



Legal Aid 4 – Future of Legal Aid

11th December 2007

The previous three information sheets on “Legal Aid” set out information relating to how legal aid operates in England and Wales; and give details of changes that have been made from October 2007.

This information sheet explains some of the concerns – specifically those held by ILPA and what was the Constitutional Affairs Committee – about the future of legal aid in England and Wales. It also gives some information about the way in which the Legal Services Commission (LSC) intend to provide legal aid to those in immigration detention from April next year.

The Constitutional Affairs Committee

This committee is now called the Justice Committee. It is a Select Committee of MPs. It specifically looks at the business of the Ministry of Justice, which is a government department currently led by Jack Straw MP. The committee changed its name when the Ministry of Justice replaced the Department of Constitutional Affairs.

In the year 2006-2007, the committee undertook a detailed inquiry into the government’s proposals on legal aid. It is these proposals that have, in part, been implemented by the October 2007 changes. Similar changes are being made to legal aid for all areas of civil law; and the committee did not look exclusively at the impact upon immigration and asylum law. However, the committee’s comments are clearly relevant to immigration and asylum.

The committee published their report in May 2007. The report is available at: <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmconst/223/223i.pdf>

The Committee’s concerns

The committee was highly critical of proposals of the government and the Legal Services Commission (LSC) that have been implemented by the October 2007 changes; and about the intention that these changes be used as a steppingstone to competitive tendering in 2009.

Specific criticisms made by the committee included:

- the LSC had insufficient evidence to know why costs in legal aid have gone up; and the October 2007 changes and future proposals therefore constituted a “*breathhtaking risk*”
- fixed fees are not suitable for social welfare law, including immigration and asylum, and may have “*unintended adverse consequences for the quality and availability*” of legal aid
- fixed fees may result in cherry-picking of cases, whereby legal advisers select the less complex or time-consuming cases so as to maximise their profits and this would particularly disadvantage clients with complex cases, communication difficulties or other disabilities
- the decision not to make a separate payment for the legal adviser’s waiting time was “*manifestly unjust*”; the justification given for not making a separate payment for the legal adviser’s travel time was not made out
- generally, the fixed fees regime (that has been introduced in October 2007) is “*short sighted*”, based on “*shaky evidence*” and “*unwise in the extreme*”

ILPA information service

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Information sheets provide general information only.

ILPA members listed in the directory at www.ilpa.org.uk provide legal advice on individual cases. ILPA does not.

- it was questionable whether the government or the LSC truly believe in the competitive tendering regime they have committed themselves to implementing from 2009
- there was no evidence to support the LSC's contention that quality would be maintained; and the committee was not convinced that there had been attention to anything but cost
- the burden of financial risks (e.g. from increased costs due to inefficient court practices, changes in the law or policy) will generally fall upon legal advisers
- the committee concluded that there had been a "*catastrophic deterioration*" in the relationship between legal advisers and the LSC

Legal aid for those in immigration detention

The LSC have invited legal advisers who wish to do legal aid work in the following Immigration Removal Centres to submit applications to the LSC by 4 January 2008:

- Campsfield, Colnbrook, Dover, Harmondsworth, Haslar, Lindholme, Tinsley House, Yarl's Wood

From April 2008, it is intended that legal aid (excluding certificated work, see "Legal Aid 1 – General" information sheet) for those detained in these centres will only be available from legal advisers who have exclusive contracts with the LSC. There are limited exceptions (see "Legal Aid 3 – Exemption from Fixed Fees & Exclusive Contracts"). A legal adviser will need an exclusive contract for each of those centres in which the adviser wishes to undertake legal aid work. Advisers will be required to provide advice surgeries in these centres where detainees can obtain 30 minutes of advice without the need to satisfy any means or merits test. Those advisers with exclusive contracts for Harmondsworth and Yarl's Wood will be required to undertake legally-aided fast track cases.

Under these exclusive contracts, the legal adviser will be paid a fixed fee for each advice surgery they provide. This fee will be at a different level depending on whether the surgery is for a half or a full day. A full day will be where the adviser is booked to see five or more detainees at the surgery. There will also be a fixed fee for a legal adviser who is on standby for receiving calls from the Border and Immigration Agency to take on a fast track case. The remaining work will be paid at hourly rates.

Some further general information on exclusive contracts is available from the "Legal Aid 3 – Exemption from Fixed Fees & Exclusive Contracts" information sheet.

General concerns

The committee's criticisms and concerns about the future of legal aid plainly apply to legal aid for immigration and asylum cases. Swings and roundabouts (see "Legal Aid 2 – Fixed Fees" information sheet) will not work where the level of experience and expertise (and therefore ability to take on complex cases or vulnerable clients) differs significantly from one legal adviser to the next. This problem is made worse where the fixed fee is set very low, yet the threshold to be exempted from the fixed fee is set very high (see "Legal Aid 3 – Exemption from Fixed Fees & Exclusive Contracts" information sheet on this threshold).

As regards exclusive contracts, these can undermine the relationship between the legal adviser and the client. It may appear to the client, because he or she has no choice, that the legal adviser provided is not truly independent of the authorities (including the Home Office).

Exclusive contracts also risk undermining quality because, in taking away the client's ability to choose, the possibility that clients select on the basis of quality is lost.