

Reforming the Civil Advice and Assistance Scheme

The Advice Services Alliance's response to the
Legal Aid Board's consultation Paper

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PREFACE

The Advice Services Alliance (ASA) was established in 1980, and is the representative body for advice services in the UK. Its main aims are:-

- to promote the development and improvement of advice services;
- to act as a forum for the discussion of common issues of concern;
- to encourage co-operation between advice agencies.

The following national advice networks are full members of ASA:-

- Citizens Advice Scotland (CAS);
- DIAL UK;
- Federation of Independent Advice Centres (FIAC);
- Law Centres Federation (LCF);
- National Association of Citizens Advice Bureaux (NACAB);
- Scottish Association of Law Centres (SALC);
- Shelter;
- Shelter Cymru;
- Youth Access.

Other organisations concerned with the provision of advice and legal services are affiliated to ASA as associate or observer members.

ASA is pleased to have an opportunity to respond to the Legal Aid Board's proposals. Our response is based on discussions between ASA network members currently involved in legal aid provision in England and Wales, and should be considered in conjunction with responses submitted by individual networks. The response seeks to represent the consensus of opinion amongst the networks on the Board's proposals in general, but its comments on specific proposals should not be taken in every case as necessarily representing the views of all network members.

ASA's policy as set out in this response is that while we support a move towards an exclusive contracting scheme for advice and assistance based on franchising, we are strongly opposed to cash limiting and exclusion from the new scheme of solicitor suppliers able to meet the Board's quality assurance requirements. However, for the purpose of responding to some of the specific proposals in the consultation paper, we have assumed that a cash limit will apply and that the number of suppliers will be rationed. It should be clear from the context when such assumptions are being made.

1. INTRODUCTION

Predetermined budget

- 1.1 The Lord Chancellor has stated that legal advice and assistance currently provided through the green form scheme should in future be provided as far as possible through contracts at fixed prices or rates under plans determined in advance. The Legal Aid Board's proposals interpret this as meaning a strict cash limit (except for transitional arrangements to pay for outstanding green form work by non-contracted firms). ASA believes that there are other ways of meeting the Lord Chancellor's objectives.
- 1.2 In essence, the Board's proposals resurrect the policy of the previous Government, as set out in the 1995 Green Paper, "Legal Aid - Targeting Need". ASA opposed the approach taken in that paper on the grounds that cash limiting:-
- (a) would result in arbitrary and unfair decision making, thus undermining the principle of equal access to justice;
 - (b) would leave the scheme less open to public scrutiny and more vulnerable to future cuts by breaking the link between entitlement and provision;
 - (c) was unnecessary given that the recent surge in legal aid expenditure appeared to be at an end, allowing the Government time to consider alternative means of keeping future spending under control.
- 1.3 ASA remains convinced that cash limiting is a crude approach to controlling expenditure which will lead to injustice. If the proposed system for allocating resources fails to predict accurately the level of demand for different types of service in different parts of the country, eligible clients will be denied help as the money runs out or suppliers ration their services in anticipation of overrunning their budget. Imbalances between supply and demand may arise because of intrinsic weaknesses in the planning system itself - and there are a number of arbitrary assumptions underlying the Board's proposals - or because of factors beyond the Board's control, such as changes in economic and social conditions or the impact of new legislation.
- 1.4 ASA accepts that more needs to be done to control legal aid expenditure, which continues to grow faster than the rate of inflation. Before considering cash limiting however, the Government should monitor the outcome of reforms to the legal aid and civil justice systems as a whole, including the introduction of the fast track procedure for most lower value civil cases and the replacement of legal aid in personal injury cases by conditional fee arrangements.
- 1.5 Further measures can also be taken through regulations and guidance to curb waste within and, where it exists, abuse of the green form scheme.

Exclusive contracting

- 1.6 ASA recognises that as presently constituted, the green form scheme does not ensure quality of service. We support the objectives of the franchising scheme, and agree that the provision of legally aided advice and assistance should in future be limited to franchised suppliers.

- 1.7 However, we have two major reservations concerning the Board's proposals, which seek to introduce exclusivity within the context of a cash limited budget. Firstly, they provide no guarantee that there will be sufficient access to advice and assistance. The Board's estimate that somewhere between 2,300 and 3,500 contracts will be awarded is arbitrary and seems largely predicated on limiting contracts to larger legal aid suppliers. In the absence of firm evidence to the contrary, it is impossible to be confident that this will not seriously reduce access.
- 1.8 Secondly, while the Board's quality regime provides some guarantee of a minimum standard of service, it is not currently capable of assessing the relative quality of competing suppliers satisfying the franchising requirements, especially in respect of the quality of legal work. This is a major weakness in the context of proposals which seek to limit a priori the number of contracted suppliers. We will examine the issue of quality in more detail in the final section of this response.
- 1.9 In view of our general opposition to cash limiting and the specific concerns outlined above, ASA believes that the sensible way forward is an exclusive contracting scheme in which all solicitor suppliers (whether in private practice or the not-for-profit sector) are awarded a contract provided that they satisfy the franchising requirements. Payment under such contracts should reflect eligible work done on behalf of clients and should not be subject to a predetermined cash limit.
- 1.10 If this approach is adopted, a proportion of the savings resulting from the withdrawal of legal aid funding from non-franchised firms should be applied to increased social welfare law provision, including by non-solicitor suppliers in the not-for-profit sector.

2. PROPOSED ALLOCATION OF FUNDS

Fluctuations in demand

- 2.1 ASA would urge the Government to reject cash limiting at this stage and adopt the more cautious approach advocated in the introduction to this response. If however the Board's approach is endorsed, it is essential to build in safeguards to avoid arbitrary rationing of services. We would propose the following:-
- (a) provision to transfer resources within and between legal aid areas in the event of lack of take up of the full allocation of funds in some areas and/or consequent underspend by contracted suppliers - it is wholly unacceptable for legal aid funds to go unspent simply because the actual pattern of demand for advice and assistance does not match that predicted by the Board;
 - (b) a contingency fund to cover the cost of unforeseen demand.
- 2.2 We believe that both of the above safeguards are necessary. It cannot be assumed that fluctuations in demand can simply be absorbed by transferring funds from suppliers undertaking less work than anticipated in their contracts. Firstly, suppliers will have every incentive to meet volume targets, including by cherry picking cases. Secondly, it is doubtful whether the Board's monitoring systems will be sufficiently robust to identify underspends quickly enough to ensure the necessary transfers of funds at the right time. Thirdly, demand may simply outstrip a fixed budget.

Total allocation of funds

- 2.3 The expenditure figures used in the Board's consultation paper (1996/97 green form expenditure) are clearly designed to illustrate the Board's approach. We note however that two areas of relevant expenditure are excluded from the figures:-
- (a) green form expenditure on personal injury cases (approximately ,7.4 million In 1996/97);
 - (b) funding for the phase II block contracting pilot in the not-for-profit sector (for which we understand ,14 million has been allocated in 1998/99).

We would expect to see these allocations included in the budget for the proposed scheme (taking account of provision to fund advice and assistance in medical negligence cases), as to exclude them would represent a cut in real terms to the total provision for advice and assistance.

- 2.4 More generally, the Government must ensure that any savings resulting from the replacement of legal aid by conditional fee arrangements are reapplied to the legal aid system, with priority given to increasing the provision of social welfare law services. The Board's proposals merely redistribute existing funds for this area of work, a form of rationing which will result in losers as well as gainers. There is no reason for example to believe that client need for advice and assistance in Merseyside will fall as a result of funds in that area being reduced.

Allocation of funds between legal aid areas

- 2.5 The proposed allocation of area funds for advice and assistance in non-family/immigration matters, entailing a 25% shift towards an allocation based on income support levels. is speculative and unsupported by evidence that it will represent a fairer and more effective use of resources.
- 2.6 ASA agrees that income support figures provide a reasonable if imperfect proxy for financial eligibility for advice and assistance. It does not follow however that they are a reliable indicator of client need for legal services. A more sophisticated model is required, taking into account a range of social and economic indicators. For example, data on such factors as the condition of the housing stock, the number of possession hearings and the incidence of homelessness should be taken into account in determining potential need for legal advice on housing matters.
- 2.7 The Board's proposals also assume that there are sufficient suppliers of suitable quality to provide new services in those areas allocated additional funds. The Board recognises that this may not be the case in relation to immigration law (which is examined later in this response), but we would suggest that the problem is also likely to arise in other areas of law, as there is a shortage of good quality suppliers in some areas of the country.
- 2.8 This underlines the need for a mechanism to transfer funds between areas in the event of lack of take up or underspend. It also highlights the need for the Board to draw up a development strategy to ensure the emergence of suitable suppliers in poorly resourced areas of the country. ASA has long argued for a separate development fund for this purpose.

- 2.9 Given the above considerations, the Board should commission research with the objective of constructing a suitable model for allocating funds between areas on the basis of need for legal services. The work of regional legal services committees should be taken into account in constructing a model, although ASA would not support a system in which legal aid areas bid against each other for funds. In the meantime, the proposed reallocation should either be deferred or set at a lower rate.

3. REGIONAL LEGAL SERVICES COMMITTEES

Terms of reference and membership

- 3.1 Although the terms of reference for regional legal services committees (RLSCs) do not specify a maximum number of external members, such membership is in practice limited to four (one member representing each of the private practice, advice sector, local authority and consumer perspectives). ASA does not wish to see the creation of an unwieldy talk shop, but in view of the size of legal aid areas and the need for RLSCs to be broadly representative, their external membership should be increased to a minimum of eight to twelve members.
- 3.2 We also strongly believe that RLSCs should be independent of the Board, for three reasons:-
- (a) to ensure a clear separation between the processes of identifying need and awarding contracts;
 - (b) to provide RLSCs with a wider remit than that presently currently envisaged - their role should not be limited to rationing existing legal aid resources (working within the Board's corporate strategy), but should encompass a general research function;
 - (c) to enable RLSCs to consider other means of funding legal and advice services, possibly in line with future Government proposals for developing a community legal service - assuming that such a role is in principle desirable (and this requires further consultation), it would inappropriate for the Board, as just one purchaser of legal services, to have effective control of the committees.

Publication of draft regional strategies

- 3.3 ASA agrees that RLSCs should have an advisory rather than executive role. However, the Board's power to amend regional strategies recommended by RLSCs should be subject to public scrutiny. The draft strategies agreed by RLSCs following the consultation process should therefore be published, and the Board should explain the reasons for any subsequent amendments in the final approved versions.

4. NUMBER AND SIZE OF CONTRACTS

Quality, access and client choice

- 4.1 The Board's proposals on the likely number of contracts highlight a key dilemma facing a cash limited scheme, namely how to strike a reasonable balance between on the one hand, quality, and on the other hand, access and client choice.

- 4.2 There is clearly a case for arguing that quality will be enhanced by concentrating resources on large or medium sized suppliers. All other things being equal (including the quality of management and personnel, which are by no means linked to the size of an organisation), such suppliers are likely to be better placed than their smaller counterparts to provide professional support to staff, develop and share specialist expertise and offer a full range of services (including through alternative methods of delivery, which are considered later in this response).
- 4.3 Taking the not-for-profit sector as an example, a more effective use of resources in terms of quality might be to fund several solicitors and/or caseworkers in a few larger, relatively centrally located agencies, contracted to provide a service over an extended catchment area, rather than to award small contracts to a greater number of agencies employing isolated specialists covering the same geographical area.
- 4.4 Against this, it is in the interests of access and client choice to ensure a diversity of suppliers. Moreover, the Board has previously recognised the dangers of monopoly or near monopoly supply. These factors strongly mitigate against over centralised provision and in favour of a continuing role for smaller suppliers. There is no ideal solution to this dilemma, but the Board's proposals should be judged in terms of how likely they are to achieve a reasonable balance between quality, access and choice. This is considered below.

Number of contracts

- 4.5 At the heart of the Board's proposals is the proposition that the bulk of advice and assistance in all subject categories will be provided by 2,000 - 3,000 firms with a core contract in matrimonial and family law. This will dramatically reduce the number of suppliers of legal advice and assistance - some 9,300 firms were providing help in the family category alone in 1996/97. The Board appears to be targeting bulk suppliers. Most firms earning a minimum of between ,40,000 (2,900 firms) and ,60,000 (2,000 firms) a year from civil legal aid and green form in family work are likely to qualify for contract, while most of the 6,400 firms earning under the minimum will probably be excluded.
- 4.6 Leaving aside considerations of administrative convenience from the Board's point of view, the consultation paper's estimate of the number of required suppliers is essentially arbitrary. In particular, it takes no account of the likely impact on access and client choice of a substantial reduction in the number of suppliers, almost certainly because this cannot be predicted by the Board. At face value, the scale of the proposed reduction will suddenly and unacceptably curtail access and choice.
- 4.7 ASA considers it incumbent on the Board to demonstrate that clients will not suffer as a result. In the absence of reliable information on how access and choice will be affected, a far more cautious approach than that proposed should be taken at this stage. ASA therefore reiterates that the most sensible course of action at present is to award contracts to all solicitor suppliers satisfying the franchising requirements.

- 4.8 The consultation paper also tends to conflate quality with bulk provision of legal aid services in general and legal aid work in the family category in particular (which is examined in more detail in relation to contract tolerances - see below). On the basis of the Board's figures, many small legal aid practices able to demonstrate high quality work, for example by specialising across a narrow range of cases, are likely to fail to obtain a contract, as will high quality firms largely undertaking private client work supplemented by occasional legal aid cases. This is not acceptable, as the consequent reduction in access and client choice will not be balanced by any gain in quality - on the contrary, quality provision will actually be lost.

Size of contracts

- 4.9 There should be no lower limit to the size of contracts, in order to ensure a role for smaller providers and larger firms undertaking a limited volume of legal aid work. This may be best achieved by retaining a system of case by case payments for such suppliers.
- 4.10 The Board envisages letting only 200-300 contracts in the not-for-profit sector. While ASA is not in a position to provide a reliable figure on the number of Law Centres and advice agencies in a realistic position to bid for a contract, it is certainly higher than the figures proposed by the Board. Moreover, even if account is taken of parallel provision by private practice, the figures demonstrate that additional resources must be found to ensure adequate provision of social welfare law services - shifting around a limited pot of money between areas will not help to achieve the Government's stated aim of increasing such provision.
- 4.11 Equally important is the size of not-for-profit sector contracts. The majority of the contracts so far awarded under the phase II block contracting pilot are for one caseworker only. This is insufficient to meet local need in many instances, provides a limited incentive for agencies to bid for contracts, and as stated in paragraph 4.3 above, does not necessarily represent the most effective use of resources. If the Government is serious about an enhanced role for the not-for-profit sector, it will need to ensure that resources are available to fund larger contracts in the future.
- 4.12 ASA considers that a mixed approach is required in the future funding of not-for-profit agencies. The Board should seek to enter more substantial contracts with agencies funded to provide a strategic role across a fairly wide geographical area. However, to ensure minimum access and guard against over centralised provision, these should be supplemented by smaller contracts. The minimum and maximum limits on contract size operating in the phase II pilot should be abandoned.

Contract tolerances

- 4.13 It is essential that all contracts include contain tolerances to enable suppliers to undertake work outside core subject areas. Suppliers will require a degree of flexibility in order to:-
- (a) deal with the needs of real clients coming through the door (as opposed to potential clients identified in the planning process);
 - (b) deal with areas of work which have been accorded a lower priority in the planning process;

- (c) develop expertise in emerging areas of law;
 - (d) ensure that a modicum of client choice is preserved.
- 4.14 ASA considers that the minimum tolerance level should be set at 10%, with suppliers able to negotiate a higher level where this can be justified in terms of the pattern of local need and provision. Other than requiring that the work is within scope and undertaken to franchising standards (except for the more detailed supervision requirements set out in the consultation paper), the Board should not impose conditions on what is done within agreed tolerance levels.
- 4.15 There is however a major tension between the Board's agenda to improve the quality of legal aid services overall and its apparent suggestion that firms with a core contract to provide advice and assistance in the family category will be able to meet much of the need for help in other subject categories through contract tolerances (this is strongly implied at paragraph 3.26 of the consultation paper). In effect, the Board is assuming that competence in family work is an adequate proxy for competence in other areas of work. This is not in our view a justifiable assumption.
- 4.16 The Board should begin from the opposite starting point, and initially seek to contract with suppliers bidding for core contracts in specific categories of law (and which will therefore be subject to the full supervision requirements in respect of those categories). This will no doubt include many family law firms seeking additional core contracts. A supplier seeking to provide a service in a subject category identified as a priority should not be refused a contract on the grounds that such work can be absorbed into the contract tolerances of a nearby family firm.

5. SOCIAL WELFARE LAW AND THE NOT-FOR-PROFIT SECTOR

Solicitor and non-solicitor suppliers

- 5.1 At several points, the consultation paper distinguishes between the not-for-profit sector and solicitors in private practice, stating for example that the Board expects the majority of contracts in debt, welfare benefits and possibly housing to be let to not-for-profit-agencies. This distinction is potentially misleading for two reasons, set out below.
- 5.2 Firstly, the distinction tends to assume that the bulk of expert provision in social welfare law lies within the not-for-profit sector (which is largely constituted by the advice sector - the terms not-for-profit sector and advice sector are used interchangeably throughout the remainder of this response). The position is more complicated than that. The assumption probably holds true in respect of debt and welfare rights law, which have largely been ignored by private practice. However, even in these categories, advice sector expertise remains patchy, due largely to chronic lack of funding in many parts of the country. In the other main social welfare law categories - employment, housing and immigration - there is an acute shortage of specialist provision within the advice sector, although many Law Centres and organisations such as the Shelter network of housing aid centres have developed an excellent reputation in their specialist fields.

- 5.3 At the same time, while the proportion of private practitioners specialising in employment, housing and immigration is relatively low and unevenly spread, such specialists play a major role in the current pattern of provision. It is therefore important that the development of a new scheme recognises the contribution of both sectors.
- 5.4 Secondly, the distinction between non-solicitor and solicitor provision (including solicitor agencies in the advice sector) is arguably more important than that between private practice and the not-for-profit sector. Some level of solicitor provision is required in all categories of social welfare law, although it is probably the case that non-qualified specialists can handle much of the work in debt and welfare benefits cases. However, there is frequently a need for early solicitor involvement in employment, housing and immigration cases, because of the complexity of the law and restrictions on rights of audience. In these categories in particular, it is essential for there to be adequate solicitor provision in each area, whether through private practice or salaried solicitors in the not-for-profit sector.
- 5.5 If solicitors are denied contracts to provide advice and assistance in these categories, it is inevitable that their expertise will wither on the vine, and clients will be denied access to the specialist help they require - the Legal Aid Scrutiny proposals in the mid 1980s were rightly discredited for seeking to establish a wholly artificial barrier between advice on the one hand, and representation on the other hand.
- 5.6 RLSCs should therefore be asked to ensure that regional strategies provide for an appropriate balance of solicitor and non-solicitor provision in each area. This might encourage the growth of salaried solicitor provision within the not-for-profit sector.

Separate funding for the not-for-profit sector

- 5.7 ASA agrees that in the short to medium term, a separate allocation of funds should be made available for the not-for-profit sector, in order to encourage the development of advice agency legal aid services, complimenting those provided by private practice. We also agree that this allocation should be increased over the first three years of the scheme. The allocation must be sufficient both to fund new contractors and enable existing advice sector contractors to expand their services.
- 5.8 Flexibility will be required in the administration of a separate allocation. It should not be ring fenced by subject category - the Board should not for example prevent private practice bidding for a debt contract by determining a priori that all funds for debt work are to be included in the not-for-profit allocation category. There should also be provision to transfer funds between allocations if there is lack of take up or consequent underspend.
- 5.9 It is at least arguable that Law Centres and other solicitor agencies within the not-for-profit sector should be funded from the general allocation for private practice. This should be considered in future consultations on the contract specification and tendering process.
- 5.10 In the longer term it may be in the public interest for all contracts to be awarded on the basis of open tendering for funds within a single allocation. The proposed separate allocation for the not-for-profit sector should therefore be reviewed in the third year of the new scheme.

Immigration work

- 5.11 ASA has serious concerns over the Board's proposals for immigration work. The Board will be aware that this is a highly sensitive political issue. There is a degree of consensus that the quality of much immigration advice is poor and that there is some abuse within this area, although the latter is most commonly associated with the activities of commercial para-legal organisations. However, there is also concern that the Government may conflate issues of access to legal advice with those of immigration control. This is wholly unacceptable.
- 5.12 The current geographical pattern of immigration advice and assistance is striking, but may well be explained on the basis of need, due to the location of the main ports of entry and the distribution of asylum seekers. While it is clearly sensible for RLSCs to identify the need for immigration advice in their areas, the Board should also consult centrally with the Home Office, independent researchers and immigration organisations on the current spread of need. In the absence of supporting evidence, it would be quite wrong for the Board to proceed on the assumption that a significant redistribution of existing funds is required.
- 5.13 The Board may or may not be correct in its assumption that some immigration suppliers will have difficulty in meeting the franchising requirements. The fact that many suppliers have not so far applied for a franchise does not in itself prove anything. A reduction in the number of suppliers will not however result in a corresponding reduction in the need for immigration advice, and the Board must therefore seek to transfer the relevant funding to specialist firms and organisations meeting the franchising requirements. ASA is strongly opposed to the use of the contracting process as a mechanism to cut the level of funding for immigration advice.

Employment and consumer cases

- 5.14 The Board's statement that it envisages letting few contracts in the employment and consumer categories presumably reflects its belief that financial eligibility levels within these categories are low. In the long term, this needs to be addressed by government action to increase eligibility.
- 5.15 It is however not in the interests of quality merely to leave these categories to be dealt with through contract tolerances. The Board should firstly, encourage niche suppliers to come forward in these areas and secondly, be prepared to award small core contracts based on the likely demand from eligible clients. Some suppliers will be in a position to provide a specialist employment or consumer service with a mix of legal aid and private client/local authority funding.

Niche suppliers and national organisations

- 5.16 ASA agrees that the Board should seek to enter contracts with niche suppliers providing services in categories such as education law. In practice, the Board will need to be pro-active in order to ensure that such suppliers are not marginalised as a result of the regional planning process.

- 5.17 In this context, it is important that the Board considers the role of national organisations such as Child Poverty Action Group, the Public Law Project, Liberty and Shelter's central legal service. While funding for such organisations needs to be considered in the context of wider government proposals on legal services, some or all are likely to have a role to play in the provision of advice and assistance, including through alternative methods of delivery. While most of these organisations are based in London, their remit is national and consideration should therefore be given to establishing a separate funding allocation.

6. SCOPE OF CONTRACTS

Alternative methods of delivery

- 6.1 ASA welcomes the Board's intention (subject to the Lord Chancellor's approval) to extend the scope of services which may be provided under contracts for advice assistance. We would hope that the Government and the Board will in due course consider further extensions, notably in relation to tribunal representation (see below) and the provision of duty advice in the county courts.
- 6.2 We agree that contracts for alternative methods of delivery such as dedicated telephone advice and second tier work should be subject to an amended specification and quality requirements, the detail of which will vary according to the method of delivery employed.
- 6.3 We nevertheless have some concerns which will need to be addressed if legal aid funding is to be made available for alternative methods of delivery.
- 6.4 Firstly, such methods should be seen as complimentary to and not a substitute for traditional face to face advice and assistance (although outreach provision for example is for most intents and purposes simply an extension of traditional advice, provided in a different office). Alternative methods frequently represent an effective use of limited resources and are likely to be particularly relevant in enhancing coverage in rural areas and small towns. The Board (and RLSCs) should however proceed cautiously in terms of transferring resources away from front line provision, by undertaking pilot projects.
- 6.5 Secondly, such services require strategic planning, particularly in relation to geographical scope, which may be local, sub-regional (for example county wide), regional or national. There is no ideal model and different considerations apply to different methods of delivery, but the Board should not assume that contracts for alternative methods can simply be bolted on to standard contracts for advice and assistance (although they should generally be provided by organisations with the capacity to conduct an in-depth casework service).
- 6.6 Thirdly, the Board should be alert to the fact that some funding for alternative methods of delivery, for example second tier advice, is already provided by other government departments. Just as steps have been taken to guard against loss of local authority funding as a result of legal aid contracts being awarded to advice agencies, arrangements should be made to safeguard existing central government funding.

- 6.7 Fourthly, there is some risk that the Board may place artificial and unhelpful restrictions on the operation of alternative methods of delivery. An example is contained in the consultation paper which suggests that second tier services funded by the Board should be limited to providing support to other contracted suppliers, presumably because of eligibility considerations. This undermines the fundamental purpose of second tier services, which is to improve the quality of legal advice generally. Second tier agencies usually target non-specialist organisations, many of whom are unlikely to be granted a legal aid contract.
- 6.8 These issues may be dealt with in the (as yet unpublished) research study by the Policy Studies Institute, but should in any case be discussed in detail with the advice sector and other organisations. The Board's proposals in this area should also be considered alongside the work of the Lord Chancellor's Department on the development of a community legal service, in order to ensure a co-ordinated approach. This may well entail mixed funding.

Tribunal representation

- 6.9 ASA has long argued that legal aid should be made available for tribunal representation, and this might be achieved through an extension of the scope of contracts for advice and assistance. There are however alternative approaches, including extending civil legal aid to cover appellate tribunals and possibly some cases heard by Industrial Tribunals. If the Government is prepared to fund tribunal representation in the future, it should separately consult on funding mechanisms and associated issues such as the merits test and cost rules.

7. CONTRACT TERMS AND APPLICATIONS PROCESS

Contract terms

- 7.1 We welcome the Board's intention to consult and negotiate with the legal profession and the advice networks on the detail of the contract specification, contract terms and tendering process.
- 7.2 While we do not at this stage envisage seeking a fundamental revision of the contract terms agreed for the purposes of the phase II not-for-profit pilot, some changes will no doubt be required in the light of the experience of those pilot agencies which have been operating phase II contracts for almost a year.

Specification and tendering process

- 7.3 We will want to look closely at the proposed specification and tendering process, as the agreed arrangements covering phase II applications from new agencies have not worked as successfully as we had hoped, and the problems encountered provide important lessons for the future.

7.4 If the specification and the tendering process are to command the confidence of suppliers and ultimately the public, they must be:-

- (a) objective;
- (b) fair;
- (c) transparent;
- (d) certain;
- (e) consistently applied.

7.5 RLSCs should not be involved at all in decisions on individual contracts.

7.6 ASA agrees that preference should be given to organisations able to demonstrate a history of providing in-depth advice over the full range of cases in a given subject category, and this should be reflected in the proposed evaluation matrix.

Appeals

7.7 ASA accepts the practical difficulties entailed in setting up a lengthy appeal process in respect of initial contract decisions (other than in respect of the quality accreditation requirements), but the Board should nevertheless provide for a simple and speedy review process, in order to weed out manifestly incorrect or perverse decisions and avoid unnecessary litigation. Contractors should have a formal right of appeal against the suspension, termination or refusal to renew a contract, whatever the reason given by the Board.

8. PAYMENT ARRANGEMENTS

Payment for time

8.1 ASA agrees that payment in the initial stages of the new scheme should continue to be linked to time. Whether or not it might be desirable and/or feasible to move away from this approach at some point should be subject to separate consultation in the light of the outcome of the current pilots. Such consultation should include publication of the research findings.

Price tendering

8.2 ASA is concerned that competitive price tendering will undermine quality as suppliers seek to cut corners in order to win or maintain contracts. The consultation paper is silent on the extent to which price will play a role in the contract decision process, either initially or in the future. In particular, it is not clear from the paper whether the proposed hourly rate for contracts with solicitor suppliers will be fixed nationally, negotiated individually or some combination of the two (as is the case in the current not-for-profit pilot). The Board needs to publicly clarify its position on this issue.

Payments to not-for-profit organisations

8.3 ASA supports the proposal that payments to not-for profit agencies should for the time being be based on the arrangements agreed for the phase II pilot, subject to negotiation on detail taking account of the experience of the pilot.

- 8.4 The question of payment to solicitor agencies in the not-for-profit sector requires separate consideration. ASA does not in principle see why such agencies should not be able to choose whether to be paid under the arrangements for private practice if they so wish.

Transitional arrangements

- 8.5 The consultation paper rightly observes that any change to provide for early payments under contracts will in the short term increase the annual cost of the scheme. The Government should acknowledge this by providing additional funding on a transitional basis, to ensure that the switch between payment regimes does not reduce the total amount of advice and assistance given to clients.
- 8.6 The proposed 60:40 allocation between contracted and non-contracted work is not supported by any data concerning the likely level of outstanding green form work being undertaken by non-contracted suppliers. If no such supporting data exists, the Board should conduct research before setting a figure.

Disbursements

- 8.7 ASA is opposed to including disbursements within fixed contract prices, whether or not they are identified as a separate ring-fenced item. To do so will create a very clear conflict of interest between suppliers and their clients. At the very least, this proposal should be deferred pending the research findings on the current private practice block contracting pilot.

9. QUALITY

Quality within the context of the current proposals

- 9.1 ASA supports the objectives of the franchising scheme. However, as we argued in the introduction to this response, it is geared towards ensuring that a supplier offers a minimum standard of service, by measuring systems and processes. Beyond this, and especially in respect of standards of legal work, it cannot assess the relative quality of suppliers. This is a fundamental problem given that the Board is proposing that not all suppliers meeting the franchising requirements will be awarded a contract.
- 9.2 For this reason alone, any move to limit the number of suppliers over and above those able to meet the franchising requirements should be deferred until additional quality measures have been developed and successfully piloted.

Franchising specification

- 9.3 Not-for-profit agencies involved in the franchising pilots have generally responded positively to the Board's quality assurance systems. There is a broad consensus that operating to franchise standards increases efficiency and, through the supervision and file review requirements, improves the quality of advice. Most agencies also consider that franchising increases client confidence in the quality of the service being provided.

- 9.4 At the same time however, it is widely held that some aspects of the scheme are overly bureaucratic and that the Board does not always strike the right balance between legitimate monitoring of quality and unwarranted interference in management decisions which should be the prerogative of agencies. The Board should recognise this tension and the attendant risk that constant additions to its armoury of controls will lead to an unjustifiably burdensome regime, in which both suppliers and the Board are required to devote a disproportionate level of resources to administration.
- 9.5 ASA therefore supports a more fundamental approach than that set out in the consultation paper, which is concerned only with additional requirements. The Board should, in consultation with the Law Society and the advice networks, review the specification as a whole with the explicit aim of streamlining both the management requirements and the associated monitoring arrangements (there is in any event a pressing need to simplify the franchising and contract specification documentation). Such streamlining does not preclude the adoption of new requirements, but should ensure a more optimum balance between necessary quality assurance and superfluous bureaucracy.

Quality of legal advice

- 9.6 As a measure of the quality of advice, the transaction criteria are at best unproven and at worst inadequate. ASA disputes the consultation paper's assertion that most practitioners consider the criteria to be an accurate indicator of good quality work. Certainly as far as the advice sector is concerned, the consensus is that while adherence to the criteria may improve the quality of file recording, assessments against the criteria by auditors who are not legally expert can both fail to identify incorrect advice and wrongly fail correct advice. The sample of files examined at audit is frequently very small and the Board faces a continuing problem in ensuring that the criteria are kept up to date and cover a sufficient range of types of case.
- 9.7 While a low transaction criteria score may be a legitimate trigger for further investigation, performance against the criteria does not in our view constitute a generally reliable measure of the relative quality of advice provided by different suppliers. The efficacy and value of the criteria should be investigated through further research, which should also examine alternative approaches to measuring quality. There are at three main alternative approaches: peer review, accreditation and outcome measures. These are considered in turn below.

Peer review

- 9.8 ASA believes that extended use of peer review should have a role within a future scheme, and it is somewhat surprising that the consultation paper makes no reference to the Board's current research project in this area, being conducted by the Institute of Advanced Legal Studies.
- 9.9 Provided that the details are drawn up in consultation with the legal profession and the advice sector, a peer review scheme might command more confidence amongst practitioners than the current approach based on transaction criteria. It should be independent and need not be prohibitively expensive if it is used strategically rather than routinely, for example:-

- (a) where audits against the franchising requirements show significant cause for concern (at present peer review is only generated as part of the appeals process when a supplier has failed a transaction criteria audit);
- (b) to provide an additional means of assessing rival bids for contracts where potential suppliers have scored equally against other criteria;
- (c) as an occasional random check on quality.

Accreditation

- 9.10 The Board's proposal to recognise the role of Law Society panels in relation to the proposed new framework of supervision standards is welcome. It clearly makes sense to build on approaches to quality developed within the legal profession wherever possible, as this will best ensure practitioner confidence in franchising. The Board should consider whether there is additional scope for taking account of panel accreditation within the franchising scheme.
- 9.11 In the longer term, it might be possible to incorporate accreditation schemes for staff employed in non-solicitor agencies (or in solicitor agencies to the extent that not all subject categories are likely to be covered by Law Society panels), should suitable schemes emerge from current advice sector initiatives in this area.

Outcome measures

- 9.12 ASA has no objection in principle to the use of outcome measures as a measurement of quality. In practice however, the development of a comprehensive system of outcome measures is likely to prove difficult, especially in relation to acts of advice and assistance, which frequently do not result in a judgment or settlement. Moreover, a crude system of outcome measures may deter suppliers from taking on difficult but meritorious cases, for fear of jeopardising their contract.
- 9.13 Outcome measures will therefore need to be rigorously researched and tested before being added to the Board's panoply of quality controls. Such research should also consider whether and how the Board should take account of solicitors' and barristers' predictions of success in certificated cases in the monitoring of contracts for advice and assistance.

Supervision and file review

- 9.14 ASA will respond to the Board's proposals in these areas in detail as part of the forthcoming consultation process on a revised franchising specification. Our initial comments are as follows:-
- (a) there should be suitable lead in-time before solicitor supervisors are required to meet the proposed new standards in full (similar to the lead-in time given to non-solicitor supervisors in the not-for-profit sector pilot);
 - (b) caution is required in tightening the procedures for file review - ASA recognises the logic of the Board's approach, but believes that the points may be able to be met through guidance rather than additional mandatory requirements.

Information technology

- 9.15 The major difficulty with the Board's proposals in this area is cost of purchasing, setting-up and maintaining appropriate systems. Most advice agencies and smaller firms are unlikely to be able to afford such systems unless the Board provides the necessary start-up costs.
- 9.16 It is not possible to comment sensibly on the proposal that suppliers should be required to demonstrate a process of cost control which has the objective of eliminating unnecessary costs. The Board needs to spell out in more detail what it has in mind.

Business planning

- 9.17 It is not clear why the Board sees the need to propose additional requirements in this area. No supporting evidence is adduced that they are necessary to ensure quality of provision, but they will certainly place a significant burden on smaller suppliers. At first sight, the proposals appear to illustrate the point expressed in paragraph 9.4 of this response concerning the imposition of unnecessary bureaucracy.