

The Unified Contract

Review of responses to the consultation on the Immigration Detention Advice Specification

November 2007

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Introduction

This document is the post-consultation report on the draft Unified Contract Immigration category specific Detention Advice Specification. The specification was published on 1 March 2007 and the consultation closed on 16 April 2007.

It provides:

- A background to the report; and
- A summary of the responses to the draft contract clauses.

Further copies of this report are available from the Legal Services Commission website (www.legalservices.gov.uk).

This report should be read in conjunction with the Unified Contract Standard Terms, the Civil and Immigration Specifications and draft version of the Immigration Detention Specification, which can be found at:

www.legalservices.gov.uk/civil.asp

Overview of the Unified Contract

1. The Unified Contract's Standard Terms have prepared the way for the Reform programme¹ and addressed issues arising from the operation of the General Contracts.
2. The Unified Contract replaced both General Civil Contracts (Solicitors and NFP) and both Mediation Contracts (For Profit and Not for Profit) from 1 April 2007.
3. The key structural difference between the General Contracts and the Unified Contract is that each legal aid Supplier will have one Unified Contract, instead of a contract per office. Each Unified Contract will contain a separate Office Schedule for each of the Supplier's offices, under which work will be allocated in accordance with the prescribed Specification.
4. The new Unified Contract Civil Specification (save for the Mental Health Section) came into force on 1 October 2007 and covers all civil Controlled and Licensed Work regardless of whether an organisation is a Solicitor or NfP.

Key Documents

The documents which comprise the Unified Contract are as follows:

- Contract for Signature and Annexes;
- Office Schedules
- Standard Terms and Payment Annex; and;
- Specification as prescribed²

¹ See document 'Legal Aid Reform: The Way Ahead' for further information

² E.g. Civil or Mediation

Background to the Consultation

5. In our consultation paper “Legal Aid: a Sustainable Future” (published in July 2006) we put forward a number of proposals concerning legal aid contracts from 1 April 2007. In that paper, we said that we wished to introduce a Unified Contract on 1 April 2007, which would cover civil legal aid from that date (as the General Civil Contracts would expire on 31 March 2007)
6. In November 2006, the joint Ministry of Justice (formerly the Department for Constitutional Affairs) and LSC paper ‘Legal Aid Reform: the Way Ahead’ CM6993 explained that, although the Unified Contract would come into force on 1 April 2007, the Contract Specification would remain largely unchanged (i.e. it would remain largely the same as the General Civil Contract Specification), until revised fee schemes came into force in October 2007 and that there would be further consultation on proposed changes to the Specification in 2007 with a view to implementation in October 2007.
7. The Unified Contract came into force on the 1 April 2007 with the new Contract for Signature Standard Terms, and Office Schedules. The Detention Advice Specification was issued for consultation on 1 March 2007 along with a number of other documents which make up the Specification of the Unified Contract.
8. There have been exclusive contracting arrangements in place for some detained clients since April 2004. This is in relation to the detained fast track process. The Home Office initially operated the scheme at Harmondsworth Immigration Removal Centre (IRC) and subsequently extended its operation to Yarl’s Wood IRC in May 2005.
9. In December 2005, in response to concerns that detainees were unable to access publicly funded legal advice, we piloted on site advice surgeries in some of the IRC’s. The purpose of the pilot was to measure the demand for on site legal advice and feasibility of on site advice provision.
10. The pilot was evaluated and published in February 2007. Copies of the evaluation can be found at www.legalservices.gov.uk

General Information on the Civil Specification

11. The Civil Specification was the main vehicle for bringing into effect the various civil fee schemes on 1 October 2007 (1 January 2008 for Mental Health), supported by a new Funding Order and certain Funding Code and Regulation changes. The Specification consists of both general and category specific provisions.

12. Following the consultation on the Detention Advice Specification it has been decided, to rename it as the Immigration Removal Centre Advice Scheme Schedule. The Schedule must be read in conjunction with the civil and immigration specifications.

Summary of Responses

13. A total of 10 written responses to the draft Detention Advice Specification were received.
14. Of these 8 were from the representative bodies or national organizations, including the Law Society, the Legal Aid Practitioners Group, Advice Services Alliance, Immigration Law Practitioners Association, Bail for Immigration Detainees, Medical Foundation, Asylum Aid and Refugee Legal Centre.
15. Of the remaining responses, 1 was from an NfP organization and 1 from a solicitors firm.³

³ See Appendix A for a full list.

Responses to the draft Detention Advice Specification

16. The draft Detention Advice Specification was published on 1 March 2007 along with the Immigration Specification. As a result of the consultation process the specification has been changed in many ways; in particular in relation to the structure, wording and some of the contractual provisions.
17. The representative bodies found the relationship between the Unified Contract, Civil and Immigration Specifications unclear and in aspects confusing. Therefore the contract will now form a schedule to the Immigration Specification making its relationship to the existing contracts clearer.
18. The schedule is an addition to existing contract specifications and terms. Therefore provisions contained in the Unified Contract, Civil and Immigration Specifications, which were repeated in the draft specification, have been taken out of the final Schedule.
19. In this paper the responses to the consultation on the contract provisions have been summarised. Below each summary is the Commission's response in italics, which sets out the current position in the final contract documents and reasoning where necessary.
20. Respondent's drafting points have been considered and amendments have been made where necessary.
21. References to paragraphs of the draft Detention Advice Specification in this document are to paragraphs in the draft document published on 1 March 2007.
22. Respondents raised both general concerns regarding the proposals to operate the contract as an Exclusive Contract as well as specific responses to the draft contract. Many of the general comments had also been raised as part of the earlier consultation.⁴

General Comments

23. Many of the respondents were concerned about the need for exclusive contracting within Immigration Removal Centres, believing all quality assured providers who wish to provide advice under this scheme should be allowed to participate.

Some Respondents stated their opposition to the principle of exclusive contracting because they believed that such a scheme would restrict choice

⁴ See 'Legal Aid: A sustainable future' for further information.

among people deprived of their liberty, and many of whom already struggled to find legal representation.

Respondents also raised concerns that currently many detainees are being charged for poor quality advice or being charged for advice that should be covered by legal aid. They fear that the proposals detailed in the Draft Specification, didn't tackle this issue and could make the situation worse.

LSC response:

We piloted the provision of advice through regular on site surgeries within IRCs due to concerns that detainees were unable to access legal advice. An effective way of tackling the issue of access is to provide regular, easily accessible, quality assured advice provision to detainees. Currently all providers (with the exception of Fast Track advice) are able to offer advice to detainees, the success and demand for on site surgeries have demonstrated that the current arrangements do not fulfil the needs of detainees. We believe that the best way of ensuring that detainees can access advice is through regular on site provision.

In relation to the issues raised regarding poor quality and payment for advice, it is not clear how ensuring exclusive publicly funded advice provision will make such a situation worse. The contract places additional quality requirements on providers. All work carried out under publicly funded contracts must be carried out by suitably accredited advisers.

In relation to the payment of advice, which should be funded by legal aid, the regulatory bodies place requirements on their members to inform eligible clients of the availability of publicly funded legal advice.

24. Some Respondents raised concerns that if Exclusive Contracting arrangements were to be implemented in Detention matters, that this should be piloted in 1 or more centres before an expansive roll out of the scheme was confirmed.

LSC response:

We have piloted the provision of on site surgeries and exclusive fast track schedules have been in operation since 2004. A copy of the evaluation can be found at www.legalservices.gov.uk

25. Some Respondents suggested that the requirement for a merits test in fast track appeals be scrapped, and fast track cases be removed from the Performance Indicator of 40% success rate at appeal. It was also suggested that success rates for making a bail application should not be subject to a performance indicator.

LSC response:

These issues were not part of the consultation. In relation to the performance indicator, this has been subject to previous consultations. We do not intend to exclude fast track cases from the Performance Indicator. We have excluded bail

applications from the current performance indicator; however, as part of contract management, we will compare the overall outcome of bail applications between different providers and discuss our findings with them.

26. Respondents also voiced concerns that the contract forces those who want to do legally-aided detention work at Yarl's Wood or Harmondsworth to also do fast track work. The Respondents' view is that there must be scope for people to bid for a contract to do detention work who are opposed in principle to detained fast track.

LSC response:

The new exclusive contracts have been designed to cover all the advice needs of detainees within each IRC. Having one contract with providers offering all the advice needs to all detainees provides clear and easy access to advice. We wish to contract with providers who can offer a wide range of advice services that are required by detainees and not just to a limited population within an IRC.

27. Respondents recommend that fully funded compulsory training be available to all advisers providing services under the new contract.

LSC response:

Although the contract will be 'new' the advice provided within it is not. The contract provides clarity as to the expectation of advice needed but the adviser's expertise and experience will determine the best course of action. As part of the tender process for these contracts providers will have to demonstrate that they have suitably qualified and experienced providers who can provide all the advice services required under the contract.

28. Respondents acknowledged that certain categories of immigration detainee would not be restricted to representation by an exclusive provider (e.g. those in prisons, short-term holding facilities, those in Dungavel, those with existing representatives, and certain other groups). Respondents are concerned that the complexity of the arrangements will be poorly understood by detainees, some legal representatives, immigration and detention centre staff, and support organisations.

LSC response:

Exclusive contracting arrangements will only apply to IRCs and builds upon existing advice provision. There will be clear access arrangements and the contracting arrangements will make it easier for detainees to access advice. The evaluation of the on site surgeries contains the views of IRC staff, many of whom were in favour on the on site advice arrangements as it made it easier for them to offer detainees access to advisers.

29. Concerns were also raised by Respondents that the complex, prescriptive detention legal advice arrangements may break down because "the delivery of

legal advice and representation continues to be at the whim of the Home Office. It is impossible for the LSC to predict or control the detention estate“.

It was also suggested that extra provisions should be added for example in relation to families, whilst others suggested that the contract was too prescriptive and should be reduced.

Some Respondents, whilst welcoming the suggestion of a Detention Advice Specification, would request greater clarification on the expected volumes of work and price for such work.

LSC response:

We are working with the Home Office (and IRC staff) to ensure that detainees can access publicly funded legal advice and that legal representatives are able to effectively offer such advice within Immigration Removal Centres.

As some respondents stated, it is very difficult to predict the demand for advice services within the detention estate. As part of the tender process we will provide details of the possible volume of predicted advice services required. It is acknowledged that this may be subject to re-evaluation and review in line with the number of individuals being held in detention and demand for services.

Some Respondents suggested additional conditions for the contract whilst representative bodies found the draft contract too prescriptive and detailed. We have therefore restructured the contract and taken out provisions, which appear in either the Unified Contract or Civil Specifications.

Responses to the Draft Detention Advice Specification

30. For the sake of clarity, one respondent suggested that it would be useful if the Detention Advice Schedule was defined with the inclusion of a list of the documents that constitute the schedule.

LSC Response:

We agree with this suggestion and a list of documents, which should be read in conjunction with the contract schedule, has been included in the contract.

31. Respondents suggested that any amendments to the specification should be consulted upon and that the LSC should not be able to amend the specification without first consulting practitioners and those suppliers who have entered into the Contract. Respondents believe that the stated notice period for amending the Specification was unreasonable.

LSC response:

The clause has been removed from the contract and any amendments will be governed by the Unified Contract Standard Terms, in particular see sections 11 and 13.

32. Some Respondents believed that the ability to terminate the schedule on 12 weeks notice at the 'Commission's will' was unacceptable and did not provide sufficient notice to suppliers.

LSC Response:

We have removed the clause from the contract and termination of the schedule will be governed by the Unified Contract Standard Terms.

33. Respondents requested further clarity concerning section 2.2, which stated that payment for work undertaken as part of the schedule is to be paid for through the schedule and not through the Unified Contract. No explanation has been given for this approach making it unclear what work will be paid for through the schedule and if this is work to be done over and above what is already expected to be undertaken under the Unified Contract.

LSC Response:

This clause has been removed. The contract will form a schedule to the Unified Contract and therefore payment will be governed through the terms of the Unified Contract. The schedule will specify the payments rates claimable and will also allocate a number of matter starts and standard monthly payment applicable to the schedule. Further information regarding payment provisions can be found in Section 7 of the Unified Contract - Civil Specification.

34. Respondents sought clarification as to whether clause 4.1 requires every supplier to provide all the services listed or just one or more of those services.

LSC Response:

Advisers will be expected to be able to provide all of the advice services (as set out in the SQM Immigration category definition). The contract has been amended to reflect this.

35. Respondents felt that the term "appropriate referrals" (Paragraph 4.3) is ambiguous and should be more clearly defined. Where referrals are necessary, responsibility for referrals should be limited to giving the client the telephone number of CLS direct whilst allowing suppliers to make other referrals where local circumstances permit.

LSC Response:

In light of the responses received the section has been amended. Referrals will, in most circumstances, therefore be limited to CLS Direct or to another exclusive contract provider.

36. Respondents requested that the LSC clarify that any revised criteria as to the nature of work permitted by different levels of accredited staff must be given

sufficient time for implementation, as this may necessitate additional training and / or recruitment. It is not feasible for such changes to be implemented on 28 days notice. It was also stated that the LSC should consult with practitioner bodies and suppliers before introducing revised criteria.

LSC Response:

This has been removed from the contract. Any changes will be made in accordance with paragraph 11.77 of the Immigration Specification.

37. Some Respondents raised concerns that the unchanged remuneration rates may lead to insufficient number of suppliers wishing to tender to take part in the scheme.

LSC Response:

There will be no increase in the remuneration rates. The new arrangements will allow providers to manage their time more efficiently and therefore more profitably under the scheme. For example instead of seeing only one client when visiting an IRC they may wish to attend two or more on a given day. This will allow more advice to be give and more advice time to claimed making the attendance to the IRC better value both for the provider and the public purse (as it will all providers to apportion the travel costs and time of the case).

38. In relation to Paragraph 6.2, some Respondents suggested that the power for the Commission to refuse permission for additional cases at its “absolute discretion” is unreasonable and is a recipe for arbitrary decision-making. Decisions, which affect the ability of a supplier to continue work under the schedule, should be based on transparent and objective criteria and must be open to review.

LSC Response

We have amended the contract and withdrawn the term.

39. Respondents suggested that for the sake of clarity in relation to Paragraphs 7.1.3-5, it would assist in making the detention advice specification a more coherent and self-contained document if the exceptions to Rule 11.97 were set out in the detention specification itself in full.

LSC Response:

As stated earlier, to reduce repetition between the various contract specifications and to reduce the complexity of the contract, it has been decided not to repeat contract provisions where they appear elsewhere.

40. Some Respondents sought clarity on whether an Annex to the specification containing rules for advising clients in circumstances where the supplier is not permitted to represent them, would be included in the final documentation.

LSC Response:

We have amended the contract to make it clear in what circumstances an adviser is not permitted to take on a detainee.

41. The current document does not make it clear that fast track cases only operate at certain locations.

LSC Response

This will be clearly stated in the schedules when contracts are issued.

42. Respondents also sought clarification in relation to Paragraph 7.2.2, as to whether payments made to suppliers who continue to represent after the client has been released from detention, up to the next graduated fee stage and beyond, will be made on the basis of this schedule or under the terms of the immigration category specific provisions of the Unified Contract.

LSC Response:

As the matter will have been opened under the detention advice schedule, payment for work will be through the same schedule.

43. Respondents also suggested that seven days for transfer of a file will be too slow in removal cases and the contract should include a requirement for representatives to ensure the client has a copy of all the documents so that they have a file of their own.

Whilst others thought that the Paragraph was not reasonable and that on some occasions a delay may be justified.

LSC Response:

We accept that in many cases clients will have been given copies of relevant documents regarding their case from their previous adviser e.g. copy of their statement, decisions, etc. However within the detention setting we believe that it is reasonable to request that advisers forward the file on as quickly as possible.

44. Some Respondents sought clarification from the LSC on the phrase under 9.1.1: "provide a variety of services". Respondents also request the LSC clarify what is meant by "A proportionate mix of services"?

Respondents requested that the basis upon which the average length of a case is calculated should be clearly set out. Some Respondents were also concerned about arbitrary averages being set out and expected to be complied with. Given the huge variety in the types of detained cases no role for averages could be identified.

LSC Response:

The contract has been amended and these terms have been excluded.

45. Respondents repeated their request for clarification of the Performance standards in light of Paragraph 9.1.5. The section on Performance Standards at pages 14-15 refers to each performance standard including a target against which performance will be measured, however no information has been given in relation to proposed targets or the standards required to be met. However, compliance with performance standards is to be monitored and audited. This approach appears to conflict with the LSC's intention to adopt a light- touch approach in the New Unified Contract and without detail on these standards and targets Respondents questioned how meaningful this consultation is overall.

Respondents asked that the LSC consult practitioner organisations before setting the Performance Standards.

LSC Response:

The section has been amended and now appears as an Annex to the contract. It has been clearly stated that although we will look to measure a provider's performance against these standards they are not Key Performance Indicators (as defined in the standard terms) and no action will be taken against providers in relation to these standards. We will however discuss any findings with providers.

46. Some Respondents were concerned that the LSC envisaged on site surgeries as the main mechanism for referral and/or accessing legal representation. This may lead to a potential shift in relation to the purpose of the surgeries and it is not appropriate to expect all requests for legal advice or representation to be made via surgery sessions.

It was also suggested that detainees should have a choice within the list of contractors and not be expected to go to the organisation providing advice at the surgery that week.

Some Respondents were also concerned that the surgery provision is being conflated with the mechanism for seeking advice.

It was also suggested to increase the number of surgery days so that emergency work can be carried out.

LSC Response:

The pilot demonstrated that the method of delivering advice through surgeries was effective. Information regarding the services is provided to detainees on arrival and posters advertising the service are also placed in the IRCs.

As with the current rota arrangements that we operate, for all our immigration and asylum services, we believe that providing detainees' access to a rota adviser is an effective method of advice delivery. It provides detainees with clear access to advisers.

There are provisions to run extra surgeries where the demand for the service in an IRC is high. In practice, holding surgeries twice a week has been found to be sufficient for demand.

47. Respondents suggested that suppliers should be allowed to assess the client's eligibility for legal aid through either a telephone conversation with the potential client or through obtaining details of their means from their relatives/friends.

LSC Response:

This is allowed under the terms of the Unified Contract - Civil Specification both in relation to telephone advice (see paragraph 2.19) and Rule B3 Attendance on a Client's behalf.

48. In relation to Paragraph 10.3, some respondents felt it was not clear what the position is for suppliers under this schedule where a client already has a legal representative but is dissatisfied with them and wants to change. In such circumstances are suppliers permitted to take instructions from the client wishing to transfer their case to them?

LSC Response:

Again, there is no change with regards to the general contractual requirement under Rule B9.1 Previous Legal Help (and paragraph 11.69 of the Immigration Specification). If the conditions of the rule are satisfied then the matter can be taken on.

49. Respondents did not feel that a suppliers' obligation to make referrals under this schedule should be any greater than providing the client with the telephone number of CLS direct. The general consensus was that it was the responsibility of the LSC rather than individual suppliers to ensure that there is adequate provision to meet clients' needs.

LSC response:

In line with the consultation responses we have agreed that, for the purposes of the contract, a referral to CLS Direct will be sufficient.

50. Respondents commented that frequent moves to other centres occur. It was stated that it was not clear how visits to clients to take instructions are to be funded if they are transferred to another detention centre or prison in another part of the country before their case has reached the next GFS stage.

LSC response:

We have amended the contract to make it clear when and to who referrals can be made in these circumstances.

51. Some found the provision in relation to subcontracting unclear and potentially unworkable as it raised professional conduct issues regarding the control of the case.

LSC Response:

Due to the concerns raised by the representative bodies, the ability to sub contract has been removed in favour of existing contractual provisions under the Unified Contract to instruct agents.

52. Some Respondents were concerned that 30 minutes was too short to provide the advice expected under the contract. The system should be flexible to allow for extra minutes where necessary.

LSC Response:

The purpose of the surgeries is to provide a detainee with access to advice and in most cases the expectation is that (subject to means/ merits) the matter will actually be taken on. The contract will be amended to make this a clear expectation to advisers.

53. In relation to fast track provisions respondents viewed clause 6 as ambiguous in relation to when advice could be given to fast track clients outside of the rota arrangements.

LSC Response:

We have amended the clause so that the exceptions to the rota arrangements are clearer.

54. Respondents also sought clarification as to how payments would be made and requested further information on how particular items of work would be funded.

LSC response:

Monthly payments will be made in accordance with the standard terms of the Unified Contract. The payment rates will be annexed to the contract. For the most part Controlled Work cases will be funded under hourly rates as set out in the Immigration Specification.

55. Respondents agreed that Level 3 advisors should continue to be paid 5% more and this should be made clear in the contract – earlier requests that Level 3 advisors be paid 15% more to encourage these highly experienced people to undertake detention work, were repeated.

LSC response:

All suppliers carrying out publicly funded work are required to be accredited under the IAAS. The 5% uplift will continue to apply to immigration cases. The 15% uplift, which previously applied to the Family scheme, was withdrawn on 1 October 2007.

56. Some Respondents noted that the contract specification does not include a requirement that (at least) a gender balance of fee earners be maintained by contractors in order to ensure that gender appropriate interviews can take place.

LSC response:

We have amended the contract to remind providers of the gender guidelines and their duties under the Unified Contract in relation to equality and diversity.

57. Respondents commented that the LSC will need to show that it is complying with the Gender Equality Duty brought in by the Equality Act 2006. The Duty places a positive obligation on each public authority to identify issues for sex equality in their services, employment and policy making and provide appropriately for significantly different needs between genders.

LSC response:

In addition to the Unified Contract standard terms regarding Equality and diversity we have added an annex to the final contract which reminds advisers (particularly who are granted schedule for Yarl's Wood) of the need to be aware of and to comply with the published gender guidelines.

Appendix A – List of Respondents

Name of Representative Body/National Organisations

THE LAW SOCIETY

LAPG

ASA

IMMIGRATION LAW PRACTITIONERS ASSOCIATION

BAIL FOR IMMIGRATION DETAINEES

REFUGEE LEGAL CENTRE

MEDICAL FOUNDATION FOR CARE FOR VICTIMS OF TORTURE

ASYLUM AID

Name of Individual Organisation

GLOUSTER LAW CENTER

WILSON & CO