The Unified Contract

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

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1 About ASA

1.1 The Advice Services Alliance (ASA) was established in 1980, and is the umbrella organisation for independent advice networks in the U.K. Our aims are to:

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

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

- Advice UK (formerly Federation of Information and Advice Centres)
- Age Concern England
- Citizens Advice (National Association of Citizens Advice Bureaux)
- DIAL UK (the disability information and advice service)
- Law Centres Federation
- Shelter
- Shelter Cymru
- Youth Access

1.3 Our members represent over 2,000 organisations that provide a range of advice, legal and other services to members of the public. Most of these organisations offer services within a local area, but some of them are regional or national. They are largely funded through public sector grants and contracts, and charitable fundraising. With some limited exceptions, services are offered to users free of charge and are focused on areas of law which mainly affect poorer people e.g. welfare benefits, debt, housing, employment, immigration, education and community care (now commonly referred to as 'social welfare law'). There are currently 452 Not for Profit contracts with the LSC. A small number of NfP agencies currently have solicitor contracts.

1.4 This response has been drafted following consultation with our full members. However, it may not reflect our members' views in their entirety and we are aware that some members will submit their own response.

2 The "consultation"

2.1 As the recognised representative body for the not for profit sector, ASA has serious concerns about this "consultation". In our view:

- It is unreasonable for the LSC to decide on a six-week consultation period in relation to such fundamental contractual changes.
- It is unreasonable for the LSC to "consult" on the basis of incomplete documentation.
- The "consultation" is in breach of the LSC's own Code for Practice for Consultation Exercises and the voluntary sector compact.

- It is particularly unreasonable for the LSC to "consult" in this way before the government responds to the consultation on "Legal aid: a sustainable future". Without provisions as to payment, or provisions specific to individual categories of law, it is very difficult to analyse what the contractual provisions will mean in practice.

2.2 We are still awaiting:

- The personal indemnity agreement - p.8 of the Contract for Signature [although we reject the whole idea of such an agreement in principle for the reasons set out below]
- A complete version of the approved personnel etc annex
- The remaining parts of the specification
  - Section 9 - the Category of Law Specific provisions
  - Part B - Payment rates
  - Part C - Guidance

2.3 The contract documents appear to be incomplete in other respects:

- Reference is made to cost assessment, but there are no provisions explaining how and when such assessments are to be carried out. Full costs assessments have never been carried out on NfP agencies – the closest we got to them being "educational" audits some years ago. We understand that the LSC is proposing to set out the relevant provisions in a costs assessment manual, but we have not seen a draft of this.
- Only passing reference is made to the sufficient benefit test, which has been an important determinant to date of the work done by NfP agencies. We understand that the LSC is proposing to insert relevant provisions into the Funding Code, but again we have not seen a draft of such provisions. If the LSC is intending to move towards a fixed fee regime this has obvious implications for the sufficient benefit test.
- Reference is made to the Contract Review Body, but there are no provisions as to its composition or procedures.

2.4 It appears to us that the "consultation" is in breach of the LSC's own Code of Practice for National Consultation Exercises. Unless the Chief Executive authorises otherwise, this requires the LSC

- To consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy
- To be clear about who may be affected, what questions are being asked, and the timescales for responses
- To ensure that the consultation is clear, concise and widely accessible.

2.5 The LSC's Code suggests that the consultation period can be less than 12 weeks in two circumstances

- where a shorter period is specified under the General Civil or Criminal Contract itself
- where the period is dictated by a timetable laid down by the Government

but neither of these exceptions applies in the current circumstances.

2.6 We believe that this "consultation" should be withdrawn. In our view, once the government has announced its final response to the consultation on the "sustainable future" paper, the LSC should consider how that response can best be implemented,

can hold preliminary discussions with the representative bodies and then consult properly on a full set of proposals.

2.7 We accept that this may put back the implementation of the new contract. However, the existing contracts can be extended for the requisite period, as has happened before on more than one occasion.

3 The SQM

3.1 We are very concerned that the contract documents imply that the LSC has already decided:

- to drop the SQM as a contract document
- not to include key elements of the SQM in the draft contract.

3.2 It is ASA's view that changes in payment mechanism and contractual changes should not compromise quality.

3.3 In the "sustainable future" consultation, the LSC proposed that suppliers would not necessarily have to comply with the SQM but that they could comply with other equivalent quality standards instead.

3.4 Whilst we appreciate the flexibility of this approach we are not aware of any suitable equivalent standards. In particular, the requirements relating to caseworker and supervisor experience and training, supervision, file review, confidentiality, approved personnel and access to legal reference materials do not exist in any other standards. We understand from informal conversations with LSC peer reviewers and LSC staff that below competent performance at peer review is often linked to non-compliance with SQM supervision requirements.

3.5 The draft contract does contain an annex relating to approved personnel and supervisors but there are no terms dealing with supervisor/caseworker qualifications and the annex appears to be unfinished.

3.6 We favour the approach proposed by the LSC several years ago at the start of the preferred supplier project. The SQM should contain some compulsory and non-compulsory elements. The compulsory elements would be mainly those relating to supervision, training and file review. Where a supplier achieved good peer review scores, there would be an assumption that they were complying with the compulsory parts and flexibility as to the extent to which they are required to demonstrate compliance with the non-compulsory parts. Where a supplier's peer review score dropped, the LSC would still have the power to audit the compulsory parts of the SQM and impose sanctions accordingly.

3.7 We notice that the Principal Schedule contains three options for QA standard: SQM, other or none. We find the implication of this particularly worrying. It would not be acceptable for the LSC to contract with a supplier that does not meet any quality standards.

Comments on the draft documentation

3.8 We set out below our comments on the draft documentation that we have received.

4 CONTRACT FOR SIGNATURE

4.1 We have a fundamental concern about the “personal indemnity agreement” that is proposed in relation to companies. Most NfP organisations with LSC contracts are companies limited by guarantee.

4.2 If we have understood it correctly, the proposal is that directors (who are, in most cases, also charity trustees) of NfP agencies will be required to agree to be personally liable for all monies owed to the LSC under the Contract.

4.3 It is our view that this requirement is both unacceptable and unrealistic.

4.4 Directors of NfP organisations are overwhelmingly members of the local community who give up their own time to act as management committee members. They receive no payment and can derive no benefit from the company/charity.

4.5 There is a significant risk that a requirement to sign such a "personal indemnity agreement" will deter most people from becoming directors of NfP organisations. Indeed, it is hard to see how anyone, properly advised, would sign such an agreement.

4.6 These provisions should not apply to the directors of NfP agencies, or to management committee members or trustees of unincorporated Nfp agencies.

5 PRINCIPAL SCHEDULE

5.1 We do not understand why the LSC is proposing two new titles and roles to be carried out within suppliers.

- We do not understand why the LSC is proposing a ‘liaison manager’. We prefer the title of ‘contract manager’ or ‘quality representative, as at present.
- We do not understand the proposed new role of ‘compliance executive’, or why such a role is felt to be necessary.

5.2 We trust that these roles can be performed by the same person, where appropriate.

5.3 We object to the service of notices by email, for reasons set out below in reference to section 15 of the Standard Terms.

5.4 As stated above, we do not understand how a supplier’s ‘Q.A. Standard’ can be ‘none’.

6 OFFICE SCHEDULE

6.1 We have several concerns about the inclusion of maximum and minimum numbers of matter starts and licensed work cases. No indication is given as how these will be used, and in particular:

- How far apart the two figures will be set
- What they will be based on
- How they will be allocated between suppliers
- The extent to which the powers will in fact be used – the note suggests that there may be a tick (or “YES”) to indicate that there are no numerical requirements.

6.2 A number of matters need to be clarified including:

- How easy will it be to increase matter starts? What will the procedure and criteria be?
- What happens to clients with clusters of problems if a supplier who does more than one category of work runs out in one category?
- If suppliers obtain costs from the other side and make no claim on the fund, will this still count as a case?
- What protection will be provided for clients who cannot find a solicitor with the capacity to take on their case?

6.3 In relation to Table 5, it is not clear what is meant by 'volume of work restrictions'.

6.4 In relation to Table 6, it is not clear what is meant by 'restrictions'.

7 STANDARD TERMS

Foreword

7.1 We are concerned at the suggestion [at p.3] that, for organisations with more than one office, an underperformance or non-compliance at one office could lead to termination of the contract for the whole organisation. While we understand that contracts will only be issued on an organisation wide basis, any response by the LSC to underperformance or non-compliance by part of a larger organisation must be proportionate to the problem identified. Action can be taken in relation to the individual office concerned, by altering its schedule if necessary.

1. Interpretation

7.2 We are concerned at the suggestion [clause 1.32 at p.13] that the "80% guarantee" will not apply to the allocation of matter starts under the first schedule of this contract. Nfp agencies have been given assurances by LSC staff that, subject to performance, they would receive the same level of funding under the first schedule of this contract as they receive under their current schedule.

2. Relationship

7.3 We are concerned at the content and tone of this section. The obligations appear to be primarily on suppliers, rather than falling on both parties.

7.4 The present NfP Standard Terms includes the following:

"In exercising our rights under this contract, and in complying with it, we must act in good faith and as a responsible public body required to discharge its functions under the Act, having regard to the professional duties owed by you to your clients."
[Clause 2.2 Nfp Standard Terms]

7.5 We would like to see such a statement included in this draft.

7.6 The Liaison Annex records the agreement of both parties that good communication is key to the effective operation of the contract, but neither that Annex nor this section contains any obligations on the LSC to respond to any communications received from suppliers. We would like this section or that annex to state specifically that the LSC will respond to communications from suppliers promptly, with specified target times for responding to different kinds of communications.

7.7 In relation to clause 2.2 [p.14], it should not be a contractual term that suppliers should have to agree to aim to continually 'improve the services you provide to Clients'. The phrase is meaningless as a contractual term.

7.8 While suppliers may be happy to look for and notify the LSC of improvements that might be of assistance, we do not think that it is appropriate for this to be a contractual term, particularly in the absence of any commitment by the LSC to take appropriate action as a result of such feedback.

7.9 We are concerned at the wide-ranging requirements on financial provision proposed in clauses 2.14 and 15 [p.15].

7.10 We suggest that, in relation to clause 2.14:

- It should commence with the words "At our reasonable request in writing".
- "all financial information" should be clarified.
- the word "reasonably" should appear before the word "specify" in line 3.
- "information about [your] operating costs and expenses" should be clarified.

7.11 Similarly,

- Clause 2.15 should commence with the words "At our reasonable request".
- "Financially viable organisation" in clause 2.15 needs to be clarified.

7.12 Clause 2.16 is not acceptable. No explanation is given as to:

- why guarantees and indemnities may be required
- in what circumstances they may be required
- the nature of the guarantees and indemnities proposed
- who might be considered to be "appropriate members of your personnel".

7.13 In relation to equality and diversity

- We do not object in principle to suppliers being required to have the policy and plans referred to in clause 2.18 [p.15], but we object to the requirements set out in the Equality and Diversity Annex, for the reasons given below.
- We cannot agree to the terms of clause 2.19(b) [p.16]. Suppliers cannot 'ensure that your staff do not unlawfully discriminate'. They can however be required to "take all reasonable steps to ensure that personnel do not discriminate".

7.14 We believe that the marketing restrictions [p.16] are drawn too widely. Clause 2.23 (b), for example, would arguably not allow suppliers to produce leaflets for the general public to explain the contract work that they perform. Not only is this desirable for the public, but it may also be necessary for suppliers to ensure that they meet minimum matter start targets and achieve a reasonable case mix.

7.15 We do not object to risk rating [p.16] in principle. However, it is essential that suppliers are notified of their rating (and the reasons for it) and that such rating is based on objective criteria. In this context:

- We do not believe that 'your ability to work co-operatively' with the LSC can be measured objectively.
- It is not clear what is meant by 'your financial position'.

7.16 In any event, there should be a prescribed procedure whereby risk ratings can be challenged.

3. Looking after clients etc

7.17 As far as access to the LSC Manual [clause 3.2, p.17] is concerned, we would be grateful if the LSC could confirm that printed copies and updates will be provided to suppliers free of charge.

7.18 As far as clause 3.3 [p.17] is concerned, once such a case management system has been required, funding must be made available to ensure that suppliers can invest in suitable technology.

7.19 As far as the compliance executive [p.17] is concerned, we refer to our earlier comments, and in particular to the question whether one person can be both the compliance executive and the liaison manager.

7.20 As far as access to documents etc is concerned [p.18], we believe that clause 3.13 is to widely drawn. The clause should commence: “At our reasonable request”. Access to equipment (computers etc) should be limited to the circumstances mentioned in (d) and (e) in clause 3.13.

7.21 We do not see any value in clause 3.14 [p.18]. Its purpose and subject matter are unclear. In our view this would be better dealt with by the LSC when authorising any third party to conduct audits, as part of an overall agreement, rather than putting this burden onto individual suppliers.

7.22 As far as new forms are concerned [clause 3.22 on p.19], there is an IT issue here, as the LSC will be well aware from previous discussions. The minimum requirement should be six months notice not ‘at least 28 days’.

7.23 We have no objection to mystery shopping [p.19] in principle. However we would ask for greater clarity on a number of issues:

- How will it be done?
- What will the mystery shoppers be looking for?
- What will this be used to measure?
- What opportunities will be given to suppliers to respond to the findings of the mystery shopping exercise?
- What reliance may be placed on such findings by the LSC? Could the findings, on their own, provide the basis for contract warnings, notices or termination?

7.24 We are not convinced of the need for a register of risks [p.20]. Suppliers should obviously have contingency plans for certain risks but it would be unreasonable to expect them to have plans for all possible contingencies. It would however be helpful to have some NfP examples to illustrate what the LSC is looking for.

4. Approved Personnel etc

7.25 We are concerned at the suggestion that suppliers should be required to inform clients of possible negligence [clause 4.5, p.21]. As we said in our response to the “sustainable future” consultation:

We are concerned that this requirement, if taken literally, may conflict with the requirements of a supplier’s professional indemnity insurance. We would recommend that this requirement be replaced with one that matches the Solicitors Practice Rule 29.09:

"If a client makes a claim against a solicitor or notifies an intention to do so, or if the solicitor discovers an act or omission which would justify such a claim, the solicitor is under a duty to inform the client that independent advice should be sought."

5. Schedules

7.26 We are concerned at the references to 'geographic (or other) restrictions' on work suppliers can do [clause 5.6, p.22]. We are not clear if these are limited to those referred to in the following clause:

"Terms in an Office Schedule may e.g. specify matter and case mix and volume of work provisions such as the maximum numbers of matters and cases that you may start and the minimum numbers of matters and cases that you must start, by Category of Law, **by forum, by type of service, by client group or otherwise**." [clause 5.7, p.22].

7.27 It is not clear, in particular, what is meant by the words that we have highlighted above.

7.28 We do not understand clause 5.17 [p.23]:

"If, in any Category of Law or Class of Work, the volume of Contract Work to be allocated or authorised would be below any Minimum Contract Size, the Next Office Schedule will not allocate or authorise any Contract Work in that Category of Law or Class of Work."

7.29 This suggests that the minimum contract size applies per category of law, and not per supplier. This contradicts the proposal made in the "sustainable future" paper.

7.30 We do not agree with clauses 5.18 and 5.19 [p.23-24]. We do not see why failure to reach minimum targets should result in a supplier being unable to do work in the relevant category of law in future. Indeed, from the LSC's perspective, such a term, if rigidly applied, could result in closing down the only supplier in an area with expertise in a particular area of law. We do not see why the next office schedules should not just specify lower minimum targets.

10. Instruction and Payment of Third Parties

7.31 The contract documents appear to be silent about payments from the LSC to suppliers in respect of disbursements.

7.32 Suppliers need to know how quickly the LSC will pay for disbursements, so that when they are agreeing things with a third party, they can make payment commitments with confidence.

7.33 We do not agree with or understand the need for clause 10.5 [p.32]. We appreciate that there may come a point at which monies should be repayable to the LSC, but 28 days is far too short a period. It is much easier to resolve a dispute if you are in fact in funds, and able to make a rapid payment of, for example, a reduced amount.

7.34 We do not agree with clause 10.6 [p.32]. We do not see how suppliers can require third parties, such as experts, to time record or to permit the LSC and the Comptroller and Auditor General to audit their records.

12. Confidentiality and Data Protection

7.35 The draft states that the LSC will respect 'plainly confidential' information [clause 12.1, p.34], 'all information of a confidential nature concerning your affairs or business' [clause 12.9, p.35], and 'information which we are bound to keep

confidential' [clause 12.10, p35], but these are not defined. The rest of this section appears to specify information that the LSC does not regard as 'confidential'.

7.36 We are particularly concerned at the suggestion that the LSC may disclose information about contract performance and 'contract decisions' [clause 12.9, p.35].

- Agencies are concerned about sensitive data being made public, as it is unlikely to be interpreted in context. For example, an agency may not have met performance standards due to staffing difficulties that are beyond its control, such as sickness or maternity leave. Publication of performance information out of context could create a negative impression with other funders.
- 'Contract decisions' could include decisions that are subject to appeal, or to legitimate dispute.

7.37 We believe that there needs to be a procedure whereby, at the very least, a supplier is given reasonable notice by the LSC of its intention to publish such information, so that the supplier can argue against such disclosure and/or argue for the supplier's comment or explanation being published together with such information. In our view "reasonable notice" should normally be at least 28 days notice.

15. Giving contract notices

7.38 We do not agree with the suggestion that notices etc can be given or served by email, unless suppliers specifically agree to this. All email systems can on occasion operate erratically and be unreliable.

16. Constitutional etc changes to be notified

7.39 We do not understand the reference to 'an advisory service' [clause 16.1. (d), p.41].

7.40 We are not clear about the reference to 'any change . . . in the number of your members or directors' [clause 16.1. (f), p.41]. Is this meant to refer to the number or the identity of members or directors?

7.41 We are concerned at the wording of clause 16.12, which suggests a duty to notify a change in members, directors or shareholders 'which has or may have a material direct or indirect bearing on the performance of Contract Work' [clause 16.12.(a), p.44]. It seems to us that this is too vague and capable of differing interpretations, particularly in relation to changes which may have an 'indirect' bearing. We would request that this suggestion be clarified.

17. Prohibited gifts etc

7.42 We would suggest that clause 17.3 [p.46] be deleted. Although we appreciate the sentiment behind it, it seems to us that such a clause would be impossible to enforce. The tender evaluation process should, in any event, be thorough enough to eliminate such bids.

7.43 It seems to us to be unfair to suggest [clause 17.5, p.46] that any breach without the supplier's knowledge is a fundamental breach.

18. General

7.44 We do not agree with the wording in clause 18.6 [p.47] The examples given at (a) and (b) should be examples, not the only circumstances in which non-performance is due to causes beyond a supplier's reasonable control. The final two lines should also be deleted. As presently worded they could even cover unintentional acts, accidents and similar occurrences.

7.45 We do not agree with clause 18.18 [p.49], concerning information to be provided electronically, although individual suppliers should be able to agree to this.

7.46 Clause 18.27 [p.50] seems inconsistent. It starts by saying that 'you' and 'we' are the only parties to the contract. However, it then says that 'you' must require your consortium members to enter into 'such contracts with us and provide such indemnities as we may reasonably require'.

7.47 We do not understand clause 18.32 [p.51]. What is meant by

- 'the manner in which you perform contract work (including material alterations to your management systems)'
- 'any fundamental change in your management or the management of your Schedule Office'?

7.48 It would be helpful to have examples of changes that do and do not need to be notified.

19. How the contract can be ended

7.49 We do not agree to the proposal for termination on three months notice [clause 19.2, p.53].

7.50 As we stated in our response to the "sustainable future" consultation:

"We do not agree with the proposal for termination on three months notice. This makes it impossible for suppliers to plan or organise their affairs. The minimum requirement should be six months notice and a prior direction from the Lord Chancellor as at present. The LSC does not need to be able to give three months notice in order to facilitate the introduction of a CLAC or CLAN, given the lead in time that will be required before any such organisation comes into being."

21. Consequences of termination

7.51 We do not accept clause 21.13 [p.58]. The proposed sanction is very serious and no procedures for its implementation are referred to. Any such clause needs to specify issues such as

- How this responsibility is to be determined
- What procedures are to be followed, to enable any person concerned to challenge the proposed exercise of such a sanction
- What appeal process is to exist.

22. Reconsidering decisions and the review procedure

7.52 We consider the time limits proposed in clause 22.7 [p.59] to be unhelpful.

7.53 14 days to request a formal review is too short, particularly if support is required to sort out arguments and supporting material. It should stay at 21 days.

7.54 28 days, when an informal reconsideration has been requested, seems insufficient to allow a Contract or Relationship Manager to deal with such a request. It may be better to allow a longer time limit; otherwise suppliers are likely to apply to the Regional Director for a formal review because they need to protect their position, when the matter is still under investigation at the informal stage. A longer time limit would encourage more decisions to be reconsidered at a lower level.

7.55 We do not agree with the suggestion [clause 22.9] that oral representations should only be permitted at the discretion of the CRB.

7.56 We are particularly concerned that nothing is said about the composition of the CRB. The “sustainable future” paper proposed changes to the CRB, but no mention of these appears in the contract documents. As we stated in our response to the previous consultation:

“We do not agree with the proposed changes to the CRB. It is not in accordance with the principles of natural justice to allow decisions previously taken by a Board to be taken by one member of LSC staff. This proposal takes away further protection from providers and is unnecessary. The current system should remain in place.”

8 ANNEXES TO STANDARD TERMS

Liaison Annex

8.1 We refer to our comments above [in relation to section 2 of the Standard Terms] on the need to include obligations on the LSC to respond to communications from suppliers.

8.2 The standard agenda refers to ‘value for money’. How will this be defined?

Equality and Diversity Annex

8.3 ASA agrees that publicly funded legal services should be accessible to all and that suppliers should be required to have equalities policies. We anticipate that all NfP suppliers already have such policies in place.

8.4 However, we have the following concerns about the Annex as currently drafted:

8.5 The draft annex is inconsistent with the "sustainable future" proposal for payment by fixed fees. In ASA's view a simple fixed fee system has the potential to be indirectly discriminatory against precisely the “equality target groups” that the LSC seeks to protect with this annex. Cases for members of these groups take longer (for further detail, please see our response to the “sustainable future” consultation). This annex will not prevent the discriminatory consequences of the new payment scheme and there is a risk that it will be seen as a disingenuous attempt by the LSC to pass the blame for that discrimination onto suppliers.

8.6 The annex fails to acknowledge the NfP suppliers that were established to provide services to certain "equality target groups" only. Examples include the Disability Law Service and the Chinese Information and Advice Centre. Some NfP suppliers have developed important historical links with certain communities and do valuable work in reaching otherwise "hard-to-reach" groups. These groups should not be required to change their client profile to “encourage clients from all backgrounds” as this will mean that services that are key to ensuring equality of legal aid provision are lost.

8.7 The annex requires suppliers to "actively encourage clients from all backgrounds". However, the Standard Terms (p.16) discourage suppliers from marketing their "ability to perform Contract Work through leaflets, letters . . . without our prior, express authority". This apparent contradiction needs to be resolved.

8.8 We suggest that the annex is amended to take account of the proposed changes to the existing equality commissions and the creation of a new body.

8.9 The Diversity Training Plan section is onerous and highly specific. The requirement to specify who will provide the training is unnecessary.

8.10 Furthermore it is important to allow for the frequent changes in terminology in this area. Many people working in the NfP sector will have attended EOP training at some point in their careers and it seems unreasonable to require advisers to attend equality impact assessment (EQIA) training and managing diversity competency training because the terminology has now changed.

8.11 In many respects, this annex duplicates existing requirements in the SQM. We refer you to our earlier proposal that parts of the SQM should be retained as contractual requirements.

8.12 Finally, it is not clear how supplier implementation of these requirements will be monitored by the LSC.

Client Service Annex

8.13 We are not convinced that NfP agencies should be required to carry the same level of indemnity insurance as required for solicitors in private practice. The indemnity requirement for NfPs is presently £1m. The Law Society recommends £2m for private practice. An extra £1m cover will cost agencies an additional premium, which is likely to amount to several hundred pounds per annum. There is no need for NfPs to match solicitors. NfPs do not on the whole do the sort of work that attracts risks of such magnitude. Agencies should of course carry out a proper risk assessment, which should identify if they need to extend their cover.

Monitoring Annex

8.14 Suppliers are required to keep records of any internal audits they carry out, but they do not seem to be obliged to carry out internal audits. Clause 3.8 of the Standard Terms states that records must be maintained in accordance with the monitoring annex, and the annex refers to 'any internal . . . audits'. We would be grateful if this could be clarified.

8.15 We do not accept the proposed requirement for an annual report. We do not understand

- why this is being proposed
- why it is proposed for a calendar year when the schedule is April to March
- why the LSC cannot retrieve the relevant client information from the CMRF forms for completed cases.

8.16 Further, no explanation has been given for monitoring the sexual orientation of clients and staff. Whilst there may well be benefits to monitoring the sexual orientation of clients and staff, we suggest that the LSC needs to state clearly why this information is sought, so that suppliers can explain it to their clients. Further, there needs to be clarity about how this information will be used and how confidentiality will be maintained. We suggest that the LSC might find it useful to consider a Stonewall publication on monitoring sexual orientation in the workplace: http://www.stonewall.org.uk/workplace/1214.asp

Approved Personnel and Supervisors Annex

8.17 We refer to our comments above about the SQM.

8.18 It seems to us that this annex is incomplete. The last four paragraphs in particular seem to be headings for requirements that could be added.

KPI Annex

8.19 KPI 2 refers to a success rate of 40%, but "success" is not defined. It would be more appropriate if the rate was described as 'to be determined following consultation with the consultative bodies'.

8.20 One possibility would be to use the definition in the specification for the Leicester and Gateshead CLACs:

" 'Satisfactorily resolved' will be defined as obtaining the most appropriate casework outcome for the client, taking into account the best interests of the client, the merits of the case, and the prospects of success of litigation. It may involve a financial or non-financial benefit. This requires an objective assessment by the solicitor/caseworker who undertook the casework at the end of the case."

8.21 KPI 3 refers to an assessment reduction. We refer to our comments above about cost assessment auditing.

Fundamental Breach Annex

8.22 We have difficulty in understanding the relevance of this annex.

8.23 Example A1 [p.9] does not seem to fit with clause 18.27 of the Standard Terms, discussed above, concerning contracting with lead members of consortia, which implies that lead members will indeed sub contract part of their contracts.

8.24 Example B3 [p.10] seems to imply that suppliers will be subject to cost assessment audits. We understood that these had largely been dropped for solicitors under the tailored fixed fee scheme. We cannot see the purpose of such audits under a fixed fee regime, save in relation to claims for exceptional cases.

TUPE Annex

8.25 We do not accept the terms of this annex.

8.26 We are particularly concerned at the implication that this annex would apply in the event that the LSC gives notice of termination under clause 19.2 of the Standard Terms [no fault termination to facilitate a reform of the legal aid scheme]. It cannot be right that suppliers could incur liabilities under this annex in respect of a termination of the contract

- on no fault grounds
- in circumstances which are unforeseeable at the time that the contract is entered into.

8.27 We believe that there should be a specific statement that the annex would not apply in such circumstances.

8.28 We cannot accept the combined effect of clauses 5, 6 and 7. They would appear to suggest that, during the last 12 months of the contract, a supplier may not

- Alter the terms and conditions of employment of TUPE employees, even to the extent of given them a pay rise
- Terminate the employment of such employees
- Recruit a new employee to replace one who has left [for whatever reason]

without exposing itself to potential liability.

8.29 Many NfP suppliers have staff employed on local authority scales or terms, entitling them to annual increases.

8.30 Suppliers should be entitled to terminate the employment of TUPE employees where they consider this necessary.

8.31 Suppliers must be able to recruit new employees to replace departing ones so as to enable them to meet their obligations under the contract.

8.32 At the very least, clause 6 must be revised

- To provide that changes within the scope of clause 5(a) can be made if they are necessary for the effective performance of the supplier's business as a whole
- To reverse the burden of proof. It is unreasonable for the onus to be on the supplier to prove anything. The onus should be on the LSC to prove that any change was not necessary.

8.33 Clause 9 is drafted far too broadly. It should surely be limited to acts or omissions by the supplier in circumstances in which it knew or reasonably ought to have known that a liability under TUPE was likely to arise, and which were unlawful or unreasonable, with the burden of proof being on the LSC to establish the same.

8.34 As currently drafted we cannot see any purpose in clause 9(b).

8.35 We do not understand clauses 11, 13 and 15, and how or why suppliers could or should warrant to comply with the LSC's obligations under the statutes mentioned.

9 SPECIFICATION

9.1 We are still awaiting

- Section 9 – the category of law specific provisions
- Part B payment rates
- Part C guidance

9.2 We have been told by the LSC that these cannot be produced until decisions have been made on the scheme as a whole, following the consultation on the "sustainable future" paper.

9.3 Our comments below are limited to the draft specification as it stands, without trying to second guess what might be contained in the missing documents. As previously stated, we do not consider that any proper consultation can take place until we have received all the documents which are presently missing, and any other documents which the LSC is intending to amend or produce.

S.1 General Rules for Suppliers

9.4 Clause 1.4 [p.5] requires that, if a supplier has provided Controlled Work and the client transfers to another supplier, the first supplier must, on request, provide 'reasons for the termination of the retainer'. It is unclear how much detail is envisaged; but it needs to be clear that this would not breach any professional duty to the client. Any consent given by the client would have to be specific on this point, rather than being merely a request for the transfer of the file.

S.2 Applications for Contract Work

Financial eligibility

9.5 We do not understand the reference to 'Volume 2 of this manual' in clause 2.3 [p.6], which presumably originates from another document. Is it intended that the 'Financial Eligibility Guidance' referred to will stand?

9.6 Clause 2.4 [p.6] does not sit with clause 2.5. It should start with the words 'subject to clause 2.5'.

9.7 We would like to know whether there will be any guidance on the questions as to

- When it is reasonable to undertake work before assessing financial eligibility
- What action to assess financial eligibility is likely to be considered to be reasonable
- Whether there are circumstances in which it would be considered to be reasonable to stop providing contract work to a client who has failed to provide evidence of means.

9.8 Clause 2.11 [p.8] states that the assessment of the client's means must be fully completed and the form signed in the supplier's presence before the Controlled Work is commenced. It should refer to the exceptions which follow.

9.9 This clause represents a change to previous practice by the LSC and could be detrimental to the adviser/client relationship. It is better practice to encourage the client to explain their problem and establish a rapport before asking the client to go through the Legal Help form and sign it. This is allowed for in the current NfP Specification. Rule 2.6(a) states 'Where the form is signed in the course of an interview, you can claim all reasonable time from the beginning of the interview.'

9.10 In any event, we believe that the amount of time spent on assessing and establishing eligibility should be proportionate to the amount of time being spent on a matter. As we stated in our response to the "sustainable future" consultation:

"Level 1 work has proved to be an effective way of providing one-off advice, either in person or by telephone, without spending a disproportionate amount of time on completing a controlled work form, obtaining evidence of means, and complying with detailed requirements in relation to opening a case, providing a detailed client care letter etc.

9.11 We believe that this flexibility and efficiency should be retained within any new system.

9.12 Advisers should be able to claim payment for short cases, whether the advice is provided in person, by telephone or by other means, subject to completion of a proxy means test, such as that presently used in relation to CLS Direct."

Postal applications

9.13 As far as postal applications are concerned, we would suggest that clause 21.5 should be amended to say that 'good cause' would also include situations where it is appropriate to start a separate matter after the start of a case, so that a new CW1 can be posted to the client for signature and return.

9.14 We do not understand why postal applications cannot apply to help at court [clause 21.4, p.9]. If a client is unable to see an adviser prior to a court hearing, but it is appropriate for the adviser to provide help at court [e.g. in a possession action, or an

application to suspend a possession warrant] why cannot a postal application be allowed?

Telephone advice

9.15 Under the present provisions, it is possible to carry out significant amounts of valuable advice to clients over the telephone. There are circumstances in which it is not practically feasible for a client to attend a supplier's office, but which do not fall within the 'good reason' provisions of clause 2.15. These include cases where the client lives some distance from the supplier (e.g. in rural areas) and circumstances in which the client is particularly vulnerable. It seems to us that such cases should best be covered by a separate rule and guidance, as in relation to postal applications, that could also include some relaxation of the rules regarding eligibility and evidence of means as presently exists under CLS Direct contracts.

Previous controlled work

9.16 We do not understand why clause 2.23 [p.10] should state that, in the absence of reasonable enquiries, a claim should be disallowed even if the client has not received controlled work from a previous supplier. This seems to us to be punitive and unnecessary and may lead to time being wasted making enquiries in order to prevent this sanction being applied.

9.17 It seems to us that the requirement in clause 2.24 that a supplier must obtain a client's consent to contact a previous supplier is inconsistent with the acknowledgement in B9 that a client may have reasonable cause to be dissatisfied with the service provided by the first supplier. There must surely be circumstances in which it would be inappropriate to ask the previous supplier to confirm the reasons for termination of the retainer, for example where the client claims that the previous supplier has acted unethically or in breach of their professional duty to the client. In such cases it would surely be sufficient merely to request a transfer or copy of the file.

9.18 The final paragraph under this clause states that, unless the client gives permission for the new adviser to contact the former adviser, no claim can be made. This seems harsh, as the new adviser may have spent considerable time with the client before the existence of the previous advice comes to light.

9.19 We do not accept the requirements set out in the final two sentences of clause 2.27 [p.11] for several reasons.

- ASA is not a regulator or complaints handling body, and does not wish to receive any such complaints.
- The requirement to assist the client in making a complaint in writing is not acceptable unless it can be treated as a separate matter from the matter about which the client has consulted the second supplier. Otherwise the client would be doubly disadvantaged. Not only would they have received poor service from their first adviser, but the time available to deal with their substantive matter would be reduced because the second supplier was spending it on dealing with the complaint.
- It is likely that such a requirement would act as a disincentive to suppliers taking on cases from clients who are unhappy with the original supplier they had contacted.
- We can envisage circumstances in which a client may, for good reason, not wish to make a formal complaint against the previous supplier.

- We doubt whether, in many cases, assistance in making such a complaint would in fact be within the scope of the legal aid scheme.

Refusing contract work

9.20 We note that clause 2.43 [p.14] allows a supplier to refuse to accept an application for contract work for good cause (such as professional reasons or conflict of interest reasons). Professional reasons, in our opinion, would include:

- Suppliers' own criteria for taking on or refusing work, which might refer to types of cases or types of clients
- Behaviour by the client that is considered to be oppressive or in breach of the supplier's equality and diversity policy.

S.3 Scope of Controlled Work

9.21 In relation to clause 3.6 [p.17] we do not understand why 'costs' should not refer to the fixed fee payable if this amount is lower than costs calculated on the basis of hourly rates.

S.5 Carrying out Controlled Work

9.22 Clause 5.5 [p.21] should presumably refer to 'a client suffering from severe mental health or learning difficulties'. In the absence of any clearer definition of this phrase it should be clearly stated that it is for the supplier to assess this, without the risk that such assessment may be overruled subsequently by the LSC, whether on audit or otherwise.

Category of law and matter start boundaries

9.23 We find it difficult to comment on this section in the absence of the category specific provisions referred to in clause 5.8.

9.24 We note the reference in clause 5.10 to the sufficient benefit test as set out in the Funding Code. We are not convinced that the existing version of the sufficient benefit test can be imported directly into a system of fixed and graduated fees.

9.25 Clause 5.14 seems to us to be a rewording of the existing provisions. We assume that "brief advice" is equivalent to the "initial preliminary advice" in the NfP Specification [clause 3.13.2].

9.26 We understand the logic of clauses 5.15 and 5.16. However, the corollary should also be stated, namely that two or more issues that would lead to more than one action, cause, matter or certificate should be dealt with as separate Matter Starts.

9.27 We consider clause 5.17 to be unclear and unhelpful. We assume that it is intended to apply only to two or more matters within the same category of law, given the wording of clause 5.14. However, if the two or more potential matters would lead to more than one action, cause, matter or certificate, then they should be treated as separate matters in line with clause 5.15 and 5.16. It is difficult to envisage circumstances in which clause 5.17 could apply. We would suggest that it be deleted. If there are particular examples that are meant to be covered, these could best be dealt with in the category specific guidance.

9.28 No examples are given where it would be justifiable to open two matter starts within one category of civil law, which is unhelpful. The only example given is in public children law, where the adviser is acting for more than one child.

9.29 The wording of clause 5.20 is unclear and unhelpful. It appears to suggest that a new Matter Start cannot be used

- whatever the time gap since the original advice was given [contrast the provision in relation to previous advice by another supplier within the preceding six months – see B9 quoted at p.10 of this draft specification]
- whether or not there has been a material development or change of circumstances [see our comments below in relation to clause 5.24]
- even if the previous matter has been closed or reported [contrast for example the provision in clause 14.1.5 in the present NfP specification].

9.30 We would suggest that this clause be deleted, or, at the very least, clarified.

9.31 With regard to clause 5.21, we refer to our comments above on clause 2.27.

9.32 Clause 5.24 is particularly problematic. NfP agencies have many clients with chaotic lives, for example due to addiction or mental health problems. They may cease to give instructions as a result of these problems, but then want to engage with the advice process at a later stage when they are better able to cope (e.g. when they are receiving treatment, are dry or off drugs, or are back on or receiving improved medication). We assume that the phrase "change in the client's circumstances" would include such a change in the client's ability to engage in the advice process, and would be grateful if this could be confirmed. In relation to clause 5.27 on telephone advice we refer to our comments above in relation to clause 2.20.

9.33 In relation to clause 5.30, it is our understanding that the grant of emergency representation covers all work done on the same day as the grant, in which case it would not be appropriate to use a controlled matter start as well. However, there must be cases where the supplier 'intends' to grant emergency representation in the near future subject to obtaining certain information in the meantime, which may refer to the case itself, or the client's circumstances, or their eligibility. In such cases it would surely be appropriate for a controlled matter start to be used in respect of the preparatory work carried out on days preceding the day in which emergency representation is granted.

9.34 Clause 5.43 [p.24] states that, if an expert is instructed to work with children, the supplier must be satisfied that the expert has been checked by the CRB and a satisfactory response received. We are not clear what the supplier is supposed to if there are CRB backlogs.

S.6 Carrying out licensed work

9.35 We do not agree with the proposed payment on account arrangements in clause 6.17 [p.28]. Suppliers will have increasing cash flow problems if fixed fees are introduced. We believe that there should be payment on account at the start of a case, with a right to apply for further payments every three months thereafter. We would also suggest that the initial payment should be increased to, say, £500.

S.7 Payment, claiming and assessment

9.36 We do not understand the reference to contributions in clause 7.4 [p.29]. Is it anticipated that suppliers will collect contributions?

9.37 In relation to clause 7.9 [p.30], we do not agree that counsel's fees should be included within fixed and graduated fees. They should be claimable as a disbursement.

9.38 Clause 7.11 (b) [p.31] states that the LSC is not obliged to make payment in respect of claims for controlled work if they are submitted over two months late. The present provision is three months. We cannot see any good reason for changing this.

9.39 In relation to clause 7.13 [p.31], we would be grateful if the LSC could state whether they are intending to provide information to suppliers on the types of cases arising in each bid zone in each category of law.

9.40 Clause 7.22 [p.31] states that there is no right of review of the LSC's refusal to treat a case as exceptional. We would be grateful if the LSC could clarify what rights a supplier has if dissatisfied with such a refusal. There must be a procedure whereby suppliers can challenge the decisions of LSC auditors in relation to such cases.

Tolerance work

9.41 We do not agree with clause 7.24 [p.32]. As we stated in our response to the "sustainable future" consultation:

"Notwithstanding the legitimate concerns about the quality of tolerance work, it does play a crucial role in providing access where contracted suppliers do not exist, and particularly in rural areas. There are also some important types of work, such as discrimination in relation to goods and services, which can only be done as tolerance work. Particular issues would also seem to arise if the proposal to separate NASS work from asylum work is implemented, if suppliers have to carry out this work under tolerance."

Right to amend standard and graduated fees

9.42 We do not agree with clause 7.25 [p.32]. As presently drafted the clause is too vague. Any proposal to amend fees downward should in any event be subject to consultation with the consultative bodies.

9.43 We do not agree with clause 7.51 [p.35] 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.