

A Consultation Paper

The Asylum and Immigration Tribunal

Amendments to the Legal Services Commission General Civil Contract

Introduction

This paper sets out for consultation the changes to the LSC General Civil Contract both solicitors and NFP's and Funding Code changes that are required to implement the new legal aid arrangements in England and Wales for the review and reconsideration of appeal decisions made by the new Asylum and Immigration Tribunal (AIT) which comes into being on 4 April 2005.

The framework setting up the way in which legal aid will be granted was established under s 26 of the Asylum and Immigration (Treatment of Claimants, etc.)(AITC) Act 2004 and the policy debated and approved by Parliament.

On the 8 November 2004, the Department for Constitutional Affairs published a consultation paper entitled ' The Asylum and Immigration Tribunal - The Legal Aid Arrangements for Onward Appeals'. The closing date for this consultation is 17 December 2004. The DCA paper seeks views on the draft Community Legal Service (Asylum and Immigration) Regulations 2005 and sets out the circumstances in which a costs order for publicly funded legal services can be made. The DCA consultation also consults on consequential changes required to existing Community Legal Service Statutory Instruments and Legal Services Commission's Funding Code Criteria and Procedures to reflect the creation of the AIT. The executive summary taken from the DCA consultation sets out the main changes as follows:

“Background

The AITC Act 2004 legislates for the unification of the existing two tier appellate system to be replaced by a single tier tribunal, the Asylum and Immigration Tribunal (AIT). It is being introduced as part of a number of measures to improve the asylum and immigration process. The AIT will be fair, swift and efficient, and it will provide an independent, effective remedy for those appealing against an immigration decision.

The new legal aid arrangements will introduce a system of retrospective funding for challenges to decisions of the AIT, with legal aid being awarded at the end of the process when the appeal decision has been reconsidered. The intention behind the scheme is that lawyers should bear the risk that, if they pursue a case which the Tribunal or Administrative Court ultimately decides is without merit, they will not be paid for their work. This should encourage lawyers to assess the merits of a case thoroughly and should reduce the number of weak challenges of AIT decisions reaching the Tribunal and the Administrative Court.

Key Aspects of the New Arrangements

- *A Retrospective test*
- Costs orders are made by the Tribunal following reconsideration or the High Court, in certain circumstances, following a review application
- *Prospects of Success*
- The test will involve an assessment whether a case had a significant prospect of success at the time the review application was made.
- *Internal Review of Funding decisions*
- If a supplier is unhappy with the Tribunal judge’s decision on funding they can apply to the Tribunal to have the decision reviewed.
- The review will be a paper-based process.
- *Remuneration*
- A risk premium will be added to mitigate the risk associated with taking forward review and reconsideration work under the new scheme.

Disbursements for experts and interpreters will be payable in all cases, as it would be unreasonable to expect them to share the risk with the lawyers, who are in a position to assess the prospects of success.”

This LSC consultation is in response to these proposed changes. It is clear that the necessity for LSC contract changes and changes to the Funding Code arise out of primary and proposed secondary legislation. Comments that you may wish to make on, in particular, the draft Community Legal Service (Asylum and Immigration) Regulations should be made directly to DCA as part of the response to their consultation of 8 November 2004.

In response to this consultation we would ask you to concentrate your comments on the proposed contract changes and how any scheme set out in the regulations could best be implemented. For this reason the consultation questions included within this paper focus on the contract changes and not on the overarching policy, which necessitates them.

The consultation will be for a period of eight weeks in accordance with the consultation period set down in the General Civil Contract. To ensure that consultation is as effective as possible it will be published on the LSC website at <http://www.legalservices.gov.uk/aboutus/consultations>.

During the development of the legislation leading to the AITC Act a Regulatory Impact Assessment (RIA) was developed setting out the change to the appeals system under the Act. Although amendments were made during the passage of the Act the assessment of the impacts set out in the RIA was unaffected. The RIA can be found at <http://www.homeoffice.gov.uk/docs2/riareformappsystem.pdf>.

Copies of this consultation are being sent to:

The Law Society
ILPA
LAPG
Advice UK
ASA UK
The Law Centres Federation
Citizens Advice Bureaux

How to respond

Please send your response by 4 February 2005 to:

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Legal Services Commission
12 Roger Street
London WC1N 2JL

Tel: 020 7759 1471

Fax: 020 7759 1469
Email: emma.warran@legalservices.gov.uk

A paper summarising the responses to this consultation will be published within three months of the closing of this consultation. The response paper will be available on the LSC website.

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

The Commission may wish to publish responses to this consultation in due course. Please ensure your response is marked clearly if you wish your name or response to be kept confidential.

If you are replying by email, your consent overrides any confidentiality disclaimer that is generated by your organisation's IT system, unless you specifically include a request to the contrary in the main text of your submission to us.

Confidential responses will be included in any statistical summary of numbers of comments received and views expressed.

Summary of proposed changes to the LSC General Civil Contract (Solicitors and NFP's)

The main changes to the contract which we are consulting upon are contained in section 5 and section 12 of the General Civil Contract (Solicitors) These changes will also apply to all Not for Profit Contracts particularly sections 8 and 13 of the NfP Contract.

Although the same changes will be made to both contracts, there will be some modification to take into account the difference between profit costs and casework hours. The Upper Cost Limit for the AIT will relate to preparation time only in the NfP contract and will be expressed in casework hours.

These proposals will also involve a change to suppliers contract schedules with changes in CLR rates for cases subject to a s 103D order under the NIA 2002 to reflect the risk premium.

The main changes can be summarised as follows:

- an extension of the CLR Upper Costs Limit to cover Case Management Review Hearings

In relation to all applications for review and reconsideration under s 103 A of the NIA 2002:

- devolved powers for CLR for applications for review and reconsideration under s 103A

- new time standards for review and reconsideration applications

In relation to applications for review and reconsideration which are subject to a s103D order:

- a merits test applied by the AIT
- the introduction of retrospective payments for CLR only after a s 103D order has been made by the AIT
- a risk premium (uplift) for CLR where a s103D order has been made.

Questionnaire

We would welcome responses to the following questions:

1. Do you agree with the proposal to fund review and reconsideration under existing CLR arrangements?
2. Do you agree that the costs of experts and interpreters should be outside the retrospective payment scheme?
3. Do you agree with the proposal for a higher rate for CLR where a s103D order is made and if so do you agree with the proposed uplift of 25%?
4. Do you agree with the proposal to have one Upper Cost Limit for both the CMRH and the substantive AIT hearing?