

# The New General Civil Contract (Not for Profit) from 1<sup>st</sup> April 2003

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

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# 1 General or background issues

## The consultation itself

- 1.1 While we welcome the opportunity to respond to the consultation on the new draft NfP contract, and have had the opportunity to outline some of our concerns to the LSC in meetings recently, ASA has serious concerns about the consultation process itself.
- 1.2 Firstly, we are concerned that the consultation is somewhat incomplete. The contract specification is well written and clear and appears to be a complete document. The proposed amendments to the standard terms however are presented as a series of amendments which need to be compared with the present provisions and in many cases are presented in outline only. The Overview, while welcome, outlines a number of themes which are not reflected in the Specification or the amendments to the standard terms, and amount more to statements of intent than detailed proposals.
- 1.3 We are concerned that the LSC is already retreating from the commitments contained in the Overview that salary elements will be uprated as under the current contract. This represents a cut in real terms. Agencies cannot divert staff resources onto private paying work, as solicitors can. Most NfP agencies have employment contracts which oblige them to pay staff on local government NJC scales, and therefore to pay any annual inflationary increases. Reducing the working hours of a caseworker in order to save salary costs is not an option as the LSC contract links payment to output. We are also concerned that the inability of the LSC to guarantee future RPI increases will exacerbate the recruitment and retention problems already experienced by the sector. On the other hand, reducing running costs is unlikely to be possible. Most advice agencies already operate within very tight budgets, and there is a danger that any cut in expenditure on running costs will result in a loss of efficiency.
- 1.4 Secondly, we are particularly concerned that the existing consultation is taking place against too tight a deadline. While responses are requested by the 31<sup>st</sup> December, the Overview states that new schedules and contracts for signature 'will be sent out in early February 2003.' [Overview para 2] Given the time that has to be allowed for printing the new documentation, this suggests that the LSC will only have a short period of time in January 2003 to consider any responses received towards the end of the consultation period.
- 1.5 We understand that the LSC has already received a large number of responses from agencies, and many more are likely to be received before the 31<sup>st</sup> December. In our view it is vital that all the responses received are properly considered. It is unfortunately already the case that many people working in NfP agencies consider that the consultation is a sham and that the LSC is merely 'going through the motions'. Given the need for the LSC to take NfP agencies with them through the proposed changes we consider that great care should be taken to demonstrate that the LSC has carefully considered all the responses received.
- 1.6 In any event, we trust that a summary of the responses received will be published by the LSC as soon as possible, together with the LSC's responses to the views received.
- 1.7 Although we appreciate that the LSC is aiming to have a new structure in place by April 2003, when the existing NfP contracts expire, we consider that many of the proposed changes may need to be phased in, rather than implemented in one 'big bang' on the 1<sup>st</sup> April 2003.

### **The nature of the changes proposed to NfP contracts.**

- 1.8 There is considerable concern amongst NfP agencies that the proposals will have the effect of 'turning NfP agencies into private practice solicitors', for no good reason and with inadequate explanation, and that the unique nature and contribution of NfP agencies is seriously at risk as a result. The LSC has previously accepted that NfP agencies are different from private practice solicitors and that they do not wish to remove this difference. This acceptance is not clear from the consultation papers however, which do not appear to contain any recognition of the special nature of NfP agencies or the value of their different approaches. The lessons from *Quality and Cost* do not appear to be reflected in the proposals. While solicitors may work faster on average, there is no evidence that the way that they work is better or more effective than the ways of working which are current in the NfP sector. We know, from *Quality and Cost*, that NfP agencies produce better results.
- 1.9 The proposals in relation to time standards in particular are based on solicitors' ways of working that are not reflected in much of the NfP sector. The assumption that caseworkers will dictate work for secretaries to type is an obvious example. NfP agencies do not have the same secretarial resources as solicitors. Much of the admin time factored into NfP contracts is already being spent on time recording, LSC reporting requirements and routine admin work such as photocopying.
- 1.10 We consider that a valuable opportunity is being missed to recognise the vital work that NfP agencies can do in dealing with problems in a proactive manner by taking up issues which concern several clients who are affected by a local [or even national] practice. There is no reason why a recognition of such work could not be built into NfP contracts, for instance by creating a tolerance [say 10%] within NfP contracts under which a specific proportion of the contract hours could be met by such forms of working. Not only would this be cost effective, but it could also help to stimulate creativity within the sector, which many feel is being stifled by the present emphasis on producing the contracted hours of direct casework time. It could also have the side effect of keeping the work interesting and challenging for those excellent and experienced workers who need to keep within the sector.

### **The changes generally**

- 1.11 In general, we consider that what is being proposed amounts to too much change, too quickly.
- 1.12 For many agencies, the cost compliance audits are going to look at questions of scope, admin and issues such as separate matters and sufficient benefit for the first time. Agencies have in the past received contradictory messages from the LSC about many of their working practices, and it is likely that significant adjustments will have to be made in many cases. This will undoubtedly take time. Some agencies will also be affected by changes in funding models (the change from model 5 being the most difficult). The proposed introduction of time standards will represent even more of a shift. Change has to be managed to be constructive rather than destructive. We consider that the introduction of time standards in particular has to be done gradually and seen as a process over time rather than something which can take effect immediately.
- 1.13 We understand that contracts have to be set up and managed from the regional offices of the LSC. We have already expressed our concerns over regional inconsistencies in the practices of contract managers and auditors. We are particularly concerned at the proposed increase in the discretion and powers of regional directors. The proposed removal of appeal rights in relation to changes in the

terms of contracts is in our view a highly retrograde step. We do not accept that a simple distinction can be made between 'contracting' decisions and decisions arising out of an agency's performance under the contract, as is suggested by the consultation documents. As a matter of principle, and also a recognition of the importance of transparency, we consider it to be vital that full appeal rights in relation to the award of a contract, the hours and payments, the categories of work, the duration of the contract and other terms should be retained both in the transition to the new contracts and once they are in operation.

## **2 The new contract: offer and payment**

### **Offers**

- 2.1 Although the Overview states that 'the overwhelming majority of [NfP] contractors can . . . expect to have a new contract granted from 1<sup>st</sup> April 2003' [para 2] the proposals appear to allow regional directors a free hand in deciding on the size of contracts to be offered. We appreciate that some agencies may be happy to agree a reduced number of contract hours, in order to reflect their performance to date. However the proposals contain no guarantee as to the size of contracts to be offered to agencies. This represents a clear distinction from the position with solicitors, who have a guarantee that they will be offered at least 80% of the matter starts which they had under their previous schedule. This in turn reflects the needs of solicitors to be able to plan their practices and their workloads. We do not see that NfP agencies are any different in this respect from solicitors' practices. If anything their position is more difficult in that they do not have the option of redirecting staff resources towards privately paying work. We cannot see any recognition in the present proposals of the need to take account of the viability of NfP agencies or their contracts, let alone the importance of preserving access to justice.
- 2.2 We consider that NfP agencies should [subject to any legitimate concerns as to their past underperformance] be entitled to a similar guarantee. Given their higher degree of inflexibility, we would suggest that an appropriate guarantee should be 85% of their previous contract hours.
- 2.3 In addition, we consider that agencies should have a right of appeal to the Contract Review Body in relation to any reduction in their contract hours which is not genuinely agreed with the LSC. We note that the Overview proposes that there will be such a right of appeal if an agency is not awarded a schedule or if it does not contain all of their current categories of law [para 5]. Such a right of appeal must in our view be extended to cover any reduction in hours.

### ***Specifying the number of hours in terms of subject categories***

- 2.4 The Overview states that "schedule awards will specify the hours to be performed in each . . . category of law". [para 3] This appears to represent a change in practice and principle from the present position, in which many agencies have had 'global' contracts in which a number of contract hours has to be carried out over a number of different categories of law, or where a number of hours has been specified for different categories of law, but agencies have been able to make up a shortfall in hours in one area by work in another area.
- 2.5 There is a continuing need for flexibility between subject areas. We do not consider that existing planning arrangements are sufficiently robust to predict need. Indeed, legal need can be very unpredictable. Agencies need to be able to respond to changes in need, which can result from changes in local or national law or practice.

- 2.6 We believe that 'global' contracts are better, in that they provide flexibility for agencies to meet needs as they arise in any of their subject areas. If it is essential for subject areas to be specified then any allocation of hours should be done by negotiation based on past performance. However, there should also be flexibility in the performance of these hours so that agencies are required to meet their total contract hours and either
- provide at least 50% of the hours for each category subject (while recognising that even this might be more difficult for small subjects), or
  - undertake sufficient hours to meet the SQM supervisor requirements, whichever is the lesser number.

### **Funding models**

- 2.7 We do not accept that a case has been made for changing the funding models which were previously agreed with the LSC.
- 2.8 There are recruitment and retention problems throughout the sector – salary scales for posts in some agencies were set at the beginning of the NfP contracts in the early/mid 90s. Agencies are now having to pay more than allowed in the funding model to attract and keep the “experienced and competent” staff referred to in the time standards. Agencies need to be able to renegotiate salary levels for all levels of staff, including staff who were originally employed and paid as caseworkers but have since become qualified as supervisors.
- 2.9 We are particularly concerned that the LSC is retreating from the commitments contained in the consultation documents that salary elements will be uprated as under the current contract. [See our comments above at page 1]
- 2.10 While we accept that model 4 can be merged with model 2, we do not think that the case has been made out for reducing the funding models to one [or two], and specifically for removing models 3 and 5. Model 3 was devised to enable agencies to carry out their supervision responsibilities properly. It only takes a mathematical calculation to enable an hourly rate to be calculated under this model. Model 5 was devised to reflect the reality that many agencies are largely self-servicing. Funding has to date been calculated on the assumption that self-servicing caseworkers will spend 20% of their time on 'admin' work. If such an assumption is accepted, then again an hourly rate can be calculated easily. If there is a concern that the relevant percentage is significantly different from 20%, then it would be possible to check the position with agencies on an individual basis, and funding renegotiated if necessary.
- 2.11 If these models are to go, however, there needs to be transitional protection for the agencies concerned. We would suggest the following:

Model 3 – for the first year, agencies should be able to contract for the same contract hours as before AND receive a payment equivalent to the amount of the payment for the supervision element, which is being lost. This could be a 5% payment for the supervision time, which amounts to £1,282.59 – roughly equivalent to the amount being lost.

Model 5 – agencies should have the choice between keeping current hours and receiving additional money or cutting their hours. Either way, the change will be significant and should be accepted as a good reason for underperformance for the first year (up to the 15% which will continue to be allowed on this basis). If they choose to keep current hours and to employ additional admin staff, agencies should receive compensation for the additional expenditure incurred, such as recruitment

costs and the cost of purchasing a new computer for each new administrator. This could be based on the provisions for first year costs in the contract [as outlined in para 21 of the Overview].

- 2.12 Given the increasing similarity between solicitors' contracts and NfP contracts which is suggested by the proposals, we would also ask the LSC to confirm that agencies with NfP contracts have the option to change to a solicitors' contract should they wish to do so.

### **Economies of scale**

- 2.13 Within the NfP sector there is considerable opposition to the proposed reductions in funding based on economies of scale, both in principle and in practice. We do not accept that the case has been made out, nor that there is any evidence for it.
- 2.14 Many agencies have pointed out that they took on additional contracts at the request of the LSC, and are now threatened with being penalised for doing so.
- 2.15 There is strong evidence to suggest that private practice solicitors are giving up legal aid because of payment rates. This hardly justifies the suggestion that NfP agencies with larger contracts should be paid less.
- 2.16 The idea of reducing funding as a result of economies of scale does not apply to the private sector – they get the same payment rate regardless of the number of matter starts. Most private practice firms doing legal aid have considerably larger contracts with the LSC than NfP agencies.
- 2.17 Implementing the changes would be likely to involve making redundancies in NfP agencies. There is a lack of flexibility in NfP funding generally, which makes it harder for NfP agencies to cope with reductions such as those proposed. Most NfP agencies are in fact undercapitalised, with inadequate IT, which in turn effects their efficiency. Underfunding is not a good long term strategy.
- 2.18 We do not consider that any of the options proposed are attractive. A uniform approach carries the risk of penalising agencies in expensive areas or providing services across a wide area. Leaving the matter to be resolved by individual negotiations carries the risk that agencies may agree to unsustainable contracts.
- 2.19 We understand that the LSC proposes to carry out some research as to the funding arrangements for NfP agencies with larger contracts. We trust that any further consideration of these proposals will be deferred until sufficient evidence has been gathered to enable matters to be considered afresh, and that the LSC will enter into negotiations with ASA and the networks if they wish to take these proposals any further.

### **Overperformance**

- 2.20 We do not consider that a proper case has made for the abolition of the previous provisions concerning overperformance. We can understand however the LSC's concern that the present provisions are open-ended and that agencies should be encouraged to plan their contracted work more carefully.
- 2.21 We would propose that the existing bonus payment provision be retained for up to 10% overperformance (on the basis that it is very difficult to get the contract exactly right), but that agencies should apply for a larger contract if they wish to be paid for a higher number of hours. If this proposal is accepted, Section 2 (paras 1 and 2) from

Appendix B to the current contract Specification would need to be imported into this contract.

- 2.22 In any event, a provision needs to be added giving agencies appeal rights if they are refused additional hours, with such an appeal going to the Contract Review Body.

### **Underperformance**

- 2.23 We are extremely concerned about the LSC's proposals in relation to underperformance, particularly as proposed in the amendments to the Standard Terms. These appear to contradict the statement in the Overview that retrospective cuts will only occur in exceptional circumstances [para 28]. We understand that the LSC may need to have reserve powers for use in exceptional circumstances while generally pursuing a more reasonable policy. However, without details of the proposed policy it is difficult for us to respond, and agencies are extremely concerned. In general we are opposed to retrospective cuts. Any exceptional circumstances should be spelt out very clearly.
- 2.24 A number of matters concern us in particular. Underperformance may be due to recruitment and retention problems, and is often due to factors which are outside an agency's control. There is a particular problem which may arise due to agencies' inability to recruit 'competent and experienced advisers' [as referred to in the main section on time standards –para 4.4.2 at p.41]. We would suggest that this problem should be recognised by the addition of an 'allowance' in contract hours when a new caseworker is employed who has no experience of LSC contracting.
- 2.25 We would further suggest that, where contract hours are reduced as a result of recruitment and retention problems, they should be reinstated when a recruitment has proved successful. It also needs to be acknowledged that some expenses continue (e.g. overheads such as rent, and the salary of an admin worker), and flexibility is needed to deal with this.
- 2.26 Retrospective cuts to funding would not be manageable for most agencies. Agencies simply do not have the financial flexibility or income generating options to cope. There is a danger of putting agencies into insolvency and/or having to make redundancies. There is a further danger that any LSC discretion or appeal process could be pre-empted by the fact that an organisation has to stop trading due to fear that it is trading into insolvency.
- 2.27 We consider also that the LSC needs to acknowledge the problems involved in setting up a new service. It takes a considerable amount of time to establish a reputation locally which will lead to a sufficient intake of new cases, either directly or by referral.
- 2.28 The documentation is unclear as to whether the proposal for monthly reporting of all work done [including work in progress] is being suggested as a routine or a special measure. We have been informed by LSC that it is proposed only as a special measure and we welcome this clarification. We can see a role for monthly reporting as a possible monitoring tool where there are concerns about underperformance. Where it is required, however, we do not consider that it would be realistic to require such information to be provided by the 10<sup>th</sup> of each month. We would suggest that information be provided by the end of the following month.
- 2.29 As a general rule, we consider that no cut in funding [or claw back] should be implemented while there is an appeal process outstanding.

2.30 In general we consider that something like the present underperformance principles should be built into the contract – with warnings, agreed action plans and appeals. In particular, agencies need to be given the opportunity to develop an action plan before any cut in payment is implemented, in line with the suggestion at para 27 of the Overview.

2.31 We would suggest the following:

“Where there has been:

- failure to reach contracted hours [as claimed by the agency, i.e. pre audit]
- failure to do enough hours [as assessed by LSC, i.e. post audit, which could include contract compliance and cost assessment (including time guidance) issues]

LSC will

- retain the current provision that allows those suppliers who under- perform by up to 15% to receive payment in full provided there was good reason for the under-performance.
- maintain the policy of discussing under-performance issues with contractors and giving them a reasonable opportunity to correct the position before moving to any financial adjustments.
- specifically: LSC will
  1. Check the data with the agency, and give them a reasonable time to correct or clarify it
  2. Work with the agency, and agree a written action plan for sustained improvement [normally over at least 2 quarters], including possible sanctions if the plan is not met, and the procedures for reviewing the implementation of the plan
  3. Review the position with the agency [at appropriate intervals and/or if circumstances change], and consider whether the agreed plan has been kept to; if not, why not
  4. Consider any new action plan proposed and/or informal representations
  5. Decide on action to be taken, including the period of time to be covered, and providing for a further review [particularly if there is to be a reduction in contract hours]
  6. Where the cause of underperformance is due to staff absence or vacancy within the agency, any reduction in contract hours should only last as long as that absence or vacancy lasts
  7. Not reclaim any part of quarterly payments already made save in exceptional circumstances – normally only where there has been no funded caseworker or agreed replacement in post during the relevant period.”

### **Changes in the Standard Terms**

2.32 We consider that some sections from Appendix B to the current Specification need to be carried forward into the new contract, with appropriate updating in terminology and content as needed.

2.33 The first section on Organisational Models provides useful guidelines to NfP agencies about how they may organise the delivery of the contract. It is important that it continues to be clear that “the . . . contracts allow room for a variety of organisational models, provided the basic requirements are met . . . . [and that] . . . Workers

funded from other sources may contribute to the amount we are supporting in the contract”(paragraph 2).

- 2.34 The third section provides useful guidelines on client satisfaction surveys, which need to be incorporated into the new contract.
- 2.35 Parts of the section regarding capacity to perform Controlled Work will be superseded by our suggested guidance on underperformance (see above). However, paragraphs 3 and 4 need to be incorporated into the new contract – leaving it open to regional offices to provide additional support to agencies in the case of long-term illness or maternity leave.
- 2.36 Similarly, the guidance on performance during first schedules (in paragraph 6) need to be carried forward into the new contract.
- 2.37 Paragraphs 8 and 9 provide important guidance to NfP agencies, the LSC and to other funders about the approach that will be taken in the event of any reduction in core funding.
- 2.38 Finally, paragraphs 10, 11 and 12 provide useful clarification about the application of sanctions against agencies and should be imported into the new contract.

### **3 Working under the new contract**

#### **Changes in contractual terms during the period of the contract**

- 3.1 We are extremely concerned at the proposal to amend the Standard Terms in relation to appeals concerning the duration of a schedule, payment, volumes or categories of work. In what we hope would be the rare circumstances in which agencies are in dispute with the LSC over such issues, we need a right of appeal to the Contract Review Body, as at present, rather than a right to request a review by the Regional Director who has probably made the decision in the first place. As the comment to the proposed new clause 8.14 makes clear, the right to request a written review is tantamount in practice to a right to request written reasons for a decision. This is clearly not sufficient. We feel very strongly that the present position [as set out in clause 23.1(c)] should be left unchanged.

#### **Upper casework limit**

- 3.2 We do not object to an upper casework limit in principle, providing that it is set at a level which is practical and realistic for agencies and the LSC. In practice the LSC will only be able to deal quickly with a limited number of extension requests. From what we have been told by agencies, particularly in the context of the proposed time guidance, there is a significant proportion of cases handled by NfP agencies which exceed 10 hours, and a number of types of case which regularly exceed 10 hours. We would suggest therefore that the limit should be set initially at 15 or 20 hours. Since the LSC is retaining the power to vary the limit up or down for individual agencies, there will be a mechanism in place which can be used to deal with any concerns which may arise.
- 3.3 It is stated at paras 72 and 73 of the Overview that the LSC “will grant such authority where we believe that the work done and to be done is reasonable and [in] accordance with the contract . . . this will avoid difficulties arising later on audit”. It needs to be clarified that the grant of such an authority will mean that work done up to the grant of the authority will not be subsequently reduced at audit.

- 3.4 We consider that the LSC should issue guidance to its own regional offices making it clear that requests for such authority should be responded to within set times, for instance 48 hours in normal circumstances, and that there has to be a system for dealing with emergencies.
- 3.5 It needs to be clarified that the work referred to is work done by the agency in question. If a file is transferred to an agency then the 'clock' should start running from that point.
- 3.6 It needs to be clarified also that the work referred to is work done by the agency after the 1<sup>st</sup> April 2003. Where a file has already been opened, the 'clock' should start running on that date.
- 3.7 Where an authority, or the authority requested, is refused, we consider that an appeal should lie to the regional director, and then to the Costs Committee [and Costs Appeal Committee] on what would in most cases be likely to be a point in principle, usually about the time standards.

### **Disbursements**

- 3.8 Agencies have had problems getting their contract managers to increase their overall disbursement limit. This appears to be an issue as to priorities at regional offices. We would ask that clear guidance be given to regional offices to emphasise the importance of dealing with such requests promptly [say within 48 hours].

### **SQM categories – debt/housing/benefits**

- 3.9 One matter that has become clearer in our discussions with the networks, agencies and advisers is that there is a considerable overlap between categories of law, in terms of the work actually done by advisers, particularly in relation to debt, housing and benefits. Housing workers deal with housing benefit issues in particular. The matter becomes a problem where agencies have a contract in one category of law but not another. We have already suggested that the SQM housing category be amended to explicitly cover housing benefit, and are pleased that this has been agreed. Consideration may also need to be given as to whether the debt SQM category needs to be amended to include the extent of benefit work done by debt advisers.

### **Boundaries of controlled work**

- 3.10 While the provisions of paragraph 5.1 of the proposed contract specification are generally acceptable, it has been pointed out to us by Shelter that there are many cases in their experience where going onto legal representation can be difficult – where work is done by non-solicitor agencies and referring to local private practice is not easy. In such cases work is often continued under Legal Help. This is often a practical necessity as well as being more cost effective.

### **Sufficient Benefit Test**

- 3.11 While we accept the principle of the sufficient benefit test, we have some concerns about the interpretation of it given in the proposed contract specification [paras 3.4 – 3.12]. These concerns arise particularly in the context of welfare benefits.
- 3.12 Firstly, there is a problem in relation to what might be seen to be relatively small amounts of benefit. Given the importance which such amounts are likely to have to the individual client concerned, it will often be inappropriate to apply the principles set out in paragraph 3.9. For example, £120 to someone on income support could be a

very significant gain, which justified two hours of legal help. Small amounts can also have knock-on effects. A small amount of backdated housing benefit, for example, might mean the difference between the client being subject to possession proceedings for rent arrears and not being so subject.

- 3.13 Similar issues arise out of the concept of 'overwhelming importance' to the client [para 3.11.2]. We have doubts as to whether this can really be described as 'an objective test'. Even if it is, would the definition given cover a mother who has no money for milk and nappies for her baby? The definition does not seem to recognise the urgency of needs in such situations.
- 3.14 Another problem which could arise from a rigid application of the test is the possibility that local agencies or decision-makers might feel that they can 'get away' with 'minor' misdemeanours on a significant scale, in the knowledge that they would not be challenged by local agencies due to the operation of the test. They would not need to be aware of the test, only to be conscious of the effects of its operation. Examples might include benefit authorities at the local level [and possibly social fund officers in particular] or local landlords who make a habit of not returning tenants' deposits.
- 3.15 In such circumstances, there would clearly be a wider public interest in pursuing such cases. We consider that this needs to be recognised within the specification, along with the other issues raised above.

### **Separate matters**

- 3.16 We can understand the suggestion that something should be treated as a separate matter after 30 minutes, but are concerned that this could be potentially very time consuming. In order to increase flexibility and save time we would suggest instead that there could be a 'window' of between 30 minutes and 2 hours. The proposition could then be that a matter should not normally be treated as a separate matter if it involves less than 30 minutes, but should normally be treated as a separate matter if it involves more than 2 hours.
- 3.17 We consider that the example given in para 3.15.3 is not very appropriate. Where a tenant is subject to a possession claim for rent arrears and is alleging disrepair it would usually be quite artificial to separate the two, particularly since damages for disrepair can amount to a complete defence to a rent arrears claim by way of set-off. Were a certificate to be granted, both matters would be included in the same certificate. In other cases however there may be a clear distinction between the two issues, for instance if a landlord is seeking possession on a different ground [to which there may or may not be a defence] and no notice has yet been given of the disrepair. In such a case it may be more appropriate to treat the matters as separate.

### **Time guidance**

- 3.18 While we understand that time guidelines may have some value as a 'benchmark' tool for auditors, we have considerable concern about how they may be implemented on audit, both in relation to general issues and issues which are specific to a particular category of law.
- 3.19 The first problem concerns the suggestion that time standards are 'based on competent and experienced advisers working on cases of average complexity/difficulty for clients without special needs.' This proposition contains three variables all of which are potentially contentious in any particular case. We have mentioned the difficulties that some agencies have had in recruiting 'competent and experienced' advisers. While they are 'getting up to speed', inexperienced advisers

may take longer, and need higher levels of supervision. From our discussions with advisers it is clear that, in any event, there are significant differences of opinion between 'competent and experienced' advisers as to the time which would normally be involved in, for instance, a welfare benefits appeal.

- 3.20 The other variables are possibly even more problematic. In reality a 'case of average complexity/difficulty' can probably only be described as one which takes an 'average' amount of time for a client without special needs. Where caseloads cover a wide range of cases with different issues, it is difficult to suggest what 'average complexity/difficulty' might amount to. Where cases are more similar, problems still arise. In debt, for example, where many [if not most] cases involve multiple debt, such a case might involve one or two priority debts, three to five non-priority debts, only one priority creditor who is particularly obstructive and only two non-priority creditors who object to the client's proposals. We doubt if such a concept is very helpful. In reality, there are just too many variables to enable much sense to be made of the concept of a 'case of average complexity/difficulty'.
- 3.21 The concept of clients' special needs is also a serious problem. Paragraph 4.4.4(e) says that 'This would include learning difficulties, material physical disabilities, or lack of English or other communication difficulties.' We consider that this needs to be clarified more fully, with specific reference given to problems including mental ill-health, literacy, numeracy, or high levels of stress, anxiety, or depression.
- 3.22 Auditors will need to be trained to be sensitive to the difficulties in recording some of these matters on files, particularly in agencies which encourage clients to ask for access to their files. Auditors will also need to become aware of the extent to which such 'special needs' are likely to be found within the clients of a particular agency, or within specific categories of law within an agency. This is recognised at paragraph 4.4.6(a), but the situation may occur more often than the LSC or its auditors may expect. We have already heard unfortunate stories of agencies arguing with their auditors as to the proportion of cases in which the auditors will accept that clients have 'special needs'.
- 3.23 The time guidelines proposed vary in the extent to which they are appropriate to the NfP sector. In debt and welfare benefits, we can see very little correlation between the guidelines and the work done by NfP agencies. The housing and immigration guidelines are better. The employment guidelines clearly reflect some considerable experience of the work that solicitors and advisers actually do [and have to do] in practice, although they contain various apparent deficiencies and inconsistencies. We understand that the LSC has received numerous representations on these guidelines. Our views in relation to debt, welfare benefit and employment time standards are attached to this response as an appendix.
- 3.24 In relation to the housing time standards, we have received representation that the initial 2 hour time limit for giving general advice is not sufficient and should be 3 hours. Clients often approach NfP agencies without any clear idea of whether they have a legal problem and what help they need. It can take a long time to assess their needs fully. Further, the time standards need to include work on housing benefit, in line with the amendment in the SQM category.
- 3.25 The introduction of time guidelines will be a very significant change to NfPs' working practices. They have the potential to be highly time-consuming and destructive to relations between agencies and the LSC. We think that it is vital that the LSC considers carefully all the representations which it receives on these issues, that the guidelines are introduced gradually, and that the position be reviewed after 12 months, so that the experience of agencies and auditors can be compared, and

greater clarity achieved as to the general principles involved and the contents of the individual guidelines.

- 3.26 One problem highlighted by the general guidance concerns the extent to which caseworkers actually use computers in the ordinary course of their casework. This is a problem which already exists of course in relation to solicitors, although it is not clear to us that a solution has been reached. Where caseworkers prepare letters or draft documents on their computers it should be expressly stated that they can claim the time actually spent [whether in units or in minutes] unless the time claimed clearly represents the time taken by someone with minimum keyboard skills. Otherwise we run the risk of caseworkers having to consider in the case of each document whether it could have been produced more quickly by being dictated or typed by a competent typist, and adjusting their time records accordingly. We understand that the LSC has accepted this principle in relation to solicitors in private practice. We would request that this principle is spelt out specifically within the NfP contract.
- 3.27 A similar problem arises in relation to letters produced to a standard format, as discussed at paragraph 4.12.4 of the specification. For good reasons, agencies vary in the extent to which they do this, and also in the extent to which they use such formats but still have to input a considerable amount of information which is specific to the particular case in question. We do not want auditors counting a 4 page letter as one unit merely because it contains paragraphs that appear in other letters. Agencies should be able to claim the time that such letters take to actually prepare, even if a standard format is used.
- 3.28 A similar problem concerns the use of similar letters to several respondents. This occurs particularly in debt cases, where agencies are writing to several creditors often along similar lines. We understand that the LSC has confirmed in relation to solicitors that each such letter should count as one unit, and this should also be confirmed in relation to NfP contracts.
- 3.29 We are also concerned about the emphasis on payment by length. A short, clear letter can take longer to write than a long rambling one, and may be considerably more effective. The idea that one page can be prepared or dictated in 6 minutes can also be inappropriate in many cases.
- 3.30 It should be noted that letters and statements are very different types of document, and one rule of thumb is not necessarily applicable to both.
- 3.31 Many NfP agencies work on trying to prevent court action, and do more work on initial letters than solicitors, which is often more cost effective.
- 3.32 As far as telephone calls are concerned, it has been suggested to us that, when phone calls last longer than 6 minutes agencies should be able to claim the actual time spent. We understand that this point is accepted by the LSC and would be grateful if this point could be explicitly stated.
- 3.33 We consider that the guidelines need to be amended in relation to non-effective telephone calls. It is possible for advisers to spend a lot of time being passed around electronically and then getting nowhere. This is not something you can usually delegate to an admin worker. You need to know what to say when you get through. We accept that large amounts of time should not be claimed in such circumstances, and that it is often possible to do other work while holding on, but advisers would rarely be doing this unless they thought that it would really have the potential to advance the client's case if they were able to get through. We would suggest that a maximum of 15 minutes be claimable in such circumstances.

- 3.34 The concept of 'basic form filling' is one which can be potentially problematic in many areas. We discuss some of these in our comments in relation to the individual time standards. In general, however, we do not accept that a simple distinction can be made between 'basic form filling' and the completion of forms which have a legal content. The situation is considerably more complex than that. In our view this is an area that needs general reconsideration by the LSC.
- 3.35 In relation to immigration, there is one specific point on which we would appreciate clarification. This concerns the definition of 'asylum cases' in relation to the upper case limit. In most asylum cases, one would make both an asylum claim under the UN convention and a human rights claim. The contract documentation does not appear to define 'asylum'. The definition of asylum, for NASS purposes, includes both a UN convention claim and/or an Article 3 claim. There are circumstances in which one might advise dropping a 'pure' asylum claim and pursuing the ECHR claim, or indeed a claim on another ground. There might be difficulties in applying the upper case limit in such circumstances. We would propose therefore that an 'asylum' claim be defined as including a claim under the UN convention, and/or under the ECHR/HRA, and any case in which a claim of either kind has been made.

### **Recording and reporting**

- 3.36 Concerns have been expressed to us about the suggestion that all work should be counted in units. This may cause problems with computer programmes. It appears to be auditor driven – rather than driven by good practice. We would suggest that this be recommended but not required.
- 3.37 As far as travel and waiting are concerned, we would ask that the position in relation to outreach travel be clarified by the LSC, as some regional offices have apparently claimed that they are not allowed to pay for this. We would endorse the suggestion made by NACAB and others that travel time and costs are allowed for agreed peripatetic and outreach services.
- 3.38 The consultation documents suggest that agencies should separately record travel and waiting time. This is not done at present, and we would ask for further clarification on this point. There will be costs in new computer systems and this would represent another change for agencies to manage. One of our networks has advised us that systems changes need four to five months to implement.

### **Controlled Legal Representation**

- 3.39 We understand that the CLR rules for immigration have been changed with effect from the 16<sup>th</sup> December. It appears to us that the provisions in the consultation documents do not reflect these changes.

### **Devolved powers**

- 3.40 At page 74 of the draft contract, it appears to us that para 10.4.1(c) should read "grant, amend or refuse to amend an emergency certificate".

### **Contract compliance audits**

- 3.41 We are not in principle opposed to contract compliance audits, but have some concerns about the proposals set out in the consultation documents. More generally we think that peer review is a much more precise tool for assessing the quality of work done, its appropriateness and the time spent. We believe that the LSC may have overestimated the cost of peer review and the extent to which it is more expensive than LSC auditing.

### ***Educational audits***

- 3.42 We welcome the recognition by the LSC that “it will take suppliers some time to adapt to the new process”. For most NfP suppliers their first audit after April 2003 will be their first opportunity to learn how the LSC auditors assess their performance against the various requirements.
- 3.43 We also welcome the assurance given in the overview that hours claimed will not be reduced at first audit “on the basis of what we regard as excessive time spent (in relation to the time guidelines or other guidance including the Sufficient Benefit test) but will give feedback and guidance for the future.” However, we note that this concession is not set out in the draft contract documentation and would want this to happen.
- 3.44 Moreover, we consider that the proposals do not provide a sufficiently clear and gradual process of introduction of a new and very different regime of auditing for NfP agencies. Many of the requirements to be audited involve judgements about matters of degree and we have concerns about inconsistency in auditing. We therefore consider that it is preferable in most cases for sanctions to be applied only where agencies have been given a clear warning. We accept that an exception should be made in the case of fraudulent abuse.
- 3.45 It will therefore take time for agencies to adjust their working practices to the new requirements and how they are interpreted by the LSC. There is a further difficulty with the time guidance for debt and welfare benefits in particular which have not been tested in the NfP sector where much of this work is carried out.
- 3.46 We therefore propose a three stage process.

We accept that it is reasonable at the first audit and in exceptional cases for the LSC to reserve the right to make reductions of hours (subject to appeal) where auditors have found evidence that an agency has claimed for work where the client was clearly not eligible or where work is clearly out of scope.

However, in relation to administrative work we would make a distinction between “organisational admin” and “casework admin”. We accept that “organisational admin”, e.g. the completion of contract returns, is clearly outside the scope of the contract and that it would be reasonable for sanctions to be applied at first audit if this work has been claimed.

However, the distinctions between legal and admin work are less clear in relation to “casework admin”. The guidance set out in the draft Specification appears to be based more closely on the private practice model of working where secretaries or P.A.s are commonly employed. Often for reasons of necessity, caseworkers in the NfP sector are unused to working with the degree of admin and secretarial support available in the private sector. A particular difficulty will arise in situations where activities are a mixture of legal and admin work e.g. typing a letter to a client. We suggest that it is reasonable for agencies to be given an indication or clear warning about wrongly claiming casework admin before sanctions are applied.

As far as agencies which are changing from model 5 are concerned, there are implications in terms of audits as caseworkers will no longer be able to claim admin time. A first / ‘friendly’ audit will be looking largely at work done under model 5 rather than under the new model. Caseworkers will need to adjust to having to apply the casework/admin distinction and arguably will need longer to do so than workers on the other models.

In relation to the second audit we suggest that, where warnings have been given at first audit, sanctions may be applied to adverse findings in relation to the sufficient benefit test, improperly claiming admin work and conducting matters outside scope. However, we consider that some latitude should be given to former Model 5 agencies in relation to claiming admin work.

In relation to disbursements, the same principles should apply. If the LSC considers that agencies have incurred disbursements wrongly or unreasonably, no deduction should be made unless the agency has been warned explicitly about this, and yet continues to act inappropriately.

Finally, sanctions should be applied in relation to the time standards only at the third audit where agencies have been given adequate time to get used to the requirements and where these have been amended following consultation.

We would ask that commitments along these lines be spelt out clearly, either in the contract or in guidance.

- 3.47 In any event, there need to be clearer guidelines about when the LSC is “likely” to apply findings (see para 43 of the Overview). This vague wording is bound to cause problems.
- 3.48 We are still unclear as to how the statement that LSC will be comparing performance with other NfP agencies fits with other statements suggesting that the LSC is likely to reduce payment if the costs claimed are more than 20% above the costs assessed.
- 3.49 Agencies need to be able to see the auditors “work books” so that they understand the basis of the assessment.

### ***Appeals***

- 3.50 As far as appeals are concerned, we welcome the proposed role of NfP representatives in the process. We would suggest that NfP representatives have the option of counting the time spent against their contract hours, rather than receiving payment for their participation, if they so wish. In general however, agencies are more concerned that appeals are heard by subject specialists, rather than NfP representatives as such, although both would be preferable.
- 3.51 We do not see why agencies should effectively have to obtain ‘leave to appeal’ from another costs committee when no such requirement is imposed on the regional director. Further, it is not clear to us whether the cost appeals committee will hear the matter afresh or adjudicate only on the point of principle of general importance, which has been certified. We would appreciate clarification on this point.
- 3.52 In any event, we would ask for a LSC/ASA/network meeting after the first round of educational audits in order to get feedback about the problems, so that ASA and the networks can arrange appropriate training and support for agencies.

### ***The sample***

- 3.53 Agreement is needed about how files are selected. We suggest that the selection should be representative and agreed as such with the agency. It is not clear to us whether the sample will contain live and/or closed cases. It is also not clear whether auditors will be looking at hours/work done since the last audit or at cases closed since the last audit. There is of course a significant difference.
- 3.54 In principle, we do not accept that there should be penalties on files which have not been audited. The sampling process does not yet appear to us to be robust enough.

- 3.55 It seems to be suggested that an extrapolation can be applied to all cases which happen to have been reported in the period since the last audit. It seems to us that this is wrong in principle [since it is likely to reflect work which was done some considerable time beforehand, and to be too much of a lottery, since the extent of the extrapolation will depend on the number of cases closed during a particular period] It would be more logical if it was applied to all hours/work of a particular type which had been done during the relevant period.

***Outcomes***

- 3.56 The importance of outcomes is recognised at paragraph 4.4.6 (c), in relation to the time standards, but this recognition does not appear to be repeated in relation to audits and any extrapolation from them. If an agency is taking longer on cases, but is achieving 'significantly better outcomes', then this is a factor which should be taken very seriously into account before any extrapolation takes place.

## 4 Time Guidance For Debt: A New Approach

### Introduction

- 4.1 We have discussed the debt time guidance with groups of practitioners in London and Manchester and have considered the written views of several agencies. Drafts of this document have been circulated widely and met with general approval from individual advisers and organisations such as the Money Advice Association.
- 4.2 It is our considered view that the existing/proposed time guidance is inappropriate in relation to debt work, as carried out in Nfp agencies, and also to debt work carried out under solicitor contracts. In particular
- it does not distinguish between priority and non priority debts
  - it does not represent best practice [as set out, for instance, in the LSC's Transaction Criteria and the *Debt Advice Handbook*<sup>1</sup>]
  - it does not reflect the work that debt advisers actually do
  - it does not reflect the detailed analysis in *Quality and Cost* of the nature of debt work and the factors which are associated with longer case times.
- 4.3 Rather than try to amend the existing guidance, it is our view that the debt guidance should essentially be rewritten to reflect the work that debt advisers do and the most common situations that arise in that work and affect the amount of time which is actually necessary.

### General commentary

- 4.4 We do not have any particular comments on the proposed guidance in relation to
- recovery of debts [para 12.4]
  - voluntary arrangements, and Interim Orders [para 12.8 (insofar as it relates to voluntary arrangements) and para 12.9]
  - advising on setting aside a statutory demand [para 12.11]
  - advice to creditors on enforcing judgements [paras 12.12 and 12.13]
  - help in court [para 12.14]
  - refusal of application for Legal Representation [para 12.15]
  - disbursements [para 12.16]
  - advocacy assistance [para 12.17]
- 4.5 The guidance needs to recognise that debt advice involves a large amount of letter writing. Correspondence with all the client's creditors is necessary at various stages of a matter. Incoming correspondence cannot be ignored. It is necessary to keep all the creditors 'within the loop' as much as possible, in order to increase the chances of obtaining their co-operation, and avoid the risk that a creditor will take unilateral action.
- 4.6 There appears to be a practice issue in relation to when advisers close files. Some advisers may close files when a degree of finality has been obtained, although they may have to reopen them, as a new matter, if there is a change of circumstances or

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<sup>1</sup> Mike Wolfe and others: *Debt Advice Handbook*, 4<sup>th</sup> edition, Child Poverty Action Group [1999]

other developments. Other advisers may leave files open if there is a possibility that further work may be needed. This problem appears to be inherent in debt advice given the number of possible issues/debts/parties which may be involved in one case.

- 4.7 It appears to be general practice that all benefit work in relation to a debt case is done within the debt case rather than as a separate matter. However, many advisers will open a separate benefit file [and refer if appropriate] where further action is required such as a fresh/new application for DLA, or a benefit appeal.
- 4.8 There is a serious problem in defining what is meant by a case of 'average complexity/difficulty'. This is likely to be reflected in the number of priority and non priority debts which a client has. The Guidance reads as if an 'average' client has 2 or 3 non priority debts. This is not the case for most clients dealt with by Nfp agencies. In many Nfp agencies the more simple debt cases are handled by generalist advisers outside the contract, with the specialist debt advisers doing only the more complex cases. If solicitors on the whole handle more simple cases [as suggested by *Quality and Cost*] then the 'average' case may be less complex than most of the cases handled by Nfp debt specialists.
- 4.9 There is also a problem in defining whether a client has 'special needs'. Paras 4.4. and 4.6 are not very specific, particularly in relation to clients with mental health problems, literacy or numeracy problems, depression or high levels of stress or anxiety, which are commonly found in debt work. Such clients often require a significant level of support if the advice is to be effective.
- 4.10 Many debt clients
- have a degree of language, learning, literacy, numeracy or other problems which make it difficult for them to articulate their problems, understand and act upon advice given or advocate their rights and needs effectively
  - have mental and/or physical disabilities
  - suffer from high levels of stress, anxiety and depression
  - have family / friends who are not necessarily more able / capable
  - are in low wage / insecure employment and go in and out of different employments frequently
- 4.11 It must be recognised that successful debt work requires the development of trust between the client and the adviser. This also has an impact on time spent.
- 4.12 It must be recognised that a number of things can happen during the course of a case to 'throw a spanner in the works', or require the adviser to start again, such as a change in the client's circumstances [e.g. the loss of a job], or action by an individual creditor. This will inevitably affect the amount of time which must be spent on a case.
- 4.13 Bearing in mind that the time guidance only applies
- to cases of average complexity/difficulty
  - for clients without special needs

we suggest that an alternative approach could be along the following lines.

## **Initial consideration and advice**

- 4.14 The first stage in debt work is seen as one of information gathering, evaluation, assessment and the formation of an initial strategy.

It would normally include:

- identifying creditors [though not necessarily the full details of the debts]
- minimising debts, especially by checking that the client is actually liable for individual debts, or has insurance in relation to the debt
- identifying present income and possible additional income
- assessing the client's expenditure
- preparing an initial budget sheet [for evaluation purposes and to inform strategy]
- advising the client as to their legal position in relation to the debts identified, the legal options available to the various creditors and the client, and the impact of court orders
- determining the initial overall strategy
- confirming the initial advice to the client in writing.

In the average case, 2 hours would normally be sufficient to complete this stage. However, in cases with considerable documentation further time may be necessary.<sup>2</sup>

## **Income Maximisation**

- 4.15 In an appropriate case, extra time may be needed for further advice on income maximisation [excepting housing costs (mortgage interest and HB) and CTB – which are dealt with separately below]. This may include:

- clarification of the client's tax position and tax allowances/coding in particular
- advice as to the possibility of increasing income e.g. by taking in boarders [and the relevant benefit rules in relation to that]
- advice in relation to debts that are being recovered from the client's benefit
- advice as to possible entitlement to benefits, including disability benefits [especially DLA], industrial injury benefits, and WFTC
- advice as to the appropriateness of payments made to the client e.g. by resident non dependant children

In the average case, a further hour may be necessary to cover this work.

## **Housing debts**

- 4.16 The proposed time guidance in relation to housing debt work which is contained within the housing time guidance allows between 2 and 4 hours to carry out the necessary work in an average case. [See paras 13.12/17/18/22/26/33]
- 4.17 Given that there will be some initial work in relation to these matters which will be carried out in the first stage outlined above, but also that particular issues arise in

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<sup>2</sup> See the reference to the 'volume of documentation to be considered' at para 4.4.4; and the timescales suggested at para 4.2.14

relation to possession cases for rent/mortgage arrears, we suggest that a further 2 hours would normally be sufficient to deal with the housing debt issues that may arise.

- 4.18 This additional 2 hours would normally be sufficient to include the preparation of a financial statement if it is needed at this stage.
- 4.19 If the housing debt is in fact the main issue in the case, the additional 2 hours would normally also be sufficient to bring the case to a conclusion.
- 4.20 Particular difficulties may arise however in relation to housing benefit [particularly in some local authority areas where there are severe problems in HB administration] or in relation to the correct amount of mortgage interest payable to a client on IS or (IB)JSA. A further 1 hour would normally be sufficient in such cases. More time may however be needed in some local authority areas in relation to HB.
- 4.21 Additional time may also be needed in cases under the Consumer Credit Act. This is recognised in para 13.22, but the additional time needed may be considerably more than the additional 1 or 2 hours suggested there.

### **Dealing with other priority debts**

- 4.22 Additional time will be needed if the client has other priority debts, e.g. in relation to rates, council tax, utility debts, unpaid fines, maintenance arrears, some HP debts, fines, tax, national insurance or benefit overpayments.<sup>3</sup>
- 4.23 In the normal case, a further 1 hour may be sufficient to enable these debts to be dealt with.
- 4.24 The amount of time needed can vary significantly however, depending on the number of priority debts and the stage in the recovery process which has been reached in relation to each debt. [As a rough guide it may take 30 minutes extra for each priority debt.]
- 4.25 This additional 1 hour would normally be sufficient to include the preparation of a financial statement if it is needed at this stage.
- 4.26 If these priority debts are in fact the main issue in the case, the additional 1 hour would normally also be sufficient to bring the case to a conclusion.
- 4.27 Particular difficulties may arise however in relation to council tax benefit [particularly in some local authority areas where there are severe problems in HB/CTB administration].

### **Further advice to the client**

- 4.28 Where the client has unsecured debts, further work will be necessary, and further advice will be required.
- 4.29 If it has not been prepared earlier [see above] it is likely that a financial statement will have to be prepared. In the normal case, an additional 20 minutes will be appropriate for this.

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<sup>3</sup> See the Debt Advice Handbook, chapter 7

- 4.30 It will be necessary to engage in correspondence with the creditors. Normally at least 2 letters per creditor will be needed: one to request account information [to identify the stage the debt is at in the recovery process, interest and other charges which may be being applied and how this will affect strategy/negotiations and also to verify liability and whether the client is insured against the debt] and one to enclose the financial statement, with an offer of repayment [if appropriate]. Further advice will also have to be given to the client in relation to the approach to be adopted to these debts and the responses received. Such correspondence should be charged at the appropriate rate either for standard letters or for detailed letters.
- 4.31 It is not possible to estimate an overall time for dealing with these matters since the time will depend, amongst other things, on the number of creditors involved, whether they respond, when they respond, and how they respond.
- 4.32 If it is considered appropriate for the client to apply for an administration order, some further time will be necessary, in relation to the legal issues, and the completion of the form. The income and expenditure on the form needs to be completed extremely carefully in order to make the client's position clear and justify any payment proposal. It is necessary to explain to the client the requirements and implications of each section, and the policies and practices of the local County Court.
- 4.33 [It is not correct to state that the form is not complex and involves no legal questions and would not usually require assistance in its completion [para 12.7]. Problems arise if the client has a partner, or is a couple. Most debt advisers treat a couple's debts together, whereas an administration order can only apply to one person. The resources and liabilities of a couple have to be disaggregated. Where both are eligible (i.e. have a CCJ), it is necessary to complete two forms. There is no mention on the form of the applicant's right to apply for a composition order, which has to be expressly applied for. The treatment of travel costs on the form is different from that normally adopted by debt advisers, and the form has to be completed appropriately.]
- 4.34 Normally, a further 60 minutes (one hour) would be sufficient, although this may depend on the number of complexities as outlined above.
- 4.35 Advice in relation to bankruptcy will also involve further work [as recognised in the draft guidance]. The time needed may depend on the number of creditors. Normally an additional 1-2 hours is necessary.
- 4.36 **Summary:** the flow chart attached summarises our suggestions.

After initial consideration and advice areas of work may be exclusive or may be cumulative

**Initial consideration and advice:**

- Identifying creditors
- Minimising debts i.e. whether insured/liable
- Assessing present income and expenditure
- Preparing budget sheet for initial evaluation and to inform strategy
- Advising client on legal position in relation to debts identified
- Determining initial overall strategy
- Agreeing and confirming initial advice/strategy in writing

**2 hours**

**Income Maximisation, including:**

- Clarification of tax position and coding
- Advice on benefit entitlement
- Debts being recovered from benefit
- Other e.g. rent from non-dependants

**1 hour**

**1.2 Housing Debt (mortgage/rent/secured debts):**

- See Housing Time Standards paragraphs: 13.12/17/18/22/26/33
- Including preparation of Financial Statement where necessary at this stage, usually where

**2 hours**

**Other debt related housing, including:**

- HB mal-administration
- ISMI errors and/or non-payment

**1 hour**

**1.1 Other priority debts:**

- Priority both by sanction and client need: council tax (inc. distraint and committal), utilities, HP, benefit overpayments, telephone
- Could include preparation of Financial Statement for negotiation and mitigation (if not prepared earlier)

**1 hour**

**Bankruptcy:** advice and form completion/check. Number of creditors can significantly affect time claim

**1-2 hours**

**Consumer Credit Act cases:** e.g. pursuing rights under consumer credit contract, preparation advice and application for Time Order

**1-2 hours**

**Credit debts: Non-priority in terms of sanction: unsecured borrowing such as credit cards, personal loans, and overdrafts**

- 2 letters per creditor to conclude where no disagreement on terms of offer and assuming no court action and that responses received and within reasonable time frame
- Further advice to client on individual responses & strategy changes
- Would include Financial Statement if not completed previously, if so then additional 20 minutes
- If <5k and Admin Order then further 60 minutes

*Assume 2 x standard rate letter / creditor (request for account info & offer). May be need for additional contact*

## 5 Time Standards for Welfare Benefits

5.1 This document summarises the main points made at meetings of welfare benefit practitioners that ASA has either convened or attended. We have also taken into account the many written responses sent to us by individual advice agencies. The overwhelming view is that the Welfare Benefit time standards need to be reviewed and substantially amended.

### General points

5.2 The welfare benefit standards are written negatively, and appear to invite auditors to consider that work is likely to be fraudulent. The standards do not take readers through the likely stages in a case as clearly as some of the others. Possible headings might be:

- initial interview and consideration of case
- making enquiries of third parties
- advising and assisting a client in making a claim for benefits
- applying for a review and/or an appeal of a decision
- assisting a client in making a complaint to an Ombudsman
- appeals to the Social Security Commissioners
- representing your client
- additional time where there is a successful appeal

5.3 Welfare benefit work is significantly more complex than the standards imply and many cases involve complex inter-relationships between benefits. Welfare benefit law is amended frequently, and is often badly drafted.

5.4 The time standards need to take into account the significant problems with the administration and efficiency of benefit decision makers. A significant amount of time can be spent trying to get responses from decision-makers, or even getting them to make a decision in the first place. A report by the DWP for the period 2000-1 (and assessed as being “fair and balanced” by the National Audit Office) found that the following percentages of decisions were correct: income support – 59%; DLA and AA – 61%; child benefit – 57%.

5.5 Most benefit clients will have at least one of the special characteristics which are listed in paragraph 4.4.4 (e) of the Draft Specification. Many benefit clients will have multiple problems. The standards should acknowledge that it can take time to develop the necessary relationship of trust between adviser and client so that clients feel comfortable disclosing essential but sensitive information about, for example, their relationships or medical conditions. Many clients, as a coping mechanism, minimise the impact of their disability/illness on their daily life and therefore will need considerable support in presenting their case for benefit entitlement.

5.6 The introduction of tax credits next year will need to be incorporated into the standards.

5.7 Many LSC NfP suppliers refer straightforward welfare benefit matters to generalist colleagues or neighbouring generalist agencies. Some take only referrals from generalist agencies. This will affect their work profile and average caselengths.

## Separate matters

- 5.8 Most practitioners consider that, in most benefit cases, there are no good *practice* reasons for opening more than one file in one subject matter area. It is usually more time consuming to work from several files as issues are often inter-linked. The same information is often needed to deal with several issues e.g. appeals against more than one decision. Occasionally, it will be easier to split a file usually because of the volume of paper. The time standards need to acknowledge this.

## Benefit checks

- 5.9 The current time standards suggest that a “benefit check” involves a straightforward check of a client’s entitlement. However, practitioners use the term to describe a process that involves obtaining detailed information from the client about their circumstances which may include details of their accommodation, their family circumstances, their health, their income and their claim history. This would then lead to checking current benefit payments for their accuracy, identifying any possible unclaimed benefits and in some circumstances to carrying out a “better-off calculation” involving advising a client about the impact of choosing between two or more options.
- 5.10 Several factors other than a client’s “mental illness, language difficulty or other communication problem” might cause such a check to take substantially longer than 30 minutes. These might include the problems caused by interlinked benefits, the need to obtain information about non-dependents and the need to obtain information from a third party.

### “Where the matter could have been easily dealt with by the client . . . “

- 5.11 Practitioners have expressed considerable concern about this clause (15.4. (c)) in the time standards and have little faith in the ability of benefit staff to give appropriate assistance. We refer you to the general point 1.3 above which sets out recent statistical information from the DWP about the accuracy of decision making by the Benefits Agency.
- 5.12 Practitioners report that benefit staff are not trained to give advice and are in general experienced only in the administration of one benefit with no knowledge of the interrelationship between benefits. Further, practitioners have given us many examples of where incorrect information or advice has been given by benefits staff, often resulting in further time consuming problems

## Form filling

- 5.13 In the context of welfare benefits advice, form filling is not simply an administrative task. Clients need assistance in putting forward the relevant factual information in support of a claim for welfare benefits. This work involves fundamentally the same process as legal work in many other subject areas from drafting a divorce petition to preparing a witness statement in court proceedings.
- 5.14 It is our view that claims for all welfare benefits *may* require specialist legal help. The factors which affect the need for specialist advice and assistance are:
- the type of benefit (s) being claimed. For example, in all but exceptional cases clients will need assistance in claiming DLA and AA and in completing IB50s. In many cases, clients will need some specialist help with claiming Income Support, Housing Benefit and Council Tax benefit.

- the nature of the client's disability – in particular clients with rare conditions or complex disabilities will need more assistance with establishing entitlement
  - mental health or language problems
  - the need for supporting evidence
  - any claim which is linked to immigration status.
- 5.15 We accept that caseworkers should always justify the advice and assistance given to a client in making a claim by recording the legal and factual issues involved. However, the guidelines need to be amended to reflect a more realistic time.

### **Reviews and appeals**

- 5.16 We have received representations from practitioners that insufficient time has been allowed for reviews and appeals.
- 5.17 Most cases would involve the following stages:
- preparing an appeal letter to the DWP or other body
  - obtaining reasons for the decision and the evidence already considered by the decision maker
  - reading this bundle of documents
  - collecting medical or factual evidence on behalf of the client
  - legal research, if the matter is complex or unusual
  - preparing detailed submissions.
- 5.18 There is agreement amongst practitioners that the time allowed in the current standards for reviews and appeals is insufficient. However, we have received a wide range of representations from them as to the time that should be allowed. In part, these reflect differences in practice including in particular the extent to which time is taken at review stage as opposed to appeal stage. Many agencies prepare detailed submission at review stage in the hope of getting a decision reversed more quickly and to prepare the ground in case an appeal is necessary. Other agencies focus more on the appeal stage which may, in part, reflect the greater ability of such agencies to provide representation at the tribunal thanks to their non-LSC funding.
- 5.19 Both approaches clearly have merit.

Given the wide range of issues which may be involved in such cases, the varying extent to which further evidence may be required, the varying ability of clients to understand the issues involved, it seems difficult to suggest a fixed amount that can be attributed to this stage of a case.

One possibility is to follow the approach in the employment guidelines (in relation to unfair dismissal) which suggests various ranges depending on the complexity of the case, the amount of documentation involved and the work necessary to prepare evidence for submission to the tribunal.

### **Additional time where there is a successful appeal**

- 5.20 The current standards indicate that a maximum of an hour can be spent on following up a successful appeal. Although this may be reasonable in many cases, we have received representations from practitioners suggesting that securing payment of the correct amount of arrears of benefit can (unfortunately) take considerably longer than this.

## **Assisting a client making a complaint to an Ombudsman**

- 5.21 We suggest that the time standards should include acknowledge the need to provide advice and assistance to clients in making a complaint to an Ombudsman.

## **6 Comments on the Employment Guidelines**

### **Introduction**

- 6.1 Due to time constraints and priorities, ASA have not been able to consult as widely on the employment guidelines as we have in relation to debt and welfare benefits. Our thoughts on the employment guidelines arise partly out of a consideration of the guidelines themselves, and partly from comments from various advisers and agencies which we have received or seen.
- 6.2 It appears to us that the guidelines need to be amended, rather than rewritten. Of the existing provisions, those in relation to unfair dismissal [UD] appear to be the most logical and well-developed. Other guidelines, particularly those in relation to discrimination and equal pay, need to be adapted to correspond more closely to the approach adopted in the guidelines on unfair dismissal.
- 6.3 We set out below some general and specific comments and our suggestions for amendments to the guidelines.

### **General**

- 6.4 There is an issue about the changes in the Employment Act [EA] 2002 and their impact on initial advice. As Caroline Underhill has pointed out:
- “We are concerned that the model of case on which the average time is based is one which will soon be outdated. Changes in the Employment Act 2002, which will be realised by regulations expected next year, mean that advisors will need to assist and advise clients with regard to internal dispute resolution mechanisms (grievance and appeal) prior to assisting them with a tribunal. This assistance will involve matters relating to law as the procedures can affect both whether an early resolution can be sought but also the outcome of any subsequent litigation if resolution is unsuccessful. Internal procedures are sometimes protracted. Even the shortest procedures will add to the time needed in the “average” case. It will not, in many cases be possible to complete an application to the Employment Tribunal, nor to advise on the merits of the case, without having assisted the client to pursue the internal procedures.”<sup>4</sup>
- 6.5 There is an issue about advice in relation to costs, with further amendments due from the EA2002. Advising on potential Employment Tribunal [ET] claims is increasingly like advising whether to issue a fast track county court claim. It will be a rare case in which such advice can be included in an initial process of diagnosis, advice and the preparation of an ET1 within 2 hours.
- 6.6 The general idea that you can take instructions, advise and draft an ET1 in 2 hours is inappropriate and insufficient, although it may be possible in some redundancy cases, some wrongful dismissal cases and ‘simple’ UD claims where there is an obvious point e.g. a procedural one. The preparation of an ET1 is also likely to become more time consuming as a result of changes due to the EA2002. [One recent draft revised ET1 was 10 pages long]

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<sup>4</sup> Draft comments prepared on behalf of the Law Centres Federation

6.7 The guidelines assume that a case has only one issue. This is often not the case.

6.8 The Quality and Cost findings are relevant. The researchers looked at 3132 employment files between 1997 and 1999. Specifically, they found that:

- The mean was 5.6 hours [exceeded only by mental health at 7 hours]
- 72% of all cases concerned employment ending for a full time employee. The mean for these cases was 6.0 hours.
- The highest 10% of matters took at least 13.6 hours [exceeded only by mental health at 15.5 hours]
- The highest 5% of employment cases lasted more than 20 hours.

### **Unfair Dismissal cases**

6.9 In relation to para 11.6.2, it should be noted that

- you cannot advise on the 'amount of compensation' unless the client has already got a new job
- there are proposed changes on calculating compensation as a result of the EA2002
- the issue of impact on benefit entitlement can be very complicated.

6.10 The time allowed for further advice in para 11.6.5 is insufficient to include the preparation of witness statements.

6.11 Para 11.10 in relation to enforcement action is illogical and inconsistent with the debt guidelines. The county court procedure is not straightforward. There are a number of different possibilities to consider. The court will not be able to tell someone how to apply for a garnishee order, for example. It would be silly to stop when the client has won the case but the employers have not paid up. In the debt guidelines, para 12.12 allows 2 hours' work for advice on enforcement of a judgment. A similar provision needs to be included within the employment guidelines.

### **Redundancy cases [11.12]**

6.12 This section seems to assume that the only issue is whether a client is entitled to a redundancy payment [RP]. If this is obvious then the initial 2 hours proposed may be sufficient. However, the further advice should be 2 hours, as for UD, and not 1. This should cover most cases.

6.13 However, if it is denied that the client was an employee, was dismissed or was redundant, then the case could take as much time as a UD case.

6.14 ACAS have jurisdiction for RP cases.

### **Wrongful dismissal [11.13]**

6.15 If such cases are mostly for clients who cannot claim UD, then the initial tasks could possibly be done in 2 hours [11.13.3] .

6.16 If the case goes to the ET however, the additional 1-2 hours for everything [11.13.4] is not enough, especially if statements have to be prepared, documents assembled, or the case becomes complex, either because of tribunal procedure or the facts / documents. In those circumstances more time is needed, as for a UD case [as in 11.7.1 and 2].

6.17 We believe that ACAS also have jurisdiction in these case.

### **Discrimination cases**

- 6.18 On the whole the guidelines for Sex, Race and Disability Discrimination [SD,RD and DD] are the same. They suggest that you only ask for details of acts in the last 3 months, whereas you may well be looking for a pattern and/or a continuing policy over a much longer period.
- 6.19 They also imply that you would not prepare a questionnaire before issuing the ET1. However, if you have enough time you are more likely to do it first. There is a case for separating out the questionnaire and putting it into both sections [before and after preparation of the ET1], with separate time allowed for its preparation.
- 6.20 The general approach is less generous than for UD, which allows
- 2 hours initially
  - 2 hours more for preparation
  - 3-5 hours if the case is *procedurally* complex
  - 3-6 hours if the case is complex or involves substantial documentation [with a maximum of 12 hours in *very* exceptional cases]
- 6.21 The UD guidelines thus allow an additional 3-6 hours if the case is complex *and/or* has substantial documentation, whereas the discrimination guidelines only allow more time in *very* exceptional cases which are highly complex etc. The discrimination guidelines therefore seem to omit allowance for the 'ordinary' complex case.
- 6.22 ACAS are also involved in such cases.

### **DDA claims**

- 6.23 The guidelines seem to assume that the client's disability is not in issue. This is in fact a problem specific to DDA cases and needs additional recognition as such.
- 6.24 There is no mention of the questionnaire in para 11.22.1

### **Equal pay cases**

- 6.25 Generally the times seem too low, for the same reasons as for discrimination cases.

### **Our suggestions**

- 6.26 We would suggest the following:

#### ***General***

Any guidelines issued now should be expressed to be temporary pending the implementation of the changes resulting from the EA2002.

The reference to what you can normally do in the first two hours should be changed to

- 3 hours for UD, SD, RD and EqP cases
- 4 hours for DD cases to cover the issue of whether the client is disabled.

- 6.27 There should be an enforcement section which refers to all types of cases and allows up to 2 hours.
- 6.28 The section on ACAS [11.11] should be moved to the end of the guidelines and expressly extended to cover all claims for which ACAS have responsibility [including UD, RP, WD, discrimination and EqP].
- 6.29 Whereas the other time guidelines say that they refer only to cases of average complexity for clients without special needs, the employment guidelines clearly cover complex and exceptional cases. They should be amended to state explicitly
- that generally cases may take longer for clients with special needs
  - that the guidelines do not cover all cases, and that longer times can be agreed with the regional office via applications for extension of the upper case limit [if this proposal is implemented]
- 6.30 There should be specific reference to the fact that cases will take longer in certain circumstances, for instance
- where there is a dispute as to whether the client was an employee
  - where there is a dispute as to whether a client's employment transferred under TUPE

### ***Unfair dismissal***

- 6.31 The period for completion of the initial tasks should be 3 hours, rather than 2.
- 6.32 The reference to drafting witness statements should be taken out of 11.6.5, which should stay at 2 hours, and included in 11.7.1 which should be changed to 4-6 hours.
- 6.33 There should there be a specific reference to the complexity of constructive dismissal cases, which are generally 'complex'.

### Redundancy

- 6.34 The initial 2 hours is probably sufficient in most cases. However the further advice should be expanded to 2 hours. This should cover most cases.
- 6.35 Recognition needs to be added as to the possible complexity of the case, by including additional possible allowances for complexity as for UD claims.

### Wrongful dismissal

- 6.36 The initial 2 hours is probably sufficient in most cases. However the further advice should be expanded to 2 hours. This should cover most cases.
- 6.37 Recognition needs to be added as to the possible complexity of the case, by including additional possible allowances for complexity as for UD claims.

### Discrimination Cases and Equal Pay

- 6.38 We suggest an initial 3 hours, but 4 for DDA cases [to cover the issue of whether the client is disabled].
- 6.39 A specific allowance should be included for preparing a questionnaire – maybe 1-2 hours.
- 6.40 The additional times for complexity should be changed to match those for UD, as amended [i.e. statements go into the section on procedural complexity which is expanded accordingly], while retaining the higher maximum allowances in very exceptional cases.

6.41 The DDA guidelines should refer to the possibility of a questionnaire.