.19 (telephone advice), the assessment of means section and the Client's details must be fully completed and the form signed by the Client in your presence at the first attendance with the Client".

- 5.3 As we have previously stated, many suppliers consider that it is better practice to take initial instructions before asking a client to sign a Legal Help form. We would suggest that para 2.11 be amended to include the wording in the current NfP General Civil Contract Specification (paragraph 2.6.1.a) which states "Where the form is signed in the course of an interview, you can claim all reasonable time from the beginning of the interview."
- 5.4 We suggest that a further "good reason" is added to paragraph 2.14, i.e.

"(d) where it is appropriate to open a new matter start for an existing client"

- 5.5 In relation to telephone advice (para 2.19), we propose that "good reason" should be extended to include:

- where the problem is urgent and the client can not reasonably make arrangements to attend the office sufficiently promptly or where immediate legal advice will prevent a problem from becoming worse
- where the distance/travel time/travel costs exceeds specified amounts
- other exceptional circumstances e.g. where a Client for other reasons finds it difficult to access face to face advice and where telephone advice is the only realistic way for them to access advice (where, for example, a controlling partner or other family members make it difficult for someone to leave the home unsupervised and where they have been able to gain access to a telephone).

- 5.6 In paragraph 2.22, the final sentence should be clarified to say:

"If you fail to make reasonable enquiries, where this Funding Code provision [B9] applies, any claim for Controlled Work in relation to this matter will be disallowed."

- 5.7 In relation to paragraph 2.23, it is unreasonable to insist that a previous supplier is contacted in every case. There are circumstances where the reason for the termination of the retainer will be very clear on the face of documents held by the client.

- 5.8 Paragraph 2.25 seems to us to be poorly drafted, although it appears also in the current Solicitors Specification. Subpara (a) appears to add a gloss to the provision in B9 by setting a higher test (“justified” as compared to “reasonable cause” for being dissatisfied). This is apparent also from paragraph 2.26, which refers to an “allegation of poor service”. Subpara (b) is quite acceptable but should be a free standing provision.
- 5.9 Paragraph 2.26 is unclear as to the extent of information that should be provided to the Regional Office, the purpose of providing this information and the use to which the Regional Office will put it.
- 5.10 Paragraph 2.28 should presumably be amended so that it applies also to non-solicitor caseworkers.
- 5.11 Similarly, paragraph 2.36 should be amended so that it is clear that it applies to employees of firms and organisations.

***Refusal of contract work without good cause/intentionally changing case mix***

- 5.12 In paragraph 2.40 we would suggest that the examples given of “another good cause” should also include “or where the client has been threatening or abusive”.
- 5.13 In order to avoid repetition, we will consider paragraphs 2.41 - 2.43 and paragraph 7.14 together.
- 5.14 In our view, these provisions are entirely unacceptable and should be removed. They are particularly unacceptable as far as NfP organisations are concerned. The LSC/DCA Regulatory Impact Assessment states that 55% of organisations with an NfP contract will be “losers” as a result of these new payment provisions.
- 5.15 If they wish to survive as suppliers of legal aid services, these “losers” have two options available to them: they can make efficiencies or they can change their case mix.
- 5.16 ASA accepts that, in some circumstances, fixed fees will provide an incentive for some organisations to become more efficient and reduce their case costs. However, we doubt whether efficiency will be enough for most losers.
- 5.17 Over time, a substantial number of NfP organisations have developed whole organisation case-work priorities in order to
- make best use of staff skills e.g. specialist legal skills, language skills etc
  - prioritise the most marginalised clients and those in more urgent need
  - target particular issues e.g. tackling discrimination
  - complement the work of other providers (whether or not LSC funded) in the area.
- Indeed some organisations have been established explicitly to service particular groups e.g. Disability Law Service and Chinese Information and Advice Centre.
- 5.18 These NfP agencies have used various methods for prioritising certain cases and clients, including:
- developing links with particular community groups e.g. refugee or disability groups
  - publicising successes in certain areas of work
  - restricting cases in some subjects to referral-only e.g. accepting welfare benefit cases only on referral from general help level providers.

- prioritising referrals from other professionals e.g. CPNs (community psychiatric nurses), GPs, Social Workers
  - providing outreach services in particular locations
  - obtaining complementary funding from other sources
- 5.19 As a result, many NfPs have strong local (and sometimes regional or national) reputations for being expert or specialist in certain types of work.
- 5.20 Those agencies that are losers under the new payment structure will have no alternative but to change their case mix in order to survive. This will involve unpicking many or all of the above arrangements, within an extremely short period. We suggest that few commercial organisations, even with vast resources, would be able to change their customer base within a period of 9 months.
- 5.21 Changing case mix will also inevitably involve having to refuse certain cases.
- 5.22 Vera Baird QC MP, Minister for Legal Aid, has herself acknowledged that organisations will have no alternative but to change their case mix. She has done this on several occasions over the past few months - at public meetings and in meetings attended by groups of NfP agencies with their MPs.
- 5.23 Therefore, we consider that it is entirely unreasonable for the prohibition on "intentionally changing case mix" (para 7.14) to remain in the specification. Further, the concession that organisations "may take appropriate steps to . . . undertake a mix of cases . . . which broadly reflects the types of cases arising in your Bid Zone. . ." is entirely misconceived. The standard fixed fees have been set on the basis of averages throughout England & Wales – they do not reflect average case costs within Bid Zones. In order to survive, agencies will have no alternative but to change their case mix to reflect the types of cases arising in England and Wales as a whole. We have no doubt that many agencies will take these steps with the greatest reluctance.
- 5.24 In these circumstances, the blanket prohibition in paragraph 2.41 on consideration of the level of the standard fixed fee is totally unacceptable and unreasonable.
- 5.25 In our view, the LSC has sufficient protection against those suppliers who wish to financially exploit the introduction of the standard fixed fee. A KPI restricts the "fixed fee margin" available to suppliers to 20%.
- 5.26 We appreciate that the LSC is concerned that the introduction of standard fixed fees will result in some suppliers seeking excessive financial benefits by cherry picking the easier cases and clients.
- 5.27 However, the proposals contained in paragraphs 2.41 - 2.43 will have a disproportionate and detrimental impact on those suppliers who have in the past and in good faith prioritised certain types of cases in order to obtain maximum benefit for the most vulnerable clients.
- 5.28 Finally, we note that "age" does not appear in the list of unacceptable discriminations in paragraph 2.44.

## **6 Scope of controlled work**

- 6.1 We consider that it is unacceptable for the LSC to have the powers set out in paragraph 3.8 of the draft Specification. We cannot foresee any circumstance in

which it would be reasonable for the LSC to exercise this power without invoking other sanctions.

## **7 Scope of Licensed Work**

- 7.1 Again, we consider it unacceptable for the LSC to have the powers set out in paragraph 4.6 (c), and cannot foresee any circumstance in which it would be reasonable for the LSC to exercise this power without invoking other sanctions.

## **8 Carrying out Controlled Work**

- 8.1 We agree that suppliers should not be able to charge eligible clients fees for work that is within scope. However, it should be made clear that suppliers may, if they wish, charge Clients for work that is outside scope e.g. representation in certain tribunals.
- 8.2 We assume that paragraph 5.5 (a) (ii) should read "Client suffering from severe mental *health* or learning difficulties;"
- 8.3 We do not object in principle to the proposition set out in paragraph 5.8. A number of problems arise however.
- 8.4 The first concerns the extent to which the proposition constitutes a change from the existing rules and existing practice. The standard fees proposed are based on existing practice under the existing rules. The more that the new proposition amounts to a change, the less justifiable is it to base standard fees on practice to date. It would be helpful if the Commission could make a public statement to the effect that, save where the new proposition is quite explicit, it is not intended that suppliers should change their existing practice based on the old rules.
- 8.5 The second problem concerns the rigidity of the new formulation. It suggests that there is an objective test to be applied, which is a "black and white" formulation, with no grey areas. This conflicts with the existing guidance, which allows for a number of such grey areas. See for example the existing Solicitors specification at para 3.10.3. Subpara (b) uses the word "usually". Subpara (d) refers to "genuinely different problems". Subpara (e) says "Where two or more matters arise from the same set of circumstances, the chances of them being separate matters diminish." These provisions clearly allow a degree of discretion to the supplier. We believe that similar formulations should be included in the new specification.
- 8.6 The third problem concerns its formulation and likely interpretation in practice. Para 5.8 refers to "more than one separate and distinct legal problem". Para 5.9 refers to "a separate and distinct problem issue". Para 5.15, on which we comment below, refers, by contrast, to "the same legal issue or problem". We appreciate that these phrases may be intended to refer to the same thing (or its opposite), but these phrases could be open to different interpretation in individual cases. It might be helpful if one phrase is used consistently. We would suggest "legal issue or legal problem", and that paras 5.8, 5.9 and 5.15 be amended accordingly.
- 8.7 We doubt if the general rules set out in this part of the Specification can be made any clearer on this question, and refer to our comments below on the Category Specific provisions.
- 8.8 It is not helpful to ask caseworkers in a fixed fee regime to consider whether "the administration of opening a separate Matter Start would be justified were it payable

at Hourly Rates" (paragraph 5.9 (a) (i)). We suggest that this phrase should be omitted.

8.9 We would suggest that paragraph 5.9 (b) should be deleted. Advisers have a professional duty to investigate any new issues raised by clients. The provision proposed could only properly apply where the adviser is satisfied that they are able to advise that such an issue should not be pursued.

8.10 If some such provision is felt to be necessary it could be made more acceptable along the following lines:

"Where you feel satisfied that you have sufficient information to enable you to advise properly on the separate issue, your advice would not be that the client should not pursue any case or defend any claim in respect of the new issue."

8.11 We consider that the requirement in paragraph 5.12 is entirely unacceptable and contradicts LSC policy statements about the importance of holistic services. It is also unnecessary given the wording of paragraph 5.8. As the provision stands, a client with more than one problem would be required to return to the supplier on consecutive days to sign the required number of Legal Help forms. If a home visit were necessary the adviser would have to visit the client on consecutive days to complete the forms. It would also potentially prevent urgent work from starting on more than one matter.

8.12 We agree with the LAPG that the phrase "without consideration of the respective levels of any applicable Standard Fee or Graduated Fee" in paragraph 5.13 is unnecessary.

***Sequential opening of matter starts***

8.13 In relation to paragraph 5.15, we understand that the LSC wishes to prevent exploitation of the fixed fee system that would enable suppliers to prematurely close cases so that they can subsequently open a second case and claim a second fixed fee.

8.14 Having said this, we have been provided with several examples of the problems that would be caused for clients and advisers by the provisions proposed. We consider that these draft provisions are unacceptably rigid. Our proposal is that paragraph 5.15 is amended to read

"The only exceptions are where:

(a) there has been a material development or change in the client's instructions which could not reasonably have been anticipated when the claim was submitted

***OR***

(b) the legal issue in question was one where the advice previously given constituted only a minor part of the work done under the previous legal advice [so that it did not qualify as a separate legal issue under paragraph 5.9]

***OR***

(c) a period of at least 6 months has elapsed since you submitted your claim. . .

8.15 It is our belief that the proposal set out in the preceding paragraph reflects the existing practice on which the standard fees have been based.

- 8.16 In relation to paragraph 5.15 (i), we accept that the failure by a client to give instructions should not normally be taken into account. However, there are occasions when clients' failure to give instructions is not wilful, but due to mental health problems or other disabilities. In these circumstances, we consider that exception (a) should apply.
- 8.17 As far as paragraph 5.15 (ii) is concerned, we refer to our comments below in relation to paragraphs 5.38 and 5.39 and the SPAN endpoint codes. We would accept that a decision or response from another party should not normally constitute a material development, but an element of discretion will be necessary in order to accommodate those cases in which it is reasonable for suppliers to close cases on the basis that the "client [has been] advised and third party action or decision [is] awaited."
- 8.18 It needs to be clear that, if you do have to re-open a matter that has already been closed, then if you subsequently reach the exceptional threshold, you will be able to claim the difference between standard fixed fee and the actual work done when the case is subsequently closed.
- 8.19 It also needs to be clear that, if you do have to re-open a matter that has already been closed, you will be able to claim for disbursements incurred during the further work.
- 8.20 We understand the purpose of the proposal in paragraph 5.16 that only one NMS should be used where you act for more than one client in the same matter. It needs to be clear however what "the same matter" means. Where clients have the same legal interest, as in the case of joint tenants in dispute with their landlord, or joint debtors, this would clearly be the same matter. There are however other circumstances in which you can have multiple clients with similar claims against the same opponent. Examples could include former employees in a redundancy situation, or tenants or leaseholders in dispute over service charges, or other issues that affect them in common. These should not be considered to be the "same matter" – and indeed would not be so considered under the existing rules.
- 8.21 In relation to paragraph 5.17 (c), there needs to be clarity about what work an Emergency Representation certificate will cover. This paragraph is acceptable only if it is clear that a certificate will cover pre-grant assessment of facts and decision-making about self-grant of a certificate, whether carried out on the same day or on days preceding the day of the grant. If this is not the case then we consider that this provision should only apply in relation to work carried out on the same day as the grant.
- 8.22 We consider that it is unreasonable for the supplier to lose out if they, in good faith, provide telephone advice and the client subsequently fails to sign the application form (see paragraph 5.19). We would accept however that, in these circumstances, it may be appropriate to include some conditions, for example that the supplier must report the client to the LSC together with all details of the information given to them by the client.
- 8.23 As far as ending controlled work is concerned, it seems to us that there is a conflict between paragraphs 5.38 and 5.39 and the SPAN endpoint codes. The codes commonly include "client advised and third party action or decision awaited." However this situation is not included in paragraph 5.38. Since the standard fees are based on existing practice we would suggest that paragraph 5.38 should be amended accordingly.

8.24 We suggest that it is made clear that paragraph 5.42 only applies if paragraph 5.41 applies.

## **9 Carrying out Licensed Work**

9.1 We suggest that paragraph 6.14 should start with the words “Where paragraph 6.13 applies”.

## **10 Remuneration**

10.1 We do not understand the reference to tolerance cases being paid at an 85% rate in paragraph 7.8. We assume that this is a drafting error, given the date of this draft.

10.2 As far as Counsel's fees are concerned, in paragraph 7.10, we agree with Shelter that, if the Specialist Support Contracts exist at their current levels, the exclusion of counsel's advice is acceptable. However we would ask the Commission to confirm that, if the current level of Specialist Support Contracts is reduced or terminated, then Counsel's fees will be excluded, and claimable as disbursements, where appropriate.

10.3 We refer to our earlier comments regarding paragraph 7.14.

10.4 We do not understand the suggestion in paragraph 7.18 that “you can apply to us for the claim to be treated as an exceptional case.” It is our understanding that there will be no separate application procedure, but that suppliers will merely claim an amount that is, by definition, more than three times the amount of the relevant fixed fee. We would be grateful if this could be clarified.

10.5 We do not understand the reference to tolerance cases being paid at an 85% rate in paragraph 7.25. We assume that this is a drafting error, given the date of this draft.

10.6 We are extremely concerned at the provision that the LSC reserves (in paragraph 7.26 (b)) to itself the power to reduce a standard fixed fee without any process. We are particularly concerned that the LSC might seek to rely on such a power to reduce fees in certain subcategories of cases within one category of law, thus reducing the payment in those cases where suppliers make a “profit” (the “roundabouts”), while leaving the payment the same for those cases where a loss is made (the “swings”).

10.7 Having said this, we do accept that there will be circumstances (such as a change in law, a new test case, or a change in public administration), unrelated to the legal aid system, which may impact on the cost of legal aid cases. We suggest that the clause is amended to provide that:

- the LSC will regularly publish (at least quarterly) information about the average case costs of all cases and will regularly (at least quarterly) meet suppliers' representatives to discuss this information
- where it appears that certain types of matters are now costing less, or where certain types of matters are costing more the LSC will formally consult (with a 13 week consultation period) in writing with suppliers and their representatives to assess views about the impact of a change in the remuneration for any matter type
- adjustments to payment for one matter type should not result in a net cut in funding, but any savings should be applied to matter types where case costs exceed the fixed fee

- there will be six months notice of any change in the level of any standard fixed fee.

## 11 Assessment Procedures

- 11.1 We suggest that paragraph 8.37 is amended to make it clear that the LSC is intending to consult fully on proposals to specify maximum rates for experts' fees. We would suggest that it also be amended so that the second sentence starts "Where we have done so . . ."
- 11.2 We do not agree with paragraph 8.42 as presently drafted. It does not specify what "a sample" of claims might consist of. There is no requirement for such a sample to be large enough for it to be sufficiently representative. The reference to "all cases" is too wide. Any extrapolation must be limited to cases of which the sample is properly representative.
- 11.3 We consider that paragraph 8.45 (b) is unfair in that it makes no distinction between contracts terminated on a fault and a no-fault basis. We agree with LAPG that suppliers whose contracts are terminated through no fault of their own should be paid the full standard fixed fee (or exceptional fee, as appropriate).

## 12 Category Specific Provisions

- 12.1 We are not in a position to comment fully on these provisions, due to the shortness and timing of the consultation period. We are still receiving feedback from practitioners on these issues, and we would be particularly interested to see the comments of practitioner associations. What follows therefore represents only our provisional views.

### Debt

- 12.2 In relation to paragraph 13.2, we consider that the words "where separate proceedings have been issued against the client" should be clarified. A significant amount of time intensive work is carried out by debt advisers that is aimed precisely at preventing the actual issue of civil proceedings, usually following the issuing of a letter before action (in compliance with the Civil Procedure Rules) by the creditor. It would be extremely unfortunate if such work could not constitute a separate matter, since it would reduce the incentive on the adviser to seek to prevent proceedings actually being issued. We would suggest therefore that the paragraph should state that the issuing of such a letter before action constitutes the issue of proceedings.
- 12.3 There are other circumstances that also require clarification, particularly where the client is in receipt of bailiff action seeking enforcement of unpaid fines. These may have followed earlier criminal proceedings, but they may also follow proceedings of a more administrative nature such as the imposition of parking fines. We would suggest therefore that this paragraph be expanded in order to state that all such cases are included within the meaning of "separate proceedings".
- 12.4 As far as council tax arrears are concerned, the issuing of a liability notice by a Magistrates Court must presumably count as "separate proceedings", but it would be helpful if this could also be made explicit.

## **Employment**

- 12.5 We do not see the justification for paragraph 14.1. This would appear to prevent the opening of separate matters for statutory and contractual claims where there are separate proceedings.

## **Housing**

- 12.6 We do not find paragraph 15.5 at all clear. There is a problem in distinguishing between what is a “practical matter for which the local authority is obliged to provide assistance” and a legal matter. If the local authority is “obliged” to do something, that is by definition a legal matter. The issues in homelessness concern statutory duties and local authority policies/practices. Issues that may be seen as secondary (i.e. protection of property, charges for temporary accommodation, location of temporary accommodation etc) all stem from statutory duties. The implicit distinction between practical and legal matters appears to us to be misleading.
- 12.7 Paragraph 15.6 is particularly problematic. If all the issues mentioned are to be covered by a single matter than it seems to us that most homelessness cases in which there is any significant dispute will fall to be treated as exceptional cases. The alternative would be to allow separate matters in certain circumstances. Provided the conditions set out in paragraph 5.9 are met:
- A distinction could be made between advice on making an application and the s.184 procedure, on the one hand, and advice on an application for a review under s202
  - A distinction could be made between work done before and after the acceptance of a duty by the local authority
  - Issues as to the suitability of temporary or permanent accommodation offered could be treated separately.
- 12.8 We believe that these distinctions represent the current practice of most housing practitioners.
- 12.9 In any event it should be made clear that issues arising directly out of the occupation of temporary or permanent accommodation offered to the client – such as problems of rent arrears, housing benefit, service charges, rent restrictions imposed by the rent officer etc – constitute separate matters.
- 12.10 It seems to us that the homelessness proposals constitute the most important part of the category specific proposals and require very careful consideration. Subject to the representations which the Commission receives from other respondents, we would suggest that the Commission engages in further consultation on this issue, possibly including the Commission’s peer reviewers, HLPAs, Shelter, the representative bodies and others in a round table discussion.
- 12.11 In any event, there is clearly a distinct issue concerning possession proceedings. If the client comes to you with rent arrears and/or a summons and you act for them and an SPO is made, what is the position if the client comes back within 6 months because they have breached the SPO and the landlord has applied for a warrant? In our view this should be treated as a separate legal issue or legal problem. We believe that this coincides with present practice, and would ask that this be confirmed.

## **Welfare Benefits**

- 12.12 We do not agree with paragraph 16.2. This suggests that an objective assessment can be made, especially by an LSC auditor with no relevant local knowledge, as to

whether a case could have been “easily dealt with by the client, such as by an enquiry to the relevant benefits authority”. We agree with Citizens Advice that:

“The reality is that most clients seek advice on welfare benefits because they have not been able to resolve the issue or get the appropriate information from ‘the relevant benefits authority’. The role of these organisations is to administer benefits not to use the law to identify unclaimed benefits.”

- 12.13 As far as paragraph 6.13 is concerned, we would be grateful if the Commission could confirm that Legal Help can be used to assist clients in completing DLA/AA forms.
- 12.14 We consider that paragraph 6.4 requires further clarification. There is a generally held view that it is much more important that a lawyer or adviser with benefit expertise attends an interview under caution rather than a criminal lawyer who knows little or nothing about social security law. We appreciate that the PACE provisions must be taken into account. It is our understanding however that the PACE provisions only apply if the interview is conducted at a police station and/or in the presence of a police officer. However, where these conditions do not apply – where the interview, for example, is conducted by benefit office or local authority staff in their own premises – then it should be permissible for an adviser to attend such an interview under the welfare benefits category.