

**DATED**

**2008**

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**(1) THE MINISTRY OF JUSTICE**

**and**

**(2) THE LEGAL SERVICES COMMISSION**

**and**

**(3) THE LAW SOCIETY**

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**DEED OF SETTLEMENT**

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**THIS DEED** is made the

day of

2008

BETWEEN

- (1) **THE MINISTRY OF JUSTICE** on behalf of the Lord Chancellor and Secretary of State for Justice of Selborne House, 54 Victoria Street, London SW1E 6QW ('MoJ');
- (2) **THE LEGAL SERVICES COMMISSION** of 85 Gray's Inn Road, London WC1X 8TX ('LSC'); and
- (3) **THE LAW SOCIETY** of 113 Chancery Lane, London, WC2A 1PL ('TLS')

MoJ, LSC and TLS together shall be referred to as the Parties.

WHEREAS

- (A) MoJ and LSC accept that the Court of Appeal found in favour of TLS' arguments on the Public Contracts Regulations 2006 and ruled that clause 13.1 of the Contract does not comply with those Regulations. They regret that the implications of those Regulations were not recognised at an earlier stage in the process leading up to the settlement of the terms of the Contract.
- (B) TLS commenced further proceedings against LSC for Judicial Review on 12 February 2008 Case reference number: CO/1446/2008 ('the litigation').
- (C) The litigation was caused by the failure of the Parties to agree on certain issues related to whether the civil, family, and immigration fee schemes introduced (following consultation) on 1 October 2007 and the mental health scheme introduced on 1 January 2008 have been validly introduced through the Community Legal Service (Funding) Order 2007 (S.I. 2007/2441) and clause 13.2 of the Contract. In the interests of bringing to an end a potentially long period of uncertainty, and in consideration of LSC and MoJ entering into this Agreement, TLS agrees to discontinue the litigation.
- (D) This Agreement sets out the terms agreed between the Parties through a series of open, constructive and pragmatic discussions that have followed the Court of Appeal judgment on the Contract.

- (E) The Parties have agreed to develop a constructive, collaborative relationship in future dealings as expanded upon in Appendix 1.
- (F) TLS accepts that the Lord Chancellor has power to make orders (including funding orders) under section 6(4) of the Access to Justice Act 1999.
- (G) TLS recognises that LSC has a right to explore new procurement mechanisms intended to provide services in a manner that more effectively meets clients' needs. MoJ and LSC recognise that TLS has a legitimate interest in whether any proposal is reasonable and fair having regard to the legal aid providers and their clients.
- (H) LSC and TLS will work together to ensure that legal aid providers are fully informed of the development of Community Legal Advice Centres and Networks that are likely to be established before April 2010 and are provided with information in good time to help them plan.
- (I) The Parties agree that the Court of Appeal's judgment has wider significance for the way in which the contractual relationship between LSC and legal aid providers is managed in the future. Procurement law requires that the terms of contracts should be transparent and clear to all prospective bidders. The conditions that will apply throughout the term of the contract must, therefore, be set out clearly. Amendment clauses are permissible but they must be clearly drawn and not too wide. This will have an effect on the duration of contracts and when new contracts are offered there must be a procurement process that makes the contracts, and the work available to be allocated, open to new bidders as well as existing contract holders. It is agreed that clause 13.1 of the Contract no longer has effect. Similarly, the criminal contract to be introduced on 14 July 2008 will only contain limited amendment powers. However, given the desirability of stable arrangements in the longer term, the Parties will continue to search for more flexible amendment powers that comply with the Public Contracts Regulations 2006.
- (J) Unless otherwise specified or the context otherwise requires or indicates, a capitalised term used herein shall have the same meaning as is ascribed to it in the LSC Unified Contract Standard Terms 2007 (and in particular, but without limitation, the term 'the Contract' means the LSC Unified Civil Contract which commenced on 1 April 2007).

NOW IT IS AGREED AS FOLLOWS:

## **1 No Termination of the Contract**

- 1.1 Subject to the terms of this Agreement and save as specifically provided herein MoJ and LSC agree that LSC will not utilise its powers under clause 30.3 of the Contract to terminate the Contract, or any part thereof, in force at the date of this Agreement, before it expires by effluxion of time on 31 March 2010 and clause 30.3 of the Contract shall be construed accordingly. No extension of the Contract is anticipated. From the date of this Agreement until 31 March 2010, no further changes will be made to the Standard Terms, the Specification, the fee structures or the rates, apart from as referred to below.
- 1.2 The Parties recognise that any “significant legal challenge” (which means (i) legal proceedings of any kind in which any person or body (whether a party to the Contract or not) challenges the validity of any of the matters in clause 2.1 below or of the amendments to the Contract made to give effect to this Agreement or of any legislation made for that purpose; and (ii) which, in the view of a QC jointly instructed by the Parties, has reasonable prospects of success) may require termination of the Contract, make it impossible to implement the other elements of this Agreement and put at risk the constructive and collaborative working arrangements to which the Parties are committed. In the circumstances of the threat of such a challenge, the Parties therefore agree to use their best endeavours to resolve the matter without the need for termination, although provided that such a “significant legal challenge” has been issued, TLS agrees that LSC will be entitled to terminate the contract if so advised.

## **2 The Law Society and Funding Orders**

- 2.1 TLS will discontinue its claim for judicial review against LSC issued on 12 February 2008, and withdraw financial and other support for associated actions. In addition TLS will not bring any further claim, or encourage or support any further claim by a third party, relating to the validity of:
- 2.1.1 the Community Legal Service (Funding) Order 2007;

- 2.1.2 the use of clause 13.2 of the Contract to make amendments to the Contract in respect of fee schemes following the making of the Order referred to in clause 2.1.1;
  - 2.1.3 the civil, family and immigration fee schemes introduced on 1 October 2007 and mental health fee scheme introduced on 1 January 2008; or
  - 2.1.4 the contract amendments (including the Contract Specification) which came into force on 1 October 2007 and 1 January 2008.
- 2.2 TLS further agrees that it will not challenge the making of a further Community Legal Service Funding Order and the use of clause 13.2 of the Contract to make amendments as provided for in this Agreement.
- 2.3 MoJ and LSC agree to engage TLS as early as possible and fully in discussions on any proposed application of clause 13.2 of the Contract, including formal consultations under the Access to Justice Act 1999.

### **3 Remainder Work**

- 3.1 LSC agree that clause 31.10 of the Contract will be interpreted and applied by LSC such that LSC will normally exercise its discretion to permit a former legal aid provider to undertake Remainder Work (if so requested by the legal aid provider concerned and with the client's consent) unless there has been a termination based on either risk to clients or the Fund and provided that LSC shall have the right to limit such Remainder Work to a period of two years from the date of termination of the Contract in respect of that legal aid provider. In addition, the provisions of **Appendix 2** shall apply.

### **4 Standard Monthly Payments (SMPs)**

- 4.1 LSC agree that the proposed arrangements for varying the payment of Standard Monthly Payments ('SMPs') (as set out in **Appendix 3**) will be implemented from July 2008, subject to any revisions agreed following discussion with the Advice Services Alliance. Once agreed, these arrangements will remain in being for the lifetime of the Contract.

- 4.2 As a part of the process referred to in clause 4.1 above LSC will ensure that the transitional arrangements for Not for Profit organisations ('NfPs') are working effectively to facilitate the adaptation of NfP agencies to fixed fee payment systems.

## **5 CLACs and CLANs**

### **5.1 LSC:**

- 5.1.1 has provided to TLS a list of procurement areas in England and Wales, subject to agreement from individual Local Authorities to discussions being made public, where discussions on the commissioning of new social welfare law services are advanced and may lead to a Community Legal Advice Centre or Network being established (following tendering) before 1 April 2010;
- 5.1.2 will provide TLS and the Advice Services Alliance (ASA) with a separate list of the legal aid providers in those procurement areas in the list referred to in clause 5.1.1 above;
- 5.1.3 agrees that, save for the Centres and Networks specified in the list referred to in 5.1.1, no other Centres and Networks will be implemented before 1 April 2010 (although discussions with other prospective funders and tendering processes will take place before that date in order to support further joint commissioning of social welfare law services when new contracts are let from April 2010); and
- 5.1.4 confirms that the Legal Services Research Centre (LSRC) is undertaking a research project into Centres and Networks that covers process and outcomes. LSC and MoJ undertake that TLS will be involved in this evaluation, and that this evaluation will feed into the procurement process leading to new contracts for integrated social welfare law services in April 2010. As a part of this process LSC will invite TLS's Head of Research to join the Advisory Board for the research project. LSC will also invite ASA to contribute to the project.

- 5.2 LSC shall have the right to terminate the Contract or any part thereof in respect of those firms or offices where such termination is consequent upon and required as a result of the introduction of a Centre or Network contemplated in clause 5.1.1 above.

## **6 Review of Quality Assurance Mechanisms**

- 6.1 LSC and MoJ agree to a joint review with TLS of the Peer Review system and all other quality assurance processes and procedures affecting both civil and criminal legal aid practitioners. The review will be undertaken by a joint working group (the 'QA joint working group') whose composition, strategic purposes, terms of reference and reporting timetable are contained in **Appendix 4**. Until that Review has reported, and any new quality mechanisms are implemented, LSC will continue to use existing quality assurance mechanisms for existing business and developments of that business.

## **7 Contract Compliance Audit**

- 7.1 LSC and TLS agree that, within 28 days of the date of this Agreement, a joint working group (the 'CCA group'), involving LSC, TLS and the NAO will be established to look at ways to improve the way the Contract Compliance Audit (the 'CCA') system for both civil and criminal legal aid providers operates. The Terms of Reference for the CCA group are contained in **Appendix 5**.
- 7.2 LSC agrees that in respect of the current programme of CCAs (comprising a total of 196 civil or criminal contracts) and any future programme of CCAs any financial recoupment made against firms will be based on a genuine assessment of loss in accordance with the Contract (and relevant criminal contract).

## **8 Historic Unrecouped Payments**

- 8.1 LSC and MoJ agree that from the date of this Deed in respect of any case in relation to which:
- 8.1.1 no payment has been made by LSC to the legal aid provider or former legal aid provider since 31 March 2002; and

- 8.1.2 there has been no activity on the legal aid certificate since 31 March 2002; and
- 8.1.3 the total payments on account do not exceed £20,000 net of VAT; and
- 8.1.4 no agreement has been made by the legal aid provider or former legal aid provider to repay to or to allow LSC to recoup payments on account made prior to 31 March 2002 or no debit note or debit to a BACs statement has been sent by LSC before 1 April 2008 in the absence of agreement.

(each 'an historic case'), LSC will not act to recover any payments on account made by LSC in that case.

- 8.2 Provided that the application of this clause 8 to any legal aid provider or former legal aid provider is conditional upon that legal aid provider or former legal aid provider not making any claim against LSC in respect of that historic case or any other historic case. If a legal aid provider or former legal aid provider makes such a claim, this clause 8 will immediately cease to apply and LSC may take such action as it considers appropriate to recover any payments on account or other sums which are properly payable to it in respect of that or any other historic case.
- 8.3 This clause 8 will also cease to apply in the event that LSC has reasonable grounds to suspect fraud or other dishonesty or criminal conduct on behalf of any legal aid provider in respect of any such case. In addition the procedure set out in Appendix 6 shall apply.

## **9 Constructive Engagement and other matters**

- 9.1 The Parties commit themselves in good faith to constructive engagement with each other in accordance with the terms contained in **Appendix 1**.
- 9.2 In order to provide a period of stability for legal aid providers of civil legal aid services, LSC will publish, by no later than 30 April 2008, the route map **contained in Appendix 7**. This route map makes clear that whilst further changes to fees may be introduced (through a new contract) from April 2010, Best Value Tendering (BVT) will not be introduced for mainstream civil and family work before April 2013, with the



exception of a small number (two or three) of pilot areas that will be consulted on and announced before the April 2010 contracts are entered into. To the extent that any significant adjustments to the route map are required, these will be discussed fully and as early as possible with the relevant representative bodies and the Consultative Group referred to below.

- 9.3 In the light of consultations on BVT, LSC will publish a route map in respect of further criminal legal aid reform which will clearly identify the reforms and developments planned by LSC to and beyond July 2009. Because of the need to fully consider the responses to the current BVT consultation it will not be possible to publish a full criminal route map until the publication of LSC's full response to consultation. However, LSC will publish a statement by 30 April 2008 announcing that as an early decision (because of the need to finalise the duration of the July 2008 criminal contract) the auction process for the first phase of any BVT scheme would not commence before July 2009, although pre-qualification work for any potential auction process may precede this date. A copy of the statement is **contained in Appendix 8**.

## **10 Consultative Group**

- 10.1 LSC and MoJ agree that within four weeks of the date of this Agreement a new consultative group shall be established for civil, family and immigration suppliers similar to that applying in respect of the Criminal Contracts Consultative Group and shall involve representatives of TLS, the Legal Aid Practitioners Group (LAPG), ASA, Resolution, the Association of Lawyers for Children (ALC), the Mental Health Lawyers Association (MHLA), the Immigration Law Practitioners' Association (ILPA), the Housing Law Practitioners' Association (HLPAs) and others with specific expertise upon the invitation of the Consultative Group.
- 10.2 LSC and TLS agree that the work of this group shall include (but not by way of limitation) the following:
- 10.2.1 a review of fee schemes after they have been in operation for twelve months;

- 10.2.2 recommendations to LSC in respect of changes to the fee schemes having effect from April 2010;
- 10.2.3 (as a priority) the operation of the Mental Health scheme;
- 10.2.4 acting as a forum in which LSC will engage constructively with practitioners in respect of all relevant issues including (by way of example only) the circumstances in which LSC authorises firms to undertake additional work on cases in order to procure an order for *inter partes* costs; and
- 10.2.5 the proposed terms of reference for the group are attached **at Appendix 9**.

## **11 Increase in Rates and Payment**

- 11.1 LSC and MoJ agree that the following increases in rates shall apply to all matters commencing on or after 1 July 2008 and during the lifetime of the current Contract:
  - 11.1.1 MoJ and LSC will increase Level 1 Legal Help fixed fees for civil, family, mental health and immigration work by 2% above the level of fees implemented in October 2007 and January 2008. . In increasing the fixed fees LSC will also increase the underlying hourly rates by 2%;
  - 11.1.2 MoJ and LSC will increase the Level 2 Care Proceedings Graduated Fee Scheme fee from £347 to £405 (the equivalent of an additional hour's work). LSC and MoJ are committed to supporting the Public Law Outline (PLO) and ensuring that this new level of help is structured in such a way that LSC can properly judge whether it is helping to deliver positive impacts. The underlying hourly rate for Level 2 Care Proceedings will increase by 2%;
  - 11.1.3 MoJ and LSC will increase the Level 2 and 3 fees and hourly rates for controlled legal representation (CLR) in mental health cases by 5% (the 2% increase in help rates would apply to the Level 1 fees and legal help rates for mental health cases); and

- 11.1.4 MoJ and LSC will increase the Level 2 fees and hourly rates for controlled legal representation (CLR) in asylum and immigration cases by 5% (the 2% increase in help rates would apply to the Level 1 Legal help fees and rates for immigration and asylum cases). However these increases shall not apply to types of work which were excluded from the immigration and asylum graduated fee scheme - such as advice and representation for those held in detention and applications for review and reconsideration.
- 11.2 TLS has made representations concerning the impact on cash flow arising from asylum “legacy” cases. LSC and TLS have already begun and shall continue jointly to investigate this issue and LSC will publish a report on the findings by 30 June 2008.
- 11.3 Full details of the revisions to be made to the fee schemes are contained in **Appendix 10**.

## **12 Family Fee Schemes**

- 12.1 LSC and MoJ have agreed to delay to April 2010 the implementation of fixed and graduated fees for those elements of family work that remain under hourly rate payment systems at present – Levels 3 and 4 in the private family schemes and advocacy for public law cases. Proposals will be the subject of full consultation and the fees will be introduced under the new contract to be effective from 1 April 2010.

## **13 Terms of Existing Agreement to continue to apply**

- 13.1 LSC has agreed not to introduce any other changes to the Contract and the family and asylum contracts for solicitors and not for profit legal aid providers before April 2010 other than as are required:
- 13.1.1 to make amendments using clause 13.2 of the Contract (provided that any such amendments are made pursuant to and in accordance with that clause);
- 13.1.2 in regard to proposals for asylum contracts and fees relating to detained fast track and Immigration Removal Centre surgeries, and police stations,

and in response to changes introduced by the Borders and Immigration Agency concerning unaccompanied asylum seeking children, subject to consultation with TLS on the policy and mechanics;

13.1.3 where the setting up of new Community Legal Advice Centres and Networks necessitates amendment to the Contract Documents, for example to change the categories of Social Welfare Law handled by some Suppliers; or

13.1.4 to pilot new arrangements for procuring the services of expert witnesses as set out in the CMO's report, *Bearing Good Witness*.

13.1.5 in relation to individual supplier contracts in accordance with clauses 11.4,11.9,11.10 and 11A.2-6 inclusive of the Contract Standard Terms (Key Information Tables and Schedules).

#### **14 Power to enter into this Agreement**

14.1 The Parties having taken all appropriate advice warrant and represent to each other that they have full power and authority to enter into and perform this Agreement and may do so without the consent of any third party. The Parties further warrant and represent to each other that their entry into and performance of this Agreement will not constitute a breach of law, regulation or contractual or governmental obligation and that this Agreement constitutes valid, legal and binding obligations on the Parties, enforceable in accordance with its terms.

#### **15 Enforcement of this Agreement**

15.1 The Parties acknowledge that in relation to the enforcement of this Agreement damages will not be an adequate remedy and accordingly agree that they will not oppose an application by any other Party for an injunction and/or order for specific performance of this Agreement.

#### **16 Joint Statements**

16.1 On the execution of this Agreement LSC, MoJ and TLS will publish the Joint Statement contained in **Appendix 11**.

## **17 Entire Agreement**

- 17.1 This Agreement constitutes the whole and only agreement between the parties with respect to its subject matter and supersedes and extinguishes any prior drafts, agreements, undertakings, representations, warranties and arrangements of any nature whatsoever whether or not in writing relating to their subject matter except in respect of any fraudulent misrepresentations made by either party.

## **18 Precedence**

- 18.1 In the event that there is a conflict or inconsistency between the Appendices or any part of them and the clauses of this Agreement, the clauses of this Agreement shall prevail and have effect.

## **19 Counterparts**

- 19.1 This Deed may be executed in any number of counterparts, each of which when executed and delivered shall constitute an original of this Deed, but all the counterparts shall together constitute the same Deed. No counterpart shall be effective until each party has executed at least one counterpart.

EXECUTED AS A DEED by the parties the day and year first above written

## **APPENDIX 1**

### **CONSTRUCTIVE ENGAGEMENT**

- 1 The Parties believe that this Agreement represents the way forward for the Parties in light of the uncertainty created by the Court of Appeal judgment. There is a strong commitment on the part of the Parties to delivering the substance of this Agreement. However, the Parties consider that the process of reaching the Agreement and the strong commitment to work together in this way in the future, are, in many ways, the most important outcome – even if it is less immediately tangible than a number of the specific measures that are set out in this Agreement.
- 2 The Parties consider joint working to solve common problems to be an important part of their future relationships. They recognise that their responsibilities differ. MoJ and LSC have statutory responsibilities to provide legal aid in a way that ensures access, quality and value for money and wider responsibilities as public bodies, particularly regarding the expenditure of public money. MoJ and LSC have made it clear that the programme of reform for legal aid, set out in Legal Aid: The Way Ahead will continue to shape the future development of legal aid. TLS has a responsibility to its members to represent their views and to make their case in the debate over legal aid. Legal aid providers need to be able to plan and manage their businesses and to make a profit from legal aid work in order to be sustainable and invest in the future – and LSC and MoJ recognise this. These differing perspectives can give rise to disagreements but the Parties are committed, for the future, to address these through dialogue, collaborative working and joint problem solving. The Parties believe that this is in the interests of all with a stake in legal aid. The Parties are committed to constructive engagement, including engagement with other representative bodies, and to regular discussions in confidence of policies and plans under development for both civil and criminal legal aid.

## APPENDIX 2

### REMAINDER WORK PROTOCOL

- 1 Clause 31.10 is written to reflect the fact that the circumstances which will normally lead to “with fault” termination of the Unified Contract inevitably involve either risk to clients (as a result of the quality of the legal aid provider’s work) or risk to the “legal aid” Fund (because the legal aid provider has been over-claiming or otherwise not properly accounting for work done under the Contract). In either case it is difficult to see any sustainable argument as to why, having taken the decision to terminate the Contract, LSC should continue to allow that legal aid provider to undertake Remainder Work.
- 2 There are however circumstances where Remainder Work will be allowed.
- 3 The removal of the right to do Remainder Work is difficult for LSC to administer and disruptive to the clients’ cases and therefore, unless there has been a termination based on either risk to clients or to the Fund, the assumption will be that the former legal aid provider will be allowed to continue to perform Remainder Work. This assumption will however have to be tempered by other considerations as follows:
  - 3.1 that the former legal aid provider must continue, without the benefit of an LSC legal aid provider contract, to be a viable entity capable of offering the service to the clients and, in particular, to:
    - 3.1.1 continue to meet the relevant quality assurance standard (typically the SQM), especially in respect of quality of staff and supervision; and
    - 3.1.2 continue to be able to comply with all of the Contract terms in respect of the Remainder Work;
  - 3.2 that the relevant clients must be notified that the former legal aid provider no longer holds an LSC legal aid provider contract and be given the option to transfer their case to a contracted legal aid provider; and

- 3.3 that the Remainder Work is not likely to continue for longer than two years from the date of termination (although further Remainder Work will be considered if a small proportion of that work will continue for longer than this).
- 4 Wherever Remainder Work is allowed, that decision will be reviewed as reasonably required to ensure that the above requirements are still being met.



## **APPENDIX 3**

### **STANDARD MONTHLY PAYMENTS RECONCILIATION PROTOCOL**

#### **1 General**

- 1.1 LSC's objective is to pay a sum each month which is regular in amount and which results in neither a balance in favour of the legal aid provider nor LSC at a point of review. When LSC set payments their aim is to achieve a 100% reconciliation balance.
- 1.2 LSC will give at least one month's notice of a change to an SMP.
- 1.3 LSC aim to provide as stable a cash flow as possible and make the minimum number of interventions. LSC will use a standardised reconciliation process that reconciles legal aid providers' claims across a defined period and makes no interventions provided the cumulative balance of claims to payments is within a plus/minus 10% band. The band will be calculated as plus/minus 10% of claims over the period the Contract has run or the last 12 months claims, whichever is the shorter.
- 1.4 LSC's general approach will be to limit the amount of liability that can be accrued on either side. If accounts get out of balance LSC will aim to reconcile cash balances within a 6 month period.
- 1.5 When a legal aid provider's Contract ends, and is replaced by a new contract, LSC will continue to operate these provisions on an ongoing basis.
- 1.6 When a legal aid provider's Contract ends, and is not replaced, the right to a Standard Monthly Payment also ends.

#### **2 Reconciliation Approach**

- 2.1 LSC will monitor claims to payments on a monthly basis and when the balance is outside the 10% band LSC will amend future payments.
- 2.2 LSC will conduct a twice yearly review of suppliers' monthly claims to payments (this will generally be in September and March of each contract year but may vary in some circumstances such as implementation of revised fee schemes etc). Following that

review if a decision is made to amend future payments in accordance with the Protocol LSC will provide at least one month's notice of the change which will take place the following month (i.e. review in September based on claims to payments for February to July inclusive, notice in October, amendment in November).

2.3 LSC's approach in undertaking the review will be:

- (a) Consider the balance of claims to payments to date and define the value of the cumulative variance (i.e. the level of any current underpayment or overpayment).
- (b) Where the balance of claims to payments is outside the 10% band the value of the variance to 100% will be brought forward into the monthly SMP amount to be paid in the next 6 months.
- (c) Where the balance is within the 10% band then payments will remain at the current level.
- (d) Where LSC amends payments, the SMP for the following 6 months will be a combination of the average claim value of the preceding 6 months and the variance.
- (e) LSC will set a maximum band of plus/minus 50% (calculated on the same basis as the 10% band in paragraph 1.3 above) that can be reconciled by changes to SMP alone. If at any time the balance is outside the 50% band then this will trigger an exception review. In these circumstances the variance will be paid or recouped over the following 3 months by ad hoc payments or debits and the SMP reset to the average claim value of the preceding six months.
- (f) In the same way, if following a review, a legal aid provider's account remains outside the 10% range for a period of 3 consecutive months, despite resetting payments under 2.3 (b) above, the variance will be paid or recouped over following 3 months by ad hoc payments or debits.

### **3 Further Guidance**

- 3.1 Criminal legal aid providers requesting a pull forward of 7.5% (of previous 12 months claims) will have a balance target of 92.5% instead of 100% (of previous 12 months claims) for the purposes of setting future payment levels. For the avoidance of doubt this does not change the position that where the balance is outside the 10% band at any point then payments will be amended.
- 3.2 All reconciliations will be based on matching an equal number of claims with payments i.e. like for like claims and payments period.
- 3.3 LSC estimates that it currently has 303 civil and 110 criminal legal aid providers whose annual claim value is less than £2,500. It is proposed that, with the agreement of these legal aid providers, no SMPs will be set but ad-hoc payments are made at the 6 month automatic review.
- 3.4 LSC will look to develop a template reconciliation tool to be made available via the intranet for suppliers to forecast their own reconciliation activity (this will reduce the need for extended notice periods as suppliers will be able to see the effect their claims values will have approximately 2 months earlier).
- 3.5 Exceptions to the process will still need to be defined. These include setting SMPs for new firms, mergers and expansions or where “nil” submissions distort claiming patterns. LSC will need to define transitional arrangements so that all suppliers’ balances are in a position for this protocol to be implemented.

### **4 Transition to the SMP Reconciliation Protocol**

- 4.1 LSC will define transitional arrangements so that all legal aid providers’ balances are in a position for this protocol to be implemented. LSC will also need to consider the transitional provisions for NfP legal aid providers to manage their move to fixed fees from payment by caseworker.

**APPENDIX 4**  
**ASSURING AND IMPROVING THE QUALITY OF LEGAL AID SERVICES**  
**JOINT LSC/TLS WORKING PARTY**  
**TERMS OF REFERENCE**

**Introduction**

- 1 On 10 December 2007 LSC published a further set of announcements and consultation papers which continue the implementation of the reform of the legal aid system announced jointly by LSC and the, then, Department for Constitutional Affairs (now MoJ) in Legal Aid Reform: the Way Ahead (Cm 6993, November 2006).
- 2 In that paper LSC set out its plans for a system of legal aid procurement that would deliver:
  - 2.1 good quality legal advice and representation for clients;
  - 2.2 a sustainable, effective and efficient supplier base;
  - 2.3 value for money for the taxpayer; and
  - 2.4 a real contribution to the efficient, speedy and proportionate operation of the justice system.

There are a range of views about the direction and detail of the reforms to which the government and LSC are committed. However, there is agreement between LSC and TLS that legal aid clients should receive good quality legal advice and representation, that appropriate mechanisms should exist to assure the delivery of that quality and that these mechanisms should also help and encourage and permit legal aid providers to improve the quality of services.

- 3 LSC's view, as set out on 10 December, is that these objectives for quality can best be delivered through the use of a combination of:

- 3.1 quality management systems – such as the SQM or Lexcel – to ensure effective management structures, supervision and a framework for the delivery of quality services;
- 3.2 accreditation, to ensure the individual competence in specific categories of law for supervisors and others delivering specific services (e.g. police station duty work); and
- 3.3 peer review, to assess the overall quality of legal advice and representation provided to clients by firms and to provide information to enable firms to improve their quality.

**A commitment to joint working and objectives**

- 4 LSC and TLS believe that it is important to ensure that the overall quality framework and its operation:
  - 4.1 assures and, over time, improves the quality of advice and representation provided to clients;
  - 4.2 is objective and fair;
  - 4.3 provides appropriate levels of assurance and value for money for the taxpayer;
  - 4.4 ensures that the elements within the framework operate in an integrated fashion, without duplication;
  - 4.5 meshes effectively with other systems (e.g. Lexcel);
  - 4.6 is proportionate; and
  - 4.7 has the confidence of the profession, regulators, representative bodies and LSC.
- 5 It is the intention of LSC and TLS to establish a working group to review the current quality framework and its constituent elements with a view to establishing the extent to which it, and the way in which it operates, meets the objectives set out at paragraph 4 above, and to identify changes or developments that would enhance its ability to meet the above objectives.

- 6 In respect of peer review, the review will consider whether it can be further developed to improve it and the professions' confidence in the process. It will also consider whether the process for challenging the findings of peer review is satisfactory.
- 7 LSC has commenced a programme of peer review for criminal legal aid firms for, amongst other things, part of the pre-qualification process for the implementation of any BVT scheme (should LSC decide to implement such a scheme following consultation). LSC will need to ensure that any changes to the Peer Review process that might be adopted in the light of recommendations from this working group do not in any way invalidate the Peer Reviews already undertaken (for example by the implementation of a radically different scheme or standard that could not be compared to Reviews already undertaken) or delay the implementation of any BVT scheme past the date set out elsewhere in this Deed.
- 8 In respect of the SQM, the review will consider whether the scheme provides appropriate assurance in a proportionate manner of managerial competence, and whether alternative systems such as Lexcel would provide equivalent assurance such that LSC should recognise them.
- 9 The review will also consider whether there are other quality assurance tools that may provide additional or alternative safeguards that will be effective, proportionate and economical.
- 10 The working group will also consider the issues of where future responsibility for the ownership of quality standards, the mechanisms used to assess those standards, the operational delivery of quality mechanisms and the costs associated with these should properly lie.
- 11 The working group will take account of the programme of reform of the legal aid system set out by MoJ and LSC in Legal Aid: The Way Ahead and the wider reforms of the legal services market flowing from the Legal Services Act.
- 12 Whilst the working group is taking forward its review, LSC will continue to operate the current quality framework, including the current programme of Peer Review associated with the preparation for Best Value Tendering.

## **The Working Group**

13 The Working Group will consist of representatives of LSC and TLS including practitioners. The following organizations will also be invited to become members of the group:

13.1 Advice Services Alliance;

13.2 Solicitor Regulation Authority;

13.3 Institute of Advanced Legal Studies; and

13.4 Resolution.

The TLS and LSC may invite additional members where they believe this would assist the work of the group.

14 The group will be jointly chaired by LSC and TLS and administrative support will be provided by LSC.

15 The group will commence its work no later than 28 days from the date of this Deed and complete its work no later than 31 October 2008. It will publish a report no later than 31 December 2008 setting out its considerations, findings and recommendations.

16 The group will establish its own work and meetings programme.

17 The recommendations of the Review will be considered by LSC and TLS who will either accept the recommendations or provide public written reasons for not doing so no later than 14 February 2009.

## **APPENDIX 5**

### **CONTRACT COMPLIANCE AUDITS**

#### **ASSURING COMPLIANCE WITH REGULATIONS AND THE CONTRACT – AUDITING LEGAL AID PROVIDERS**

##### **JOINT LSC/LAW SOCIETY WORKING PARTY - TERMS OF REFERENCE**

### **1 Introduction**

- 1.1 Within the current legal aid arrangements there is split responsibility for decision-making on individual cases between LSC and individual legal aid providers. Where decision-making is devolved to legal aid providers they have a responsibility to ensure that decisions are made in accordance with regulations and contract requirements.
- 1.2 LSC believes that it is in the interests of clients, legal aid providers and LSC for progressively more individual case decisions on merits, means and the progression of cases to be devolved to legal aid providers. Legal aid providers have, themselves, consistently argued for more devolved decision-making. LSC believes that this approach is consistent with the Government's overall objectives for better regulation and will lead to a reduction in the overall cost of the legal aid system (by enabling both LSC and legal aid providers to reduce administrative costs associated with LSC/legal aid provider transactions). In April 2008 LSC will be publishing a consultation paper (Delivery Transformation) – and seeking to engage constructively with legal aid providers and representative bodies – on proposals to transform the way in which LSC and legal aid providers deliver legal aid. This consultation will be the key to taking forward greater devolution of decision making and developing the business relationship within which that devolution can be managed. LSC expects significant changes – particularly involving greater electronic working – to be implemented from April 2010.
- 1.3 Where decision-making is conducted by legal aid providers rather than by LSC it is necessary – given LSC's status as a public body – for there to be mechanisms in place to provide assurance that decisions made by legal aid providers are in accordance with rules set out in legislation and contracts. In the absence of such



mechanisms LSC's and MoJ's Accounting Officers are unable to ensure propriety of LSC's expenditure and LSC's accounts are vulnerable to qualification by the NAO.

- 1.4 Additionally, given the desire to devolve further primary decisions to legal aid providers, it is important that there are mechanisms in place to ensure that legal aid providers are capable of making these decisions in accordance with the rules.
- 1.5 LSC relies at present, and plans to rely in future, on a combination of management information – primarily based on information submitted by legal aid providers on the start and completion of individual cases – and auditing to provide the required levels of assurance.
- 1.6 At present the Commission uses Contract Compliance Audits (CCA) as the audit tool that it utilises for both of the objectives set out at paragraphs 1.4 and 1.5 above. LSC is currently undertaking a series of CCAs as part of a programme agreed with the National Audit Office to provide assurance of propriety of expenditure for LSC's 2007/08 accounts. This programme will be completed shortly in accordance with the currently published process.
- 1.7 TLS accepts the need for there to be effective audit processes but has expressed a number of concerns to LSC about the CCA process:
  - 1.7.1 that the process is applied in a way such that work is disallowed where there is an administrative error on the part of the legal aid provider but there is evidence elsewhere on the case file that would show the work had been properly undertaken and claimed;
  - 1.7.2 that the approach taken by LSC to extrapolate findings from a sample of files may not be justified on the basis of the size of the underlying sample; and
  - 1.7.3 that the process can be administratively onerous for firms.

## **2 A commitment to joint working and objectives**

- 2.1 LSC and TLS recognise that audit processes have on a number of occasions in the recent past caused an increase in tension and disagreement between some legal aid providers, representative bodies and LSC. Neither organisation believe this to be desirable and, therefore, will establish a joint working group (the CCA group) to review the current approach with a view to identifying whether it is possible to improve the current process or identify alternative approaches that:
- 2.1.1 provide LSC with the assurance it requires that devolved decision-making is being exercised by legal aid providers in accordance with regulations and contract requirements and that there is propriety of expenditure;
  - 2.1.2 provides effective feedback to legal aid providers to help them ensure that they are making decisions in accordance with regulations and contract requirements;
  - 2.1.3 supports the further devolution of primary decision-making from LSC to legal aid providers;
  - 2.1.4 is effectively linked to other management information on individual legal aid providers available to LSC;
  - 2.1.5 is, consistent with the other objectives, as light a touch for legal aid providers as possible;
  - 2.1.6 is simple and clear; and
  - 2.1.7 provides for proportionate and justifiable responses on the part of LSC to the issues identified.
- 2.2 LSC has a requirement to deliver a continuing CCA programme and this cannot be suspended whilst the CCA group is undertaking its review. Therefore, the CCA group will, at the outset, review the current procedures and identify whether any immediate changes could be made to the current process whilst the CCA group is undertaking its fuller review.

- 2.3 The CCA group will specifically consider whether, and if so the extent to which, auditing could be undertaken by firms or by their own external auditors and, if so, the procedures under which this could be achieved consistent with the objectives set out at paragraph 2.1 above.

### **3 The CCA Group**

- 3.1 The CCA group will consist of representatives of LSC and TLS, including practitioners. The Advice Services Alliance will also be invited to become a member of the group and LSC will invite the participation of the National Audit Office. TLS and LSC may invite additional members where they believe this would assist the work of the group or commission expert input.
- 3.2 The CCA group will be jointly chaired by LSC and TLS and administrative support will be provided by LSC.
- 3.3 The CCA group will commence its review no later than 28 days from the date of this Deed and will aim to complete its work by 31 August 2008 – but may itself decide to extend this timetable if required to complete its work. It will publish a report setting out its considerations, findings and recommendations within 2 months of the end of the review.
- 3.4 The CCA group will establish its own work and meetings programme.
- 3.5 The recommendations of the review will be considered by LSC and TLS who will either accept the recommendations or provide public written reasons for not doing so.

## **APPENDIX 6**

### **UNRECOUPED PAYMENTS ON ACCOUNT**

#### **1 Definitions**

- 1.1 For the purpose of this Appendix “outstanding payments on account” are defined as payments that have been made by LSC to a civil legal aid provider (for profit costs or disbursements) on historic cases as defined in clause 8 of the Agreement.

- 1.2 “Dormant cases” are defined as being those that have not ‘moved’ on LSC’s computer system for 24 or more months.
- 1.3 A “qualifying case” is defined as any case where the last recorded ‘movement’ on LSC’s computer system took place before 31 March 2002.

## **2 Proposal**

- 2.1 LSC is currently conducting a national review of outstanding payments on account. Under the review procedure legal aid providers are asked to provide reports on all dormant cases on which one or more payments are outstanding.
- 2.2 As from the date of this Agreement, LSC will amend its approach to asking for reports. In respect of a qualifying case legal aid providers will be offered a choice as to how the outstanding payments on account are to be dealt with.
- 2.3 With respect to qualifying cases the legal aid provider will be able to ask LSC either:
- (a) to treat the payments on account in each case as being equivalent to a final claim for costs (in which case the amount paid on account will be assessed as being the full amount payable and no further claim will be paid) (Option (a)); or
  - (b) to deal with the cases individually, on the basis of reports to be made on a case-by-case basis (Option (b)).

## **3 Benefits for the Legal Aid Provider**

- 3.1 Offering this choice will allow individual legal aid providers to choose the particular option that is most beneficial to them. Those that choose Option (a):
- Will not need to make individual case reports.
  - Will not need to search for what may be very old files.
  - Will not be asked to “justify” the amount of payments made.

- Will not have the payments on account recovered from them.
- 3.2 By choosing Option (a), no further payment will be made in any of the qualifying cases, so by choosing Option (a) a legal aid provider is in effect agreeing to limit its claim to the amount already paid out on account.
- 3.3 Legal aid providers that choose Option (b) will not be obliged to limit their costs in this way. Where the legal aid provider is able to submit a claim for costs, the claim will be processed as normal. However, where a legal aid provider chooses Option (b) LSC will seek reports on all the cases that might otherwise be exempted. This means that in any case where the legal aid provider is not able to make a final claim or otherwise justify retention of any outstanding payment, the payment is liable to be recovered.
- 3.4 Legal aid providers will not be able “mix” Options (a) and (b) by billing cases that can be billed but asking LSC to treat the other qualifying cases as cases in Option (a).

## **4 Exceptions**

- 4.1 LSC reserves the right:
- (a) Not to offer Option (a) to any legal aid provider where there are reasonable grounds for believing that payments may have been claimed dishonestly or retained fraudulently.
  - (b) Not to treat as a qualifying case any case on which the payments on account exceed £20,000 net of VAT.

## **5 Method of Implementation**

- 5.1 When first LSC writes to legal aid providers under the current review process LSC provides four lists of cases to be reported upon. The lists distinguish “live” from dormant cases, identify cases on which only the “preferential” payment of £250 plus VAT has been made and those on which an interim bill has been paid but no other payments are outstanding. The purpose of differentiating cases in this way is to simplify the reporting process for the legal aid provider involved.
- 5.2 From the date of this Agreement, LSC will supply an additional list of qualifying cases at this initial stage. Legal aid providers will be given up to 42 days to respond to

LSC's first letter on the basis that in that response the legal aid provider tells LSC whether they have decided to opt for Option (a) or Option (b). The obvious benefit of allowing this period is that it allows the legal aid provider time to determine which option would most benefit them. In the event that no response is received within the 42 day time limit LSC will proceed on the basis that the legal aid provider has chosen Option (a).

## APPENDIX 7

### CIVIL LEGAL AID CONTRACTS: THE NEXT FIVE YEARS

#### Introduction

This Appendix sets out a route map for the development of civil legal aid contracts for the next five years. Many of the proposals in this Appendix will be subject to consultation and constructive dialogue with representative bodies and others. However LSC hopes that by publishing this timeline and outline principles at this stage civil legal aid providers will be able to plan for the future with greater security.

This Appendix needs to be read in the context of other LSC publications – particularly the CLS and Family Strategies (published in March 2006 and March 2007 respectively) as well as the review by Lord Carter of Coles published in July 2006 and the subsequent consultation and post consultation papers on the implementation of fixed fees.

The outline timeline for reform is as follows:

April 2008	Publication of consultation paper (Delivery Transformation) on new ways of working between suppliers and LSC from April 2010
May 2008	MoJ and LSC consultation on changes to Family Graduated Fees for the Bar (FGF).
September 2008	LSC 12 week consultation on stage 2 of family fixed fees for solicitors and counsel and the award and terms of new Unified Contracts from April 2010
January 2009	Report on operation of stage 1 fees and 6 week consultation on any changes to those existing fees to be made for April 2010
January - April 2009	Implementation of changes to FGF scheme
April 2009	Announcement of decisions on terms of new contract, stage 2 family fees and bid round process

April –December 2009	Bid round process for the award of the new civil Unified Contract in April 2010
February 2010	Consultation paper on best value tendering (BVT) in civil legal aid
April 2010	Current civil Unified Contract expires and new contract awards come into effect along with stage two family fees
2010-11	Trials of BVT begin in a small number of geographical areas
From April 2013	Possible roll out of civil BVT

## **1 The current Unified Contract (Civil)**

- 1.1 Subject to the terms of this Deed, the current Unified Contract for civil legal aid providers will run until its expiry on 31 March 2010.
- 1.2 During this period, LSC will give stability to legal aid providers by restricting amendments to the Contract to those set out in this Deed including those necessary to respond to legislative or other changes within the terms of clause 13.2 of the Unified Contract Standard terms. Any such changes will be consulted upon with TLS and other relevant representative bodies and discussed in advance with the Civil Contracts Consultative Group.
- 1.3 LSC will also use this time to review, with TLS and others existing cost compliance, and quality procedures (including peer review) to ensure that they continue to be fit for purpose. LSC will want to confirm that these procedures maintain the right balance between its requirements to ensure propriety of expenditure and quality of service and the desire held by all stakeholders to reduce the burden of administration on legal aid providers.
- 1.4 LSC will also continue to run interim bid rounds before April 2010 to award additional New Matter Starts to ensure that the volume and spread of civil services are maximised within the capped legal help budget.

## **2 The Unified Contract (Civil) from April 2010**



- 2.1 In April 2008 LSC will issue a consultation on proposed delivery transformation changes to be incorporated into the new contract. These will include electronic working, the devolution of means testing in certificated cases, speedier processing of applications involving a risk based approach and a simplification of contributions. The aim will be to allow legal aid providers and LSC to work together in a more efficient way and reduce the costs of administering legal aid to all stakeholders.
- 2.2 In September 2008 LSC will begin consultation on:
- (a) The terms of the Unified Contract which will apply from April 2010. The new contracts will reflect the focus set out in both the CLS and family strategies on priorities within civil legal aid and on integrated services and access for disadvantaged groups. LSC will be aiming to move towards greater certainty for both parties to the contract – for legal aid providers so that they can plan their business, and for LSC so that access for clients can be assured.
  - (b) The criteria and process for awarding the new contracts to meet those priorities. The LSC has published the results of calculations which show that the actual spend on social welfare and family advice services in an area can differ greatly from assessments of need based on the prevalence of particular justiciable problems and income data as a proxy for legal aid eligibility. These results provide some guidance in the allocation of resources available for bid rounds but these also have to take account of local factors such as where clients choose to access services.
  - (c) Remuneration changes from April 2010 (see below).
- 2.3 LSC will run a bid round to award the new Unified Contracts during 2009. A list of the proposed key milestones is included in this Appendix. This will be subject to discussion with the representative bodies.
- 2.4 The new Unified Contract will come into effect from 1 April 2010.
- 2.5 Although it will be a matter for discussion with TLS and others, LSC's initial view is that the new Unified Contract will run for three years until April 2013.

### **3 Remuneration changes from April 2010**

- 3.1 In its September 2008 paper LSC will consult on a number of family graduated fee schemes. LSC will be aiming to harmonise payments made to solicitors and barristers and make all payments directly to the contract holder.

#### *Care Proceedings Advocacy*

- 3.2 LSC will consult on bringing both solicitors advocacy (currently on hourly rates) and counsels' fees (currently paid via Family Graduated Fees) into a graduated fee regime. In designing the fees, LSC will aim to create incentives that link to the Public Law Outline objectives of containing the number of unnecessary hearings and determining cases as early as appropriate in the interests of clients.

#### *Private Family Law Legal Representation*

- 3.3 LSC will aim to bring representation in private law finance and children cases within a graduated fee regime, replacing hourly rates for solicitors and Family Graduated Fees for counsel.

#### *Other family changes*

- 3.4 LSC will also consult on other family remuneration changes. These are likely to include:
- The incorporation of a proportion of exceptional care proceeding cases, currently paid on hourly rates, into the fixed fees. A file review project is currently underway and part of its remit is to measure the cost-drivers in these cases.
  - Fixed fee schemes for domestic violence applications and financial provision proceedings under the Trusts of Land and Appointment of Trustees Act 1996.

#### *Other remuneration changes*

- 3.5 As a separate piece of work, LSC will be reviewing the operation of the first stage of graduated and fixed fees (implemented in October 2007 and January 2008) with the Civil Contracts Consultative Group to see if any changes should be made to those existing schemes for April 2010. During the consultation on stage 1 of the fees, some respondents sought to make the case for more graduation of the fees, although the data was usually not conclusive as to whether the factors suggested were cost

drivers. LSC's solution was to leave a significant number of cases to escape as exceptions, and LSC would be interested to explore whether by introducing further graduation it could reduce the number of those exceptions. This would provide greater certainty to legal aid providers, as well as reduce the burden to legal aid providers and LSC caused by the need to cost assess exceptional cases.

- 3.6 LSC intends to publish the outcome of that review in January 2009, with a further 6-week consultation on any changes to be made to the stage 1 fees as a result. Any such changes would take effect in the new contracts from 1 April 2010.
- 3.7 As part of the process of budget control and of moving towards new fee arrangements covering both barristers and solicitors in family cases, MoJ and LSC will be consulting on a number of interim changes to the FGF scheme. This consultation is likely to take place in May 2008 for implementation in early 2009. These interim changes will not affect the fees paid to solicitors or not-for-profit agencies.

#### **4 The introduction of best value tendering**

- 4.1 It is LSC's view that the introduction of best value tendering remains the best way ultimately of establishing services that provide the appropriate levels of quality and access at a price that is viable for both the taxpayer and legal aid provider. LSC also considers that best value tendering contracts will allow both legal aid providers and LSC the certainty of duration and service provision that will give long term stability. LSC has already operated best value tendering for certain services, such as telephone services and Community Legal Advice centre contracts (and will continue to do so as centres and networks roll out).
- 4.2 LSC recognises the importance of consulting on any significant extension of best value tendering for civil legal aid services, and of proceeding carefully and in a staged way with any wider introduction. Additionally, in family legal aid, the extension of graduated fees for certificated work means that practitioners will need time to adapt to those changes and ways of working before competition on price is undertaken.

- 4.3 LSC will therefore be proposing that any roll out of the best value tendering for civil legal aid mainstream services should not begin until 2013. By mainstream services LSC means standard Unified Contracts for face-to-face services, excluding special contracts like telephone services, duty schemes and Centre/Network contracts. This will give a five-year period for proposals to be fully discussed, worked through and tested.
- 4.4 To inform this process, LSC will be proposing to trial best value tendering for mainstream services in a small number (two or three) of geographical areas between 2010 and 2013, offering a mix of dispersed and non-dispersed populations. LSC will discuss the criteria for choosing these areas with the representative bodies and any trial areas will have been identified before the award of contracts in 2010, so that practitioners signing contracts in those areas will be aware of the position. The award process for these trial best value tendering contracts is likely to take place during 2010-11.

## **5 Social welfare law**

- 5.1 It continues to be LSC's aim to establish Community Legal Advice Centres and Networks by jointly commissioning social welfare law services with other funders, primarily local authorities.
- 5.2 LSC will provide to TLS a list of procurement areas in England and Wales, where discussions on the commissioning of new social welfare law services are advanced and may lead to a Community Legal Advice Centre or Network being established (following tendering) before 1 April 2010. Where LSC lets a contract for a new Centre or Network it will expect to terminate other social welfare law provision as appropriate in that area in line with its commitment to integrated services.
- 5.3 Save for those included in the list provided by LSC other Centres and Networks will not be implemented before 1 April 2010 (though discussions with other prospective funders and tendering processes will take place before that date in order to support further joint commissioning of social welfare law services when new contracts are let from April 2010).

- 5.4 In those areas where LSC will not be moving to joint commissioning in April 2010, LSC will be seeking to move towards purchasing all five social welfare services together as part of the contract award process.

<b>Milestone for contract award process for 2010</b>	<b>Date</b>
Civil Route map published	April 2008
Consultation: publication of consultation document, and briefings to legal aid providers.	September – November 2008
Publication of summary consultation responses	February 2009
Publication of final fee schemes, and bid criteria	April 2009
Expressions of Interest for April 10 contracts	May – June 2009
Notification of award of contracts in one-stage areas	July 2009
Bid period in two -stage areas	July – September 2009
Notification of award of contract in two-stage areas	December 2009
New contracts & fees go live	Apr 2010

‘One-stage areas’ will be those procurement areas where LSC considers that it can award a contract to all those that have completed an expression of interest and meet any essential criteria, without the need for a further stage.

‘Two-stage areas’ will be those procurement areas where LSC considers that it needs to choose between bidders by assessing them against desirable criteria.

## **APPENDIX 8**

### **LSC STATEMENT ON THE TIMING OF THE FIRST PHASE OF ANY CRIMINAL BVT SCHEME**

In the light of consultations on Best Value Tendering LSC has decided that, in the event it decides to move to BVT, the first competition would not take place before July 2009, although invitations to tender and pre-qualification procedures may take place within the six months before that. The earliest that the first BVT contracts awarded following a July 2009 competition would come into operation would be January 2010.



## **APPENDIX 9**

### **SETTING UP A CIVIL CONTRACTS CONSULTATIVE GROUP**

#### **Background**

- 1 This Appendix sets out a proposal for a joint LSC and Law Society Civil Contracts Consultative group to focus on the development of the Civil Unified Contract. This proposed approach is designed to ensure that any amendments to the existing fee schemes are proposed in a transparent manner with a clear rationale for change. This approach is also designed to assist in the development of relevant contract provisions.
- 2 This proposal is designed to assist LSC and legal aid providers to adapt to the changes in procurement resulting from implementation of the Carter Review. Information discussed at the meetings will be made available to all legal aid providers via the LSC website, except where the information relates to future consultation proposals.

#### **Proposed Scope and membership**

- 3 As part of the review it is proposed that LSC and TLS establish a Civil Contracts Consultative Group. It is proposed that this group meet as a minimum on a quarterly basis from April 2008 to April 2010, specifically to look at the following areas:
  - 3.1 Issues arising from the implementation of the fee schemes.
  - 3.2 Inputting into the development of future procurement policy, on a confidential basis, prior to proposals being consulted on more widely. This will include proposals for fixed fees for Private Law Certificated Work and solicitor advocacy in Public Law.
  - 3.3 Reviewing the analysis of the Phase 1 fee scheme, and recommending appropriate amendments to ensure the sustainability of client access to legal aid services. A detailed timeline is set out below.
  - 3.4 Discussing the potential for LSC to fund more applications for cost orders in High Cost cases, with regard to the impacts on the Legal Aid budget.



- 3.5 Discussing required terms of the Unified Contract from April 2010 with a view to balancing flexibility and stability so as to maximise legal aid contract performance.
- 4 It is proposed that membership, in addition to MoJ and LSC, be made up of representatives from TLS, ASA, LAPG, Resolution, ALC, MHLA, ILPA, HLPAs and others with specific expertise upon the invitation of the group. The Commission's Director, Community Legal Service, will chair the group.
- 5 It is also proposed that this approach be reviewed in January 2010 to ensure its ongoing effectiveness.

## Phase 1 Fee schemes - Timeline and Areas for Review

The Civil fee schemes cover a range of cases across all categories of Civil Legal Aid. Whilst some of these cases are of relatively short duration, in some categories the average length of case is in excess of 12 months. This means that it is important to allow sufficient time for cases to be completed under fixed fees. For example a review of cases closed over a 12-month period may suggest that the fees have been set too high as the more expensive cases, those with a longer duration, have not yet been completed.

It is envisaged that the review will look at priority areas and those with the shortest case length first, for example mental health where the mean length of cases in 2005/06 was around 4 months.

In order for a review of the fee schemes to be based on an accurate understanding of the impacts of moving from payment by hourly rates to payment under fixed fees, the following timeline for review is proposed:

Date	Activity	Supporting data
July 08	<b><i>Review of NMS started by legal aid provider, by procurement area.</i></b> <b>Purpose:</b> Assessing the impacts of the reforms on client access.  <b>Frequency:</b> updated monthly on a rolling basis  <b>Forum:</b> Standing item on the Civil Contracts Consultative Group. Report published online following discussion.	NMS reported October 06-April 07 and October 07-April 08
November 08	Review of diversity impacts of the scheme - clients  <b>Purpose:</b>  Assessing any changes in case mix, or client type following the introduction of the fee schemes.  <b>Frequency:</b> updated monthly on a rolling basis  <b>Forum:</b> Standing item on the Civil	Billed Cases data October 2006-October 2007 and October 2007-October 2008  Comparison of legal aid providers' reported case mix and regional client mix under fixed fees with equivalent previously reported data

	Contracts Consultative Group. Report published online following discussion.	
November 08	<p>Review of diversity impacts of the scheme – legal aid providers</p> <p><b>Purpose:</b></p> <p>Assessing any changes in the diversity of legal aid providers undertaking legal aid work, including NfPs.</p> <p><b>Frequency:</b> One off annual review</p> <p><b>Forum:</b> Item on the Civil Contracts Consultative Group. Report published online following discussion.</p>	LSRC diversity survey
November 08	<p>Review of scheme structure – Cost neutrality and fee levels</p> <p><b>Purpose:</b> The fees for all schemes have been calculated to be budget neutral against 05/06. This will include an analysis of legal aid provider claims against fees.</p> <p><b>Frequency:</b> One off annual review</p> <p><b>Forum:</b> Item on the Civil Contracts Consultative Group. Report published online following discussion.</p>	Billed Cases data October 2006-October 2007 and October 2007-October 2008
November 08	<p>Review of scheme structure – Exceptional Cases</p> <p><b>Purpose:</b> A review of the volume and value of exceptional cases reported against predictions. Part of the review will consider the need to audit all exceptional cases and meeting NAO requirements.</p> <p><b>Frequency:</b> One off annual review</p> <p><b>Forum:</b> Item on the Civil Contracts Consultative Group. Report published online following discussion.</p>	<p>Billed Cases data October 2006-October 2007 and October 2007-October 2008</p> <p>Information collected via LSC exceptional case audits</p>

November 08	<p>Review of scheme structure – Disbursements</p> <p><b>Purpose:</b> To ensure any increases in disbursement costs are identified.</p> <p><b>Frequency:</b> One off annual review</p> <p><b>Forum:</b> Item on the Civil Contracts Consultative Group. Report published online following discussion.</p>	<p>Billed Cases data October 2006-October 2007 and October 2007-October 2008</p> <p>Information collected via LSC file audits</p>
November 08	<p>Review of scheme structure – Family</p> <p><b>Purpose:</b> For Public Law to assess the effectiveness of the Level 2, and the proportion of solicitor advocacy and use of counsel..</p> <p>For Private Law to assess the effectiveness of the scheme in encouraging early settlement.</p> <p><b>Frequency:</b> One off annual review</p> <p><b>Forum:</b> Item on the Civil Contracts Consultative Group. Report published online following discussion.</p>	<p>Billed Cases data October 2006-October 2007 and October 2007-October 2008</p> <p>Certificates issues data for the October 2006-October 2007 and October 2007-October 2008</p>
Jan 2009	<p>Full Review report published</p> <p><b>Purpose:</b></p> <p>To ensure agreement on any amendments to the fee schemes. This allows sufficient time for a 6-week consultation, and finalisation of amendments, prior to a bid round for the April 2010 contracts.</p> <p><b>Frequency:</b> One off annual review</p> <p><b>Forum:</b> Item on the Civil Contracts Consultative Group. Report published online following discussion.</p>	<p>Billed Cases data October 2006-October 2007 and October 2007-October 2008</p>
March 2009	<p>Post consultation amendments agreed</p>	<p>LSC Impact assessments</p>

## **APPENDIX 10**

### **REVISIONS TO FEE SCHEMES TO BE MADE AS PART OF THIS AGREEMENT**

#### **A. SUMMARY OF CHANGES**

##### **1 TFF Replacement Fee Scheme**

- 1.1 Increase of 2% to all standard fees and hourly rates.

##### **2 Care Proceedings Fee Scheme**

- 2.1 Increase of 2% to all Controlled Work Legal Help fees and hourly rates.
- 2.2 Increase in Family Help (Lower) fee equivalent to one hour's work along with a 2% increase in the hourly rate.

##### **3 Family Help Private Fee Scheme**

- 3.1 Increase of 2% to all level 1 Controlled Work Legal Help fees and hourly rates and to the Level 2 Family Help (Lower) hourly rates only.

##### **4 Immigration and Asylum Fee Scheme**

- 4.1 Increase of 2% to all Controlled Work Legal Help fees and hourly rates linked to those fee schemes.
- 4.2 Increase of 5% to all Controlled Legal Representation fees and hourly rates linked to those fee schemes.
- 4.3 There is no increase to the hourly rates for excluded cases – those types of work which are not within the Immigration and Asylum Fee Scheme, namely:
- (a) information, advice and representation at the Asylum Screening Unit (ASU),
  - (b) advice and representation for those held in detention including those that are subject to the Home Office Fast Track process,
  - (c) advice and representation for Unaccompanied Asylum Seeking Children (UASC),
  - (d) all cases covered by the New Asylum Model Early Advice Pilot in Solihull (if still operating in October 2007),
  - (e) onward appeals (application for review and reconsideration).

## 5 Mental Health Fee Scheme

- 5.1 Increase of 2% to all Controlled Work Legal Help fees and hourly rate.
- 5.2 Increase of 5% to all Controlled Legal Representation fees and hourly rates.
- 5.3 Increase of 2% to all remote travel payments.

**N.B. All figures quoted in this Appendix are VAT exclusive**

## B. CIVIL STANDARD AND GRADUATED FEES

### 1 Legal Help and Help at Court

**Note: Fees for these services in the Family, Immigration and Mental Health Categories are set out in sections B.2, 3, 4 and 5 of this Appendix 10. The fees below for Housing do not apply for the Housing Possession Duty Scheme – see section B6.**

Category	Under SQM				Tolerance			
	Fixed Fee		Exceptional Threshold		Fixed Fee		Exceptional Threshold	
	Oct 2007	July 2008	Oct 2007	July 2008	Oct 2007	July 2008	Oct 2007	July 2008
Actions Against The Police	£261	£266	£783	£798	£151	£154	£453	£462
Clinical Negligence	£213	£217	£639	£651	-	-	-	-
Community Care	£290	£296	£870	£888	£175	£179	£525	£537
Consumer General Contract	£174	£177	£522	£531	£146	£149	£438	£447
Debt	£196	£200	£588	£600	£121	£123	£363	£369
Education	£296	£302	£888	£906	£149	£152	£447	£456
Employment	£225	£230	£675	£690	£147	£150	£441	£450
Housing	£171	£174	£513	£522	£135	£138	£405	£414
Miscellaneous	£86	£88	£258	£264	-	-	-	-
Personal Injury	£204	£208	£612	£624	-	-	-	-
Public Law	£282	£288	£846	£864	£203	£207	£609	£621
Welfare Benefits	£164	£167	£492	£501	£133	£136	£399	£408

## 2 Family Public Law

Table 2 (a): Legal Help

National	
October 2007	July 2008
£144	£147

Table 2 (b): Family Help (Lower) – s31 Care Proceedings Only

National	
October 2007	July 2008
£347	£405

## 3 Family Private Law

Table 3 (a): Legal Help

National	
October 2007	July 2008
£94	£96

Table 3 (b): Legal Help – Divorce Petition Only

National	
October 2007	July 2008
£159	£162

## 4 Immigration and Asylum

Table 4 (a): Immigration and asylum scheme graduated fees

	Stage 1 (Legal Help)		Stage 2a (CLR)		Stage 2b (CLR)	
	Oct 07	July 08	Oct 07	July 08	Oct 07	July 08
Asylum Graduated Fee	£450	£459	£240	£252	£600	£630
Immigration Graduated Fee	£255	£260	£240	£252	£480	£504

Table 4 (b): Additional payments for immigration and asylum cases

	October 2007	July 2008
Representation at the Home Office	£290	£296

Interview (Asylum and Immigration cases within scope)		
Representation at oral CMRH	£175	£184
Representation at telephone CMRH pilot only at present)	£95	£100
Representation at substantive AIT hearing	Asylum £320 Immigration £250	Asylum £336 Immigration £263
Additional hearing: part heard or re-list	Asylum £170 Immigration £170	Asylum £179 Immigration £179
All disbursements (interpreters & translators, expert reports, travel expenses)	Separate payments outside of Graduated Fee Scheme, subject to cost thresholds.	

## 5 Mental Health

**Table 5 (a): Basic Fees**

Basic Fees	Value	
	October 2007	July 2008
Non-MHRT	£275	£281
Level 1 (MHRT)	£140	£143
Level 2 (MHRT)	£340	£357
Level 3 (MHRT)	£311	£327

**Table 5 (b): Additional Fees**

Additional Fees	Value	
	October 2007	July 2008
Adjourned Hearing Fee	£124	£130
Remote travel payment: Level 1 (MHRT)	£75	£77
Remote travel payment: Non-MHRT Level 2 (MHRT) Level 3 (MHRT)	£150	£153

## HOURLY RATES – CONTROLLED WORK

### 1 Legal Help, Help at Court and Family Help (Lower)

**Table 1 (a): Immigration, Mental Health, Actions Against the Police Etc, Public law, Education and Community Care**



Activity	London Rate		Non-London Rate	
	Oct 07	July 08	Oct 07	July 08
Preparation, attendance and advocacy	£57.35 per hour	£58.50 per hour	£52.55 per hour	£53.60 per hour
Travel & Waiting time	£30.30 per hour	£30.90 per hour	£29.45 per hour	£30.00 per hour
Routine letters out and telephone calls	£4.40 per item	£4.50 per item	£4.10 per item	£4.20 per item

In Immigration, October 2007 rates continue to apply to excluded cases i.e. types of work/client excluded from the Immigration and Asylum Graduated Fee Scheme

**Table 1 (b): Family and Housing (except as in table 1 (c), below), and Employment**

Activity	London Rate		Non-London Rate	
	Oct 07	July 08	Oct 07	July 08
Preparation, attendance and advocacy	£53.10 per hour	£54.15 per hour	£50.05 per hour	£51.05 per hour
Travel & Waiting time	£28.05 per hour	£28.60 per hour	£28.05 per hour	£28.60 per hour
Routine letters out and telephone calls	£4.10 per item	£4.20 per item	£3.95 per item	£4.05 per item

**Table 1 (c) : Legal Help or Help at Court provided in relation to a review under section 202 of the Housing Act 1996 and to a defendant to a possession claim in the County Court; Family Help (Lower) and related Legal Help in relation to s31 Care Proceedings.**

Activity	London Rates		Non-London Rates	
	Oct 07	July 08	Oct 07	July 08
Preparation, attendance and advocacy	£61.20 per hour	£62.40 PER HOUR	£57.25 per hour	£58.40 per hour
Travel and Waiting time	£30.30 per hour	£30.90 per hour	£29.45 per hour	£30.05 per hour
Routine letters out and telephone calls	£4.40 per item	£4.50 per item	£4.10 per item	£4.20 per item

**Table 1 (d): All other categories and all tolerance work**

Activity	London Rate		Non-London Rate	
	Oct 07	July 08	Oct 07	July 08
Preparation, attendance and advocacy	£50.70 per hour	£51.70 per hour	£47.80 per hour	£48.75 per hour

Travel & Waiting time	£26.80 per hour	£27.35 per hour	£26.80 per hour	£27.35 per hour
Routine letters out and telephone calls	£3.90 per item	£4.00 per item	£3.75 per item	£3.85 per item

## 2 Controlled Legal Representation

**Table 2 (a): Immigration – All Matters not subject to an Order under section 103D NIA 2002**

October 2007 rates continue to apply to excluded cases i.e. types of work/client excluded from the Immigration and Asylum Graduated Fee Scheme including Review and Reconsideration work (applications under section 103A NIA 2002)

Activity	London Rates		Non-London Rates	
	Oct 07	July 08	Oct 07	July 08
Preparation and attendance	£61.20 per hour	£64.25 per hour	£57.25 per hour	£60.10 per hour
Travel and Waiting time	£30.30 per hour	£31.80 per hour	£29.45 per hour	£30.90 per hour
Routine letters out and telephone calls	£4.40 per item	£4.60 per item	£4.10 per item	£4.30 per item
Advocacy	£69.60 per hour	£73.10 per hour	£69.60 per hour	£73.10 per hour

**Table 2 (b): Representation at Mental Health Review Tribunal**

Activity	London Rate		Non-London Rate	
	Oct 07	July 08	Oct 07	July 08
Preparation and Attendance	£61.20 per hour	£64.25 per hour	£57.25 per hour	£60.10 per hour
Travel and waiting time	£30.30 per hour	£31.80 per hour	£29.45 per hour	£30.90 per hour
Letters and telephone calls	£4.40 per item	£4.60 per item	£4.10 per item	£4.30 per item
Advocacy	£69.60 per hour	£73.10 per hour	£69.60 per hour	£73.10 per hour
Attending tribunal with counsel	£32.55 per hour	£34.20 per hour	£32.55 per hour	£34.20 per hour

## **APPENDIX 11**

### **JOINT STATEMENT**

The Law Society (TLS), Legal Services Commission (LSC) and Ministry of Justice (MoJ) have reached an agreement to resolve their differences of view about the consequences of the judgment of the Court of Appeal on the civil legal aid contract. The agreement has been reached through a series of open, constructive and pragmatic discussions between the three organisations.

The agreement is designed to provide a significant period of certainty and stability for civil legal aid providers to enable them to adapt to the changes to the legal aid system that have already been introduced, and to consider and plan for the future. The agreement also addresses a number of specific issues that the Law Society has identified to the Commission and Ministry as being of concern to civil legal aid providers and, where these issues require further consideration, sets up joint mechanisms to address these collaboratively. The principal benefits for practitioners include an arrangement in respect of historic unrecouped payments (meaning generally payments on account made at least six years ago), a right to undertake remainder work on the no fault termination of a contract, increased rates for specific categories of legal aid work and a review of the practices and procedures relating to contract compliance audits.

The MOJ and LSC accept and will not challenge the decision of the Court of Appeal in favour of The Law Society's (TLS) arguments that clause 13.1 of the Unified Contract is incompatible with the Public Contracts Regulations 2006 (the Regulations). They regret that the implications of those Regulations were not recognised earlier and acknowledge that TLS was justified in commencing those proceedings. MOJ and LSC further acknowledge and accept that the Court of Appeal judgment means that the only power of amendment which now remains in the civil Unified Contract is the power in clause 13.2.

TLS issued further Judicial Review proceedings against LSC on 12 February 2008 for a declaration by the court concerning the implications of the earlier judgment. However, under this agreement those proceedings will be discontinued on terms which are intended to provide tangible benefits for legal aid practitioners and which will establish procedures designed to ensure a closer and more constructive relationship between the parties in the future.

LSC, MoJ and TLS believe that this agreement represents the best way forward for legal aid providers and for the three organisations in the light of the uncertainty created by the Court of Appeal judgment. There is a strong commitment, on the part of the three organisations, to delivering the substance of this agreement. However, all consider that the process of reaching the agreement and the strong commitment to work together in this way in the future, are, in many ways, the most important outcome.

LSC, MoJ and TLS are pleased that further litigation and the uncertainty which would have been caused by early termination of the Unified Contract have been avoided. They look forward to working together and with other representative bodies harmoniously for the benefit of clients receiving publicly funded legal services and the legal aid providers of those services.

**EXECUTED AS A DEED** by the  
**MINISTRY OF JUSTICE** acting by:

.....

.....

**EXECUTED AS A DEED** by  
affixing the Common Seal of  
**LEGAL SERVICES COMMISSION**  
in the presence of:

.....

Chief Executive

**EXECUTED AS A DEED** by affixing  
the Common Seal of **THE LAW**  
**SOCIETY** in the presence of:

.....

Council Member

.....

Chief Executive